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VOLUME 132.

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AMERICAN STATE REPORTS.

VOLUME 132.

CASES

IN THE

SUPREME COURT

OF

ALABAMA.

RICHARDSON v. McCREARY & CO.

[158 Ala. 65, 48 South. 341.]

EXEMPTIONS—Tort or Contract.—Where the original action, in consequence of which an execution has issued, is ex delicto, no exemptions are allowed. (p. 17.)

EXECUTION SALES—Removal of Timber During Time Allowed for Redemption.—An action by the purchaser of premises at a foreclosure sale for the removal of timber from the mortgaged premises, before the expiration of the time allowed for redemption from a mortgage sale, is ex contractu. (p. 17.)

Claim for exemption of property from an execution under a judgment in favor of a purchaser at a foreclosure sale against heirs of the mortgagor, who removed trees from the property during the time allowed for redemption. The exemptions were denied and the claimants appealed.

J. N. & J. B. Miller, for the appellant.

C. J. Torrey, McClellan & McDuffie and Barnett & Bugg, for the appellee.

[67] McCLELLAN, J. This contest of claim of exemptions under Code of 1896, section 2046, was in fact and on the merits tried and determined upon the sole issue, viz., whether the original action, in consequence of which the execution against appellants was issued, was ex delicto or ex contractu, and, if the former, no exemptions could, of course, be allowed. A consideration of the original and amended complaint demonstrates, we think, that the action was not ex delicto, but ex contractu; the cause thereof being, as averred, the removal, pending disaffirmance of the sale and redemption thereunder, of timber from the mortgaged premises by the purchaser. If tortious consequences may infect the conduct of one so related to and in possession of real estate, a

question unnecessary to be decided, the pleader in this instance clearly elected to waive it, and to attempt to hold the defendants for a liability to satisfy the redemptioner for the waste (if so) committed by the defendants.

The judgment is therefore reversed, and, the trial being without jury, a judgment will be here rendered sustaining the claim of exemptions as against this demand, upon the ground stated and controlling the decision below.

Reversed and rendered.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

The Exemption of Property from Execution is usually only as against debts resting in contract as distinguished from those sounding in tort: Northern v. Hanners, 121 Ala. 587, 77 Am. St. Rep. 74.

ALABAMA GROCERY COMPANY v. FIRST NATIONAL BANK OF ENSLEY.

[158 Ala. 143, 48 South. 340.]

NEGOTIABLE INSTRUMENTS—Bona Fide Holder.—Where a bank discounts paper for one not in its debt, and credits him with the proceeds, unless some other and valuable consideration passes, the bank is not a bona fide holder protected against infirmities in the paper, or equities of the prior parties. Until the money is withdrawn, the ordinary relation of debtor and creditor stands, even though the paper has been taken before maturity and without notice. (p. 19.)

PLEADING—Replication, When a Departure.—Where the plaintiff declares on a bill of exchange as payee, it is not good pleading to set up in the replication that such bill was purchased after acceptance, and it is demurrable as for a departure. (p. 19.)

Cooper & Foster, for the appellant.

R. E. Smith, for the appellee.

144 HARALSON, J. Action on bill of exchange drawn by Steel City Produce Company on Alabama Grocery Company, payable to First National Bank of Ensley (plaintiff) and accepted by Alabama Grocery Company (defendant).

The defendant in the court below (appellant here) filed three special pleas, numbered 2, 3 and 4, setting up that it was a corporation, that the acceptance of the bill by it was for the accommodation of the drawee, and that such acceptance was ultra vires; and, further, that 145 there was no con-

sideration for the acceptance. To these special pleas, the plaintiff (the bank), in addition to the general replication, filed two special replications, setting up that it purchased the bill of exchange for value of the drawer, without notice that the acceptance was for the accommodation of the drawer. Demurrers were interposed to these special replications on the ground of departure, and overruled. In this the court was in error.

The plaintiff in its complaint declared on the bill of exchange as payee of one of the parties thereto. It was not good pleading to set up in the replication that it purchased the same after acceptance. The pleader probably intended to claim that plaintiff was a bona fide holder for value without notice.

The bill of exceptions purports to set out all of the evidence, and the court gave the general affirmative charge for the plaintiff, evidently on the theory that plaintiff proved his special replications. One of the material allegations of the replications was, that plaintiff paid value to the drawer. The only evidence on this point was that of the witness Du Bose, the president of the plaintiff, who testified that "being notified by the Bank of Huntsville that said bill of exchange had been accepted by the defendant, he, for the plaintiff, gave credit for the amount of the same to said Steel City Produce Company, who kept a regular account at plaintiff bank; that he either paid the cash to the said drawer or placed the amount of said bill to the credit of the drawer. His best recollection was that he placed it to the credit of the drawer, subject to be checked out." For all that appears, the money may have been in plaintiff's bank at the time of the trial.

146 Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of said paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not drawn out, the bank is held subject to the equities of the prior parties, even though the paper has been taken before maturity and without notice: Central National Bank v. Valentine, 18 Hun, 417; Manufacturers' National Bank v. Newell, 71 Wis. 309, 37 N. W. 420; Lancaster Co. Nat. Bank v. Huver, 114 Pa. 216, 6 Atl. 141; Dougherty v. Central National Bank,

93 Pa. 227, 39 Am. Rep. 750; Dresser v. Missouri etc. Co., 93 U. S. 92, 23 L. ed. 815; First National Bank v. Nelson, 105 Ala. 180, 16 South. 707.

The court erred in giving the affirmative charge for the plaintiff, and under the pleadings and evidence should have given the affirmative charge for the defendant: Noble v. Walker, 32 Ala. 456.

Reversed and remanded.

Dowdell, Denson and McClellan, JJ., concur.

Where a Bank Discounts a Note for a Depositor and gives him credit upon its books for the proceeds thereof, this alone does not constitute the bank a bona fide holder; to constitute it such, some other consideration must pass: Dreilling v. First Nat. Bank, 43 Kan. 197, 19 Am. St. Rep. 126; Union Nat. Bank of Columbus v. Winsor, 101 Minn. 470, 118 Am. St. Rep. 641; Security Bank of Minnesota v. Petruschke, 101 Minn. 478, 118 Am. St. Rep. 644; McNight v. Parsons, 136 Iowa, 390, 125 Am. St. Rep. 265.

SUNFLOWER LUMBER COMPANY v. TURNER SUPPLY COMPANY.

[158 Ala. 191, 48 South. 510.]

STATUTES—Construction—Contracts.—In determining whether an agreement is prohibited by statute, the intention of the legislature must be ascertained and must govern. (p. 21.)

CONTRACTS, When Void as in Violation of Statutes.—Agreements in violation of conditions imposed for the benefit of the public by a statute are void. This result does not follow if the conditions are imposed for administrative purposes, and no penalty is attached. (pp. 21, 22.)

CONTRACTS—Failure to Pay License.—If the carrying on of a business or the making of a contract is expressly prohibited unless a license fee is first paid, any contract without paying such license is void; but if the statute merely imposes a penalty for carrying on the business or making the contract without a license, the contract is not void. (pp. 21, 22.)

CONTRACTS—Validity—Absence of License.—The same rule applies to contracts made by corporations in a business for which a license is prescribed, since neither sections 2361, 2401 nor 7712 of the Code of 1907 prohibit the business, but merely penalize it under certain conditions. (p. 23.)

PLEADING—Plea and Demurrer.—A demurrer under the Code of 1907, section 5340, must point out the defect in the plea or comply with the requirements of that section. A special plea is demurrable which does not aver that the contract sued upon is specially prohibited by law, or was nonenforceable by statute, or that entering

into such a contract was a violation of any law other than one enacted solely for revenue. (pp. 24, 25.)

PLEADING—Inability to Amend—Departure.—When a plea cannot be amended so as to make it a good plea, without departing entirely from the attempted defense, the technical error of the court in sustaining a demurrer on general or inapt grounds is without legal injury to the defendant. (p. 25.)

Action on a promissory note. A special plea was filed "That the plaintiff during the years 1907-8 was and is a corporation organized under the general laws of the state of Alabama, and during none of said time has it had a license from the state of Alabama to do business in the state, and the contract sued on in said court is a contract made and to be performed entirely within the state of Alabama. During all of the time mentioned above, the plaintiff has been doing business in this state. Said business is, and during all of said time has been, that of a sawmill and railway supply business, and the contract sued on was made in the course of such business." A demurrer thereto stated: "The plea shows that the plaintiff is a corporation organized under the laws of the state of Alabama, and shows that the alleged failure of the plaintiff to pay the license tax required by the laws of Alabama did not make void the sale to the defendant of the goods described in the plea as sold by the plaintiff to defendant during the time it is alleged plaintiff had not paid the license tax required by the laws of the state to be paid by it for doing business as a corporation for the period covered by the sale of some of said business." The demurrer was sustained.

R. H. & R. M. Smith, for the appellant.

Charles M. Bromberg, for the appellee.

[194] ANDERSON, J. In determining whether an agreement is prohibited by statute, the intention of the legislature must be ascertained and must govern. "When conditions prescribed for the conduct of a business, trade or profession are not complied with, agreements in the course of such business, trade or profession are (1) [195] void, if the condition is for the benefit of the public, as for the maintenance of public order or safety, or the protection of persons dealing with those upon whom it is imposed; (2) valid, if no specific penalty is attached to the specific transaction, and the condition is imposed simply for administrative purposes, such as the protection or convenient collection of the revenue": Clark on Contracts, 385. The rule as to the rights of unlicensed or unauthorized persons to recover on contracts,

stated in 25 Cyc., page 633, is as follows: "The rule is that, when a statute imposes a penalty for engaging in a given business or calling without a license, a contract made by one who has no license is not invalid, the penalty attaching to the person and not affecting the contract; but the rule is otherwise where the statute expressly prohibits such business or calling without license, or expressly vitiates all contracts made by an unlicensed person while engaged therein." It was said by Baron Parke in the case of Smith v. Mawhood, 14 Mees. & W. 452 (English), in discussing the right to enforce a contract of sale made by one who had not taken out a license: "I think the object of the legislation was not to prohibit a contract of sale by dealers who have not taken out a license pursuant to the act of parliament. If it was, they certainly could not recover, although the prohibition were merely for revenue. But its objection was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purposes of revenue." The Massachusetts court, in the case of Larned v. Andrews, 106 Mass. 435, 8 Am. Rep. 346, in considering a sale made by one who had no revenue license, where it was made a violation of the law to carry on business without same, said: "It is to be observed that the act does not expressly declare that sales by a wholesale dealer who neglects to pay the tax shall be illegal. The tax is not laid upon [196] each sale, but upon the business or calling. The illegality does not attach to the sale, but consists in not paying the tax imposed upon the business." The court enforced the contract and quoted from the English case, supra. The New Jersey court, in the case of Ruckman v. Bergholz, 37 N. J. L. 437, in discussing the right to enforce a contract of sale made by a party who had no license as required by law, which provided a penalty, said: "The question in such case is whether the statute was intended as a protection, or merely as a fiscal expedient; whether the legislature intended to prohibit the act unless done by a qualified person, or merely that every person who did it should pay a license fee. If the latter, the act is not illegal." In the case of Aiken v. Baisdell, 41 Vt. 655, the court upheld the contract, notwithstanding the seller had no license and that the law fixed a penalty for doing business without same, basing its conclusion upon the fact that the revenue law was not intended to make any kind of business illegal or to prohibit it. "The purpose was not to diminish, restrain, control or regulate the business. The transaction of all kinds of business was just as legal after the passage of the law as before.

The law is strictly a revenue law, the sole object being to get money into the treasury, and that is accomplished by requiring all persons that engage in certain kinds of business to contribute a certain amount toward paying the liabilities of the government. Its object is to raise money, and not to regulate the business of the country. If a man engage in the kind of business referred to, he is engaged in a legal business, whether he has a license or not. If he has no license, he has no legal right to do it, and subjects himself to the penalty. The law, we think, was intended to operate upon the person, and not upon the business. If the object of the law had been to prohibit certain [197] kinds of business, or to regulate it, with a view to its effect upon public morals or public security by limiting it in its extent, or the place where it is to be carried on or the person who shall conduct it, or otherwise, in all such cases the law operates upon the business as well as the person. Revenue mainly in such cases is not the object. It is only incidental, or the means by which the law regulates and controls the business. The act in question imposes no restriction upon the business. All are at liberty to engage therein where, and when, and to any extent they choose, upon paying for the license."

Subdivision 26 of section 2361 of the Code of 1907, requiring a license of all domestic corporations, is a part of the general revenue law, and is intended solely to raise revenue, and not to restrain or regulate business. Section 7712 provides a penalty for doing business without a license. But neither section prohibits doing business, and it is merely penalized under certain conditions. Section 2401 does not make any specific act a violation of the law, but makes it so only in case it is done without a license. The business is lawful, but the failure to procure the license before doing the act is what the law intends to penalize. The section is intended merely to define the doing of business as mentioned in section 2361. This law being a mere fiscal expedient, and not intended as a regulation or protection for the benefit of the public, and there being no statute invalidating contracts made by unlicensed corporations, they should be enforced, unless there was a clear legislative intent to prohibit the thing itself, rather than to merely punish for engaging in business without the license. We are not willing to impugn the motives of the lawmakers by charging them with an intention to encourage bad faith on the part of debtors by permitting them to avoid honest obligations, because of the noncompliance with [198] the revenue law of the party from whom they obtained in good

faith money, goods or other things of value. Indeed, we are fortified in these views by legislative action, which of itself indicates that the lawmakers did not intend to strike down all contracts made with parties who had no license. For instance, we find that the legislature has enacted separate statutes striking down contracts made by certain dealers who had no license and who are enumerated in the general revenue law: See Code 1907, sec. 5764. If, therefore, it had been the legislative intent that all contracts make by all dealers required to have a license, and who had none, should be void, it was necessary to have enacted subsequent statutes invalidating contracts made by certain ones who had no license, or prohibiting a recovery upon same.

The foregoing views are not in conflict with former decisions of this court, as they related to contracts specially prohibited by law, or the enforcement of which was specifically prohibited, or the making of which violated a law, not enacted for revenue purposes only, but for regulation and protection. We shall not attempt to differentiate them all in detail, but will discuss some of the leading cases, and especially those cited in brief of counsel for appellant. In the case of Western Union Tel. Co. v. Young, 138 Ala. 240, 36 South. 374, the act of Congress made the specific thing for which the defendant was sued for not doing a violation of the law. The statute considered in Youngblood v. Birmingham T. & S. Co., 95 Ala. 521, 36 Am. St. Rep. 245, 12 South. 579, 20 L. R. A. 58, was one for regulation or protection, and made the very act done a violation of law. Moog v. Hannon's Admr., 93 Ala. 503, 9 South. 596, involved a sale of liquor without a license, and the statute expressly prohibited a recovery for such sales: Code 1907, sec. 5764, being section 1323 of the Code [190] of 1886, the one in force when said decision was rendered. The contract in the case of Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671, was made in selling fertilizers in violation of a statute "to protect the planters of the state from imposition in the sale of fertilizers," and was therefore one for protection instead of one for revenue only. The case of Fox v. Dixon, 58 Hun, 605, 12 N. Y. Supp. 267, was a suit by an unlicensed physician to recover for medical services. The court denied a recovery upon the express grounds that a statute had been violated, which had been "enacted in the interest of the health of the public, to prohibit incompetent persons from practicing as physicians."

The special plea was bad, in that it did not aver that the contract sued upon was specially prohibited by law, or was

made nonenforceable by the statute, or that entering into same amounted to the violation of any law other than one enacted solely for revenue. The demurrer, however, did not point out the defect or comply with the requirements of Code of 1907, section 5340, and the trial court erred in sustaining same: Turner Coal Co. v. Glover, 101 Ala. 289, 13 South. 478; Broslin v. Kansas City M. & B. R. R. Co., 114 Ala. 398, 21 South. 475. It plainly appears, however, that this plea could not be amended, so as to make it a good plea, without departing entirely from the defense therein attempted, and the technical error of the court in sustaining a demurrer on general or inapt grounds was without legal injury to the defendant: Ryall v. Allen, 143 Ala. 222, 38 South. 851.

The judgment of the law and equity court is affirmed.

Tyson, C. J., and Simpson and Denson, JJ., concurred.

A Contract Effected by an Unlicensed Broker does not seem to be invalid for that reason: Murray v. Doud, 167 Ill. 368, 59 Am. St. Rep. 297; but probably he cannot recover his commission: Buckley v. Humason, 50 Minn. 195, 36 Am. St. Rep. 637; Douthart v. Congdon, 197 Ill. 349, 90 Am. St. Rep. 167. An agreement, however, to perform services as a physician by a person not licensed to practice as such, which he could not perform without violating the laws of the state, is against public policy and void: Deaton v. Lawson, 40 Wash. 486, 111 Am. St. Rep. 922.

CLARK v. BIRD.

[158 Ala. 278, 48 South. 359.]

HOMESTEADS—Specific Performance—Contract to Sell Unsigned by Wife.—A bond to sell part of a homestead, not being signed and acknowledged by the vendor's wife, as required by the Code of 1907, section 4161, is void as an obligation to convey, and is not the subject of specific enforcement. (p. 26.)

HOMESTEADS—Estoppel.—A bond to sell part of a homestead, not signed by the wife according to law, does not operate as an estoppel against the husband, though he has received a valuable consideration. It is void, and a nullity to all intents and purposes. (p. 26.)

HOMESTEAD—Abandonment.—Renting one part of a homestead and residing on the other does not operate as an abandonment by the owner, nor affect its character as a homestead. (p. 26.)

HOMESTEAD—Method of Alienating.—The only mode of dealing with a homestead is by the voluntary assent and signature of the wife in accordance with the Code of 1907, section 4161, with the one exception named in section 207 of the constitution in favor of laborers and mechanics' liens. (p. 27.)

HOMESTEADS—Void Obligation for Sale—Refunding Purchase Money.—The refunding of the purchase money paid under a void contract of purchase is not a condition precedent to the recovery of the homestead. Such a requirement would create a lien or encumbrance in defiance of the constitution. (p. 27.)

HOMESTEADS—Void Obligation for Sale.—Payment for Such Improvements as have been made by a purchaser under a void contract for sale cannot be imposed by a court of equity as a condition precedent to the recovery of the property from him. (p. 27.)

HOMESTEADS—Void Obligation for Sale.—While a bond to sell, which is unsigned by the wife, is void as an obligation to convey the homestead, the personal liability of the obligor is unaffected. Cowan v. Southern R. R., 118 Ala. 554, 23 South. 754, distinguished. (p. 28.)

Bill to enjoin an ejectment suit and to enforce a contract contained in a bond from Clark to Charles Bird for five hundred dollars. The condition of the bond was that Clark should, in consideration of five hundred dollars, payable in five notes, by deed convey to Bird the land therein described in fee simple with general warranty. The land described constituted part of the homestead, and the bond was given with the knowledge of the wife, who, however, was not a party to and did not sign it. The purchaser had paid four of the notes and had erected valuable improvements on the land. Clark, the vendor, brought ejectment against Bird, the purchaser, who filed a bill against Clark to enjoin the ejectment suit and for other relief.

W. R. Walker, for the appellant.

W. T. Sanders, for the appellee.

283 ANDERSON, J. The forty acres in controversy was at the time of the attempted sale a part of the homestead, and the bond executed by John A. Clark, not being signed and separately acknowledged by his wife, was void as an obligation to convey, and was not the subject of a specific enforcement: Moses v. McCain, 82 Ala. 370, 2 South. 741; McGhee v. Wilson, 111 Ala. 615, 56 Am. St. Rep. 72, 20 South. 619. Nor does a conveyance of the homestead which does not conform to the statute (section 4161 of the Code of 1907) operate as an estoppel against the husband, notwithstanding he has been paid a valuable consideration. It is simply void—a nullity to all intents and purposes: Halso v. Seawright, 65 Ala. 431; Alford v. Lehman, 76 Ala. 526; Crim v. Nelms, 78 Ala. 604. The renting of these forty acres, which was a part of the homestead, the owner at the time residing on the other portion, did not operate as an abandonment or affect its character as a homestead: Bailey v. Dunlap M. Co., 138 Ala. 415,

35 South. 451; Metcalf v. Smith, 106 Ala. 301, 17 South. 537. The chancellor therefore properly decreed that the contract was a nullity and not the subject of a specific performance.

The constitution of 1901 (section 205) expressly exempts the homestead from the payment of any debt, except by a mortgage or other alienation, with the voluntary [284] assent and signature of the wife; and section 4161 of the code of 1907 provides the method of giving the assent. The only exception made for binding the homestead for a debt, except as specially provided for, is under section 207 of the constitution, in favor of laborers' and mechanics' liens. To require the refunding of the purchase money, paid under a void contract of purchase, as a condition precedent to the recovery of the homestead, would be but the fastening of a lien or encumbrance on the same, directly in the teeth of the constitution, thus creating upon the homestead, by way of estoppel, a charge or lien, which could not be placed thereupon by the direct and voluntary act of the owner, except in the manner and form required by the constitution and statute. Nor can we understand how a court of equity can fasten a lien on the homestead for improvements, made by one in possession under a void contract of purchase, upon the theory of an equitable estoppel, thus doing, through the machinery of a court indirectly, what the parties could not have done directly, except in a certain manner. The chancery court cannot fasten a lien on the homestead, growing out of the acquiescence by the owner, upon the idea that it amounts to an implied obligation to pay for the improvements, when an express promise and obligation to do so could not operate as a charge, unless made in the manner and form prescribed by law, or unless it was for labor and material, and even in that event a compliance with the statute would be essential to the enforcement of same.

We, of course, have decisions where the court has required the repayment of the purchase money as a condition precedent to a recovery of land; but they did not involve the homestead. So, too, are owners of land required, under certain conditions, to pay for improvements as a condition precedent to an eviction of an [285] adverse holder, and we have a statute on the subject: Code 1907, sec. 3846. Whether or not this section would apply to suits for the homestead we need not decide, since the complainant in the case at bar is not an adverse holder, not having paid all the purchase money. On the other hand, if he was, he could get the benefit of the statute in the pending action of ejectment.

The case of Cowan v. Southern R. R., 118 Ala. 554, 23 South. 754, and which is relied upon by counsel, is no authority estopping the plaintiff (Clark) from recovering his homestead, because of the erection by Bird, with the knowledge of Clark, of improvements, until first paying for said improvements. It is true the Cowan case lays down the general rule of an estoppel from evicting a railroad whose track was laid with the knowledge of the owner, and cites authorities on the subject. But the homestead was not involved in a single case cited, and while the land in said Cowan case was the homestead, what was said as to the estoppel was not decisive of the case. There was no attempt to evict the railroad, as the bill simply sought compensation for the right of way and that the company be enjoined from using the same until complainant was compensated under the constitution and statutes pertaining to the exercise of the right of eminent domain. Moreover, we can see how the doctrine of estoppel might be invoked against the eviction of a railroad going over the homestead, and yet not have any application to property not condemned or taken under the doctrine of eminent domain. The constitution makes provision for taking property for certain purposes, whether it be the homestead or not, by compensating the owner, and which can be done independent of obtaining a conveyance. Yet when a conveyance is relied upon, instead of condemnation [286] proceedings, the conveyance to the right of way, if over the homestead, is null and void, unless it is separately acknowledged by the wife: McGhee v. Wilson, 111 Ala. 615, 56 Am. St. Rep. 72, 20 South. 619. But whether or not the doctrine of estoppel can be invoked in these railroad cases, as against the homestead, we need not decide, as it would have no bearing upon the case at bar, there being no railroad or right of condemnation involved. Nor should what we here say bear upon the railroad cases, as none of them involved the homestead, except the Cowan case, supra, and we have attempted to demonstrate that it is not an authority in support of the estoppel set up in the case at bar.

While we hold that the bond of John A. Clark is void as an obligation to convey the homestead, we do not wish to intimate that he would not be personally liable for a breach of same.

The chancellor erred in not dismissing the bill of complaint, and the decree is reversed, and one is here rendered dismissing same.

Tyson, C. J., and Simpson and Denson, JJ., concur.

The Effect of a Conveyance of a Homestead by one only of the spouses is the subject of a note to Jerdee v. Furbush, 95 Am. St. Rep. 909. The general rule is that a deed of a homestead is ineffectual to convey title unless executed by both husband and wife: Lininger v. Helpenstell, 229 Ill. 369, 120 Am. St. Rep. 264; McDonald v. Sanford, 88 Miss. 633, 117 Am. St. Rep. 758; Bolen v. Lilly, 85 Miss. 344, 107 Am. St. Rep. 291; Davis v. Davis, 81 Vt. 259, 130 Am. St. Rep. 1035.

As to Whether a Homestead may be Defeated by Estoppel where there has been an antecedent ineffectual conveyance thereof, see Bovine v. Selden, 155 Mich. 556, 130 Am. St. Rep. 579; Adams v. Gilbert, 67 Kan. 273, 100 Am. St. Rep. 456; note to Jerdee v. Furbush, 95 Am. St. Rep. 921. According to Weatherington v. Smith, 77 Neb. 363, 124 Am. St. Rep. 855, neither husband nor wife can be estopped from asserting the homestead right as against a grant or mortgage not executed in the mode prescribed by law. And according to Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, a contract to convey a homestead made by the husband alone is without validity, and damages cannot be recovered against him for its breach.

VAN INGIN v. DUFFIN.

[158 Ala. 318, 48 South. 507.]

LIMITATION OF ACTION—Pleading by Demurrer.—The statute of limitations may be set up in equity by demurrer where the bill shows that the cause of action stated in it is prima facie within the bar of the statute, or offensive to the rules which courts of equity adopt for the discouragement of stale claims. (p. 30.)

LIMITATION OF ACTION—Demurrer—Bill to Set Aside Fraudulent Conveyances.—The statute of limitations may be set up in equity by demurrer, where the bill shows prima facie the bar, notwithstanding that it does not contain the additional averment that the grantee, under a fraudulent conveyance, had held adverse possession for the time required. (p. 30.)

LIMITATION OF ACTION.—A Bill to Set Aside a Fraudulent Conveyance is a suit for the recovery of land, and is governed by the statute of limitations. (p. 30.)

LIMITATION OF ACTION.—Time Begins to Run from the Date of the Execution of a Fraudulent Conveyance, against antecedent creditors. As Code of 1907, sections 4832, 4834, paragraph 2, provides that actions for the recovery of lands must be commenced within ten years "after the cause of action has accrued," the date of the conveyance marks the period of accrual. (pp. 30, 31.)

LIMITATION OF ACTION—Fraudulent Conveyance.—The fact that the party seeking to set aside a fraudulent conveyance was ignorant of the fraud until after the right to recover was barred, is not per se sufficient to entitle him to the benefit of the exception in Code of 1907, section 4852, in the absence of any act or conduct calculated to mislead, deceive, or lull inquiry. (p. 31.)

Tomlinson & McCullough, for the appellant.

Arthur L. Brown, for the appellee.

[320] SIMPSON, J. The bill in this case was filed by the appellant against the appellees, and seeks to set aside certain conveyances of lands executed to said defendant Elizabeth Duffin, respectively dated September 25, 1891, April 8, 1896, March 1, 1898, August 25, 1898, and May 20, 1898, and to subject the property therein conveyed to a debt due the complainant January 12, 1889, and reduced to judgment on February 29, 1892, claiming that said lands so conveyed to said Elizabeth Duffin were paid for by her husband, said defendant P. J. Duffin. A demurrer was interposed to said bill, setting up the statute of limitations of ten years, and the staleness of the demand; also additional demurrers, that the bill is without equity, and to the ninth section because it does not show any effort to discover the fraud, and mere ignorance will not excuse him; also, that no fraudulent concealment of facts is shown.

It is settled by the decisions of this state that the statute of limitations may be set up in equity by demurrer where the bill shows that the cause of action stated in the bill is prima facie within the bar of the statute of limitations or offensive to the rules which courts of equity adopt for the discouragement of stale demands: Lovelace v. Hutchinson, 106 Ala. 417, 17 South. 623.

Appellants insist that it is not apparent on the face of the bill in this case that the cause of action is prima facie within the bar of the statute, because the bill does not allege that the defendant Elizabeth Duffin is and has been for the time required in the adverse possession [321] of the lands in question. It is not a question of adverse possession. A bill to set aside a fraudulent conveyance is a suit for the recovery of land, and governed by the statute of limitations: Washington v. Norwood, 128 Ala. 383, 30 South. 405. The statute provides that actions for the recovery of lands must be commenced within ten years "after the cause of action has accrued": Code 1907, secs. 4832, 4834, par. 2. The plaintiff's claim was due and payable before the execution of any of these conveyances, and consequently his "cause of action"—to move against said conveyances—accrued at the time the conveyances were made, the latest one of them being May 20, 1898, and the bill in this case was filed September 25, 1908.

The case of Washington v. Norwood, 128 Ala. 383, 30 South. 405, does not conflict with this conclusion. On the contrary, the point decided in that case is that, where a party was surety on a bond, his "cause of action" did not accrue until the breach of the bond, and, notwithstanding the adverse pos-

session of the land, the statute of limitations did not commence to run against him until by the breach of the bond his cause of action accrued. In other words, in both cases the decision is that the cause of action accrues at the time when the party could file his bill to set aside the fraudulent conveyance, and the statute of limitations commences to run then. The bill alleges that the complainant has continuously resided in the state of New York, and that he did not discover the fraudulent acts committed by respondents until August 1, 1908, although the conveyances sought to be set aside were duly recorded in the probate judge's office in Jefferson county, Alabama. The notice effected by the registration statute is operative alike on residents and nonresidents; but he insists, further, that the decisions on the question of the statute of limitations not [322] commencing to run apply to his case, so that the statute would not commence to run until the facts constituting the fraud were actually brought to his knowledge.

The code provides that: "In actions seeking relief on the ground of fraud, where the statute has created a bar, the cause of action must not be considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud, after which he must have one year within which to prosecute his suit": Code 1907, sec. 4852. Our decisions are that "ignorance of right, there being no more than mere passiveness, mere silence, on the part of his adversary, cannot be ingrafted as an exception on the statute of limitations, without a destruction of its wise policy, and without an encouragement of mere negligence. In the absence of fiduciary relation between the parties, imposing the moral and legal duty to disclose, there must be some act or conduct calculated to mislead or deceive or to lull inquiry": Tillison v. Ewing, 91 Ala. 467, 468, 8 South. 404; Underhill v. Mobile Fire Department Ins. Co., 67 Ala. 45; Martin v. Branch Bank of Decatur, 31 Ala. 115.

The complainant has not brought himself within the terms of the exception.

The decree of the court is affirmed.

Haralson, Anderson and Denson, JJ., concur.

The Defense of the Statute of Limitations may be Raised by General Demurrer when the lapse of time appears on the face of the petition: Zuellig v. Hemerlie, 60 Ohio St. 27, 71 Am. St. Rep. 707. See, also, Rice v. Moore, 48 Kan. 590, 30 Am. St. Rep. 318; Damon v. Leque, 17 Wash. 573, 61 Am. St. Rep. 927; State v. Norcross, 132 Wis. 534, 122 Am. St. Rep. 998.

As to How Far Courts of Equity are Bound by the Statute of Limitations in administering equitable relief, see Deadman v. Yantis, 230 Ill. 243, 120 Am. St. Rep. 291; Baldwin v. Williams, 74 Ark. 316, 109 Am. St. Rep. 81.

The Title of a Fraudulent Grantee is Protected by the Statute of Limitations, and if creditors do not, by proper judicial proceedings, effect the cancellation of his title within the statutory period after the discovery of the fraud, such title becomes final and conclusive: Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 94 Am. St. Rep. 709. See, also, Baldwin v. Williams, 74 Ark. 316, 109 Am. St. Rep. 81; Harper v. Raisin Fertilizer Co., 158 Ala. 329, post, p. 32.

HARPER v. RAISIN FERTILIZER COMPANY.

[158 Ala. 329, 48 South. 589.]

APPEAL AND ERROR.—Rulings Favorable to the Appellant will not be considered on appeal. (p. 34.)

APPEAL AND ERROR—Review.—There being no decree on a motion to dismiss an original bill, before the filing of an amendment, the court on appeal can consider only the motion to dismiss the bill as amended and the overruling of the motion to strike the amendment. (p. 34.)

APPEAL AND ERROR—Motion to Strike.—The ruling of the court on a motion to strike may be reviewed on appeal from the final decree. (p. 34.)

EQUITY—Supplemental Pleadings, When cannot Cure Defects. As a rule, if the record does not show that the complainant is entitled to relief under the original bill, the averment, either by supplemental bill or amendment, of subsequent validating matter does not cure the defect. (pp. 34, 35.)

LIMITATION OF ACTION—Fraudulent Conveyance as a Bar to. A debtor is not disentitled from pleading the statute of limitations against the debt on the ground that he had made a fraudulent conveyance and successfully concealed the fact. (p. 35.)

LIMITATION OF ACTION—Pleading by Demurrer.—If, upon the face of the bill, it is apparent the claim or demand of the complainant is barred by lapse of time, or by the statute of limitations, the defense is available in a court of equity, on demurrer, as well as by plea or answer. (p. 35.)

PLEADING—Fraudulent Conveyance.—The grantee of a fraudulent conveyance may plead any defense, not merely personal, which the grantor of debtor could have made against it. (p. 35.)

LIMITATION OF ACTIONS—Plea of by a Successor in Interest.—While a mere creditor cannot raise the defense of the statute of limitations, in an action to set aside a fraudulent conveyance, yet the party who has acquired an interest in the property, by deed or mortgage, from the original owner is placed in the shoes of the grantor, and, in order to protect the property, may make any plea which could have been made by such original owner. (p. 36.)

FRAUDULENT CONVEYANCE—Issue in Suit to Set Aside.—The fact of primary importance in a suit to set aside a fraudulent

conveyance is the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable. (p. 35.)

FRAUDULENT CONVEYANCE—Barred Debt.—If, at the time a conveyance alleged to be fraudulent is made, the statute has barred the debt of the attacking creditor, the conveyance is not fraudulent. (p. 37.)

JUDGMENT—Filing in Vacation.—A decree signed in vacation is not effective till filed in court. (p. 37.)

JUDGMENT—Conclusiveness.—A judgment in a foreclosure suit rendered after the institution of a creditor's bill to set aside the conveyance of other lands as fraudulent does not impart to the bill equity which it did not have at the time it was filed, nor preclude the defense of the statute of limitations by the grantee. (p. 37.)

LIMITATION OF ACTION.—Foreclosure Proceedings can be Maintained Notwithstanding the Debt is Barred by the statute of limitations. (p. 37.)

H. L. Martin, for the appellant.

J. F. Sanders and M. Sollie, for the appellee.

331 SIMPSON, J. The bill in this case was filed by the appellees. J. P. Harper and the Raisin Fertilizer Company, against the appellants, R. Harper and R. F. Harper. J. B. Harper having died, the case was revived in the name of his representatives; and the bill was subsequently amended so as to substitute the widow, who is also executrix, in place of R. F. Harper, deceased. The bill is based upon a debt due by R. Harper to J. B. Harper, secured by a mortgage, which said debt and mortgage had been, by said J. R. Harper, transferred and assigned to said Raisin Fertilizer Company, to be held by it as collateral security for a debt due by said J. B. Harper to it. It is alleged that the mortgage debt is largely greater than the value of the property mortgaged, and the bill alleges that certain other properties have been fraudulently conveyed by said R. Harper, and seeks to have the conveyances set aside, etc. While there were several decrees and orders during the progress of the case, the appeal is from the final decree rendered June 1, 1907.

332 The agreement to submit shows that all previous decrees are set aside; also that the motion to dismiss the bill as amended, the demurrer to the bill as amended, and the motion to dismiss, filed February 8, 1907, are withdrawn; and the cause was to be submitted on demurrer to the bill as amended, filed September 21, 1906, the motion to dismiss the bill as amended, filed the same day, the motion to strike part of the bill, additional demurrers filed October 22, 1906, motion to dismiss bill as amended, filed October 22, 1906, motion to strike amendment to bill, and

motion to dismiss bill for want of equity, filed September 21, 1906. The record does not show any note of submission, and the decree of the chancellor states that "this case is submitted on written agreement, in vacation, on demurrers to the bill as amended." The decree sustains the demurrer, and then, reciting the submission on "motion to dismiss the bill as amended, and motion to strike," overrules both. It is evident, from this recital, first, that the demurrer being sustained, the appellant cannot call upon this court to consider any matters in the chancellor's opinion as to the various grounds of demurrer, some of which he considered well taken and others not, the decree being in favor of the appellant sustaining his demurrer (Coleman v. Butt, 130 Ala. 266, 30 South. 364, and cases cited); second, that there being no decree on the motion to dismiss the original bill, before the filing of the amendment, we can consider only the motion to dismiss the bill as amended, and the overruling of the motion to strike the amendment. The ruling of the court on the motion to strike may be reviewed on appeal from the final decree: Hood v. Southern Railway, 133 Ala. 374, 377, 31 South. 937.

333 The bill as amended shows that the debt which is claimed to be due to the complainant was due on the first day of April, 1889, the conveyance sought to be attacked was made May 1, 1902, and the original bill in this case filed September 9, 1902; so that the debt was barred by limitations when the conveyance was made and when the bill was filed, and the amendment filed December 8, 1905, shows that, since the filing of the bill, to wit, on September 9, 1903, a decree of foreclosure on the original mortgage was rendered by the chancery court, that the property was sold, and after said sale and the application of the proceeds a personal judgment was rendered against the mortgagor for a balance of two thousand and eighty-nine dollars. It also shows that the conveyances complained of were made May 1, 1902, and subsequent thereto, and that the bill for foreclosure was pending at that time. The bill was without equity as originally filed, by reason of the debt being barred: Battle v. Reid, 68 Ala. 149. At that time it was incapable of amendment, so as to give it equity. So the question arises, Can the subsequent facts set forth in the amendment impart validity to it?

It is a general principle of law "that, if the record shows that the complainants were not entitled to relief upon the original bill, matter which subsequently occurred, and

which is averred by way of supplemental bill (or amendment), does not cure the defect": Land v. Cowan, 19 Ala. 297; Hill v. Hill, 10 Ala. 527; Planters' & Merchants' M. Ins. Co. v. Selma Savings Bank, 63 Ala. 585; Scheerer v. Agee, 113 Ala. 383, 21 South. 81. This court has said that "the theory on which such a bill proceeds is that the fraudulent donee is to be taken and deemed as an executor de son tort. This being the capacity in which he is sued, he can prefer any defense to the debt, with which he is sought to be charged, that the decedent in his life, [334] or a rightful representative, could prefer": Halfman's Exrx. v. Ellison, 51 Ala. 543; Houston v. Blackman, 66 Ala. 559, 41 Am. Rep. 756. In another case, in which a creditors' bill was filed attacking conveyances made by a decedent, this court said: "We do not consider the question whether the statute of limitations would protect the title of the fraudulent grantee. We know of no principle or authority upon which the position can be maintained that a debtor is denied the privilege of pleading the statute of limitation against the debt because he has made a fraudulent conveyance and successfully concealed it. The statute is pleaded by the administrator, and we can perceive no reason why he should not as well defend in the chancery court, upon the ground that the claim is barred by the statute, as if he had been sued at law": Reed's Admr. v. Minell & Co., 30 Ala. 61. This court has also said: "If, upon the face of the bill, it is apparent the claim or demand of the complainant is barred by lapse of time, or by the statute of limitations, the defense is available in a court of equity, on demurrer, as well as by plea or answer": Battle v. Reid, 68 Ala. 149; Lovelace v. Hutchinson, 106 Ala. 417, 17 South. 623. "The grantee may plead any defense, not merely personal, which the grantor or debtor could have made against it": Deposit Bank of Frankfort v. Caffee, 135 Ala. 208, 33 South. 152. "The fact of primary importance in such a proceeding is the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable": Yeend v. Weeks, 104 Ala. 331, 53 Am. St. Rep. 50, 16 South. 165.

It is true that our court has held, in several cases of creditors' bills, that the statute of limitations to the original cause of action was not pleadable; but the [335] ground upon which such decisions were rendered was that in each case the effort was, not merely to set aside a deed claimed to be

fraudulent, but to enforce a trust in the land, by reason of the money of the debtor having been invested in the land or otherwise, and the court very properly said that the enforcement of the trust did not depend upon the question of limitations as to the original debt: Stoutz v. Huger, 107 Ala. 248, 18 South. 126; Guyton v. Terrell, 132 Ala 67, 31 South. 83; Northwestern Land Assn. v. Grady, 137 Ala. 219, 33 South. 874. These decisions do not impinge upon the general doctrine that the grantee, in a conveyance claimed to be fraudulent, can make the defense of the statute of limitations as to the original debt, and so long as he is insisting on that defense the bill is without equity as to him: Davis v. Davis, 20 Or. 78, 25 Pac. 140. In the case of Emory v. Keighan, 94 Ill. 543, the action was ejectment, the title being based on a purchase at a mortgage sale, and the question of the statute of limitation was attempted to be raised by a surety on the note, said note not being barred against the principal by reason of his absence from the state; and the court held that the bar as against the surety on the note did not invalidate the sale under the law of that state, by which the bar of the note also bars the foreclosure of the mortgage. That decision was, of course, correct, as the foreclosure of the mortgage did not affect the liability of the surety on the note. The case of Cartwright v. Cartwright, 68 Ill. App. 74, is based entirely on the last-cited case, and on Lee v. Mound Station, 118 Ill. 304, 8 N. E. 759, and Shields v. Shiff, 124 U. S. 351, 8 Sup. Ct. Rep. 510, 31 L. ed. 445, neither of which touches the question at all. While a mere creditor cannot raise the defense of the statute of limitations, yet the party who has acquired an interest [336] in the property by deed or mortgage from the original owner is placed in the shoes of the grantor, and authorized, "for the purpose of protecting the property, to make any plea which he himself could have made": Ward v. Waterman, 85 Cal. 488, 24 Pac. 930; Hill v. Hillard, 103 N. C. 34, 488, 9 S. E. 639.

We are unable to agree with the chancellor to the effect that the statute of limitations is not applicable, because the judgment rendered in the foreclosure suit "is conclusive of the fact that at the time of the filing of the original bill in this case the debt was not barred by the statute of limitations." "A judgment against a grantor in an alleged fraudulent conveyance is not evidence that the debt existed at any time anterior thereto": Yeend v. Weeks, 104 Ala. 331, 53 Am. St. Rep. 50, 16 South. 165; Lawson

v. Alabama Warehouse Co., 73 Ala. 289. The foreclosure proceedings could be maintained, notwithstanding the debt was barred by the statute of limitations (Ohmer v. Boyer, 89 Ala. 274, 7 South. 663), and the judgment over is rendered on motion, without any notice to the defendant, other than the filing of the bill: Wells v. American Mtg. Co., 123 Ala. 413, 26 South. 301.

It is unnecessary for the court to consider whether such a judgment could in any event take from the grantee the right which he had to defend his property by pleading the statute of limitations. It is sufficient to say that such a judgment, rendered after the institution of the creditors' bill, could not impart to the original bill equity which it did not have at the time it was filed. The amendment should have been stricken from the bill and the bill dismissed.

The decree of the chancellor is reversed, and a decree will be here rendered dismissing the bill.

[337] Tyson, C. J., and Haralson, Dowdell, Anderson and Denson, JJ., concur.

ON REHEARING.

SIMPSON, J. While the record shows that the decree was signed in vacation, June 1, 1907, and was not filed until July 5, 1907, the decree did not become effective until said latter date: Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200. In this case it was held that a paper purporting to be a decree of the orphans' court, signed by the judge, and found among the papers, but not recorded, was not a decree of the court.

When a decree is rendered in vacation, as in the case now under consideration, the mere signing of it cannot make it effective, as it is still in the breast of the court, to alter or destroy, until it is filed in court; consequently the appeal on August 3d was in time.

It is not necessary to decide whether the defense of the statute of limitations can be raised by motion to dismiss the bill. This is not the case of a bill to enforce the collection of a debt, to which the defense of the statute of limitations is interposed, but the bill is by a creditor, to set aside a conveyance claimed to be fraudulent, and if, at the time the conveyance was made, the statute had barred the debt, so that the debtor was at liberty to disregard the debt and convey the property, the conveyance was not

fraudulent. Hence a bill seeking to set it aside is without equity.

The motion for rehearing is denied.

Tyson, C. J., and Haralson, Dowdell, Anderson and Denson, JJ., concur.

The Title of a Fraudulent Grantee is Protected by the Statute of Limitations, and if creditors do not, by proper judicial proceedings, effect the cancellation of his title within the statutory period after the discovery of the fraud, such title becomes final and conclusive: Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 94 Am. St. Rep. 709; Van Ingin v. Duffin, 158 Ala. 318, ante, p. 29.

WESTERN UNION TELEGRAPH COMPANY v. NORTHCUTT.

[158 Ala. 539, 48 South. 553.]

TELEGRAPH CORPORATIONS—Notice of Necessity for Expeditious Delivery.—The very fact of a communication being sent by telegraph gives notice that expedition is the main object in view; so that it is not necessary to bring to the attention of the corporation the circumstances which call for sending the message without delay, or even to couch the message in intelligible language. (p. 41.)

PRINCIPAL AND AGENT—Undisclosed Principal—Right of Action.—An undisclosed principal may sue on a contract made by his agent for the transmission of a telegraphic message. (p. 40.)

TELEGRAPH CORPORATIONS—Damages—Mental Suffering. Where there is a right of recovery of anything else for the breach of a contract for the transmission of a telegraphic message, a recovery may be had in addition for the mental anguish, but then only in case of messages between persons occupying close degrees of relationship, relating to exceptional events, such as sickness or death. (pp. 40, 41.)

TELEGRAPH CORPORATIONS—Damages—Mental Suffering. The nondisclosure to the telegraph company of the principal in a telegram dispatched by an agent, and it not appearing in the telegram, disentitles the principal from recovering for mental pain and anguish. (p. 42.)

TELEGRAPH CORPORATIONS—Mental Suffering.—The measure of damages to which the sender of a telegram delayed by a telegraph corporation, so that relatives sent for were too late to attend a funeral, is entitled is limited to the time between when the relatives could have reached the sender and the time when they actually did reach. (p. 45.)

TELEGRAPH CORPORATIONS—Action Against—Admissibility of Evidence.—The mental suffering of the plaintiff, forming a ground for damages in an action against a telegraph corporation for delay in delivering a telegram asking relatives to come to a funeral, is limited to the time between the hour when the relative could have gotten there if the telegram had been expeditiously delivered and

the time when he did get there, and evidence of the plaintiff's mental suffering from the time of the death was inadmissible. (pp. 43, 44.)

TELEGRAPH CORPORATIONS—Evidence.—Mental suffering is not the subject of direct proof. It is an inference to be drawn by the jury from the manner and causelessness of the wrong. (p. 43.)

TELEGRAPH CORPORATIONS—Jury Questions.—Where there was evidence contradicting the genuineness of the signature to the delivery sheet of a telegram, it was for the jury to determine both whether the telegram was received at the time therein specified and the signature to the delivery sheet was genuine. (p. 44.)

TELEGRAPH CORPORATIONS—Evidence.—In an action for delay in delivering a telegram, the telegram received by the sendee is admissible. Letters and figures upon it are evidence calling for explanation as well as by whom and when they were marked, and whether the deliverer was the agent of the corporation. (p. 44.)

TELEGRAPH CORPORATIONS—Jury Trial—Instructions.—In an action for damages for delay in delivering a telegram, in consequence of which relatives were prevented from attending a funeral, a charge that if the telegram in question was delivered to the sendee before any passenger train passed his station the plaintiff could not recover was bad, as a passenger train might have passed just after the sendee received the telegram, not leaving sufficient time for him to have reached the depot. (p. 45.)

EVIDENCE—Impeachment of Own Witness.—A party cannot discredit his own witness, notwithstanding the witness has testified in certain matters differently from what the party himself has testified. (p. 44.)

APPEAL AND ERROR—Objection, When must be Made.—The time for objection to a question is before it is answered, otherwise the objection is too late. (p. 44.)

TRIAL—Conduct of Judge—Remarks.—After a document had been put in evidence, it was error for the judge to say to counsel for the party impeaching the document, "You are responsible for it." (p. 44.)

TRIAL—Charge—Argumentative Instructions.—A charge was properly refused as argumentative which stated that it was possible that the plaintiff understood that the man she asked to dispatch a telegram was acting then as her agent, but that the evidence must go further and establish to the satisfaction of the jury that the agent also understood and agreed to act. (p. 45.)

TRIAL — Charge — Misleading and Faulty Instructions.—A charge requiring the jury to determine what was the negligence charged in the complaint is misleading and faulty, and properly refused. (p. 45.)

TRIAL—Invasion of Jury's Province.—Charges covering the general effect of evidence and alleging the absence of evidence of particular facts are properly refused as trenching on the province of the jury. (p. 45.)

PRINCIPAL AND AGENT—Establishment of Agency.—Where one requests another to send a telegram, in order to entitle the principal to recover, it must be proved that that other accepted the agency and did not send the telegram on his own account. (p. 45.)

PRINCIPAL AND AGENT—Creation of Agency—Union of Minds of Parties.—In order to constitute an agency, it requires the concurrence of the minds of both the principal and the agent. (p. 44.)

Charge "c" referred to on page 45 was as follows: "I charge you that it is possible that plaintiff understood that A. D. Northcutt was acting as plaintiff's agent when he left to send the alleged message; but the evidence must go further before you can find for the plaintiff, and establish to your reasonable satisfaction that A. D. Northcutt also understood and agreed so to act." Charges 31 and "e" were on the general effect of the evidence and charges 30 and "g" were on the absence of evidence of certain facts.

Campbell & Johnson, for the appellant.

G. O. Chenault, for the appellee.

[556] SIMPSON, J. This action was brought by the appellee for damages for delay in delivering a telegram. The action is on the contract, and alleges that plaintiff's husband was killed accidentally; that her brother in law (Northcutt), as her agent, sent from Nauvoo, Alabama, to her father (Van Horn) at Dora, Alabama, a telegram in these words: "Harris killed in mines. Notify Jack at once at Empire. [Signed] A. D. Northcutt." "Harris" was plaintiff's husband, and "Jack" was a brother of his. There is some conflict in the evidence as to the agency of Northcutt in sending the message; but, according to the plaintiff's statement, she requested him to send the telegram to her father, and added the request to notify his brother.

Plaintiff claims that, by reason of the delay in the delivery, her father could not, and did not, reach Nauvoo until after her husband was buried, so that her principal claim for damages is for mental anguish for the day during which the arrangements were being made and the funeral was conducted, on account of being deprived of the consolation of having her father with her. Upon the general subject of recovery for mental anguish in such cases, the authorities in other states are in hopeless conflict; but our own court has carefully gone into the matter and has arrived at certain definite conclusions which it may be well to state in the outset, for it [557] is not deemed wise, at this day, to go behind our decisions and open up this wide field of controversy for a new alignment of principles.

1. An undisclosed principal may sue on a contract made by an agent: Western Union Tel. Co. v. Millsap, 135 Ala. 415, 33 South. 160, and cases cited; Manker v. Western Union Tel. Co., 137 Ala. 292, 34 South. 839; Western Union Tel. Co. v. Manker, 145 Ala. 418, 41 South. 850.

2. Where there is a right of recovery of anything else on the contract, a recovery may be had in addition for mental anguish: Western Union Tel. Co. v. Krichbaum, 132 Ala. 535, 31 South. 607; Western Union Tel. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419.

3. While there has been some criticism of the rule laid down in the leading case of Hadley v. Baxendale, 9 Ex. 241, to wit, that the damages for the breach of a contract "should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it," yet the criticism was only verbal, to the extent that it would be more accurate to say that any special facts which magnify the transaction and entitle the party to special damages should be brought within the contemplation of the parties: Daughtery v. Am. Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435. This and other cases adhere to the rule in said leading case, but hold that, by reason of the peculiar nature of the telegraph company and the duties it undertakes to the public, the very fact of a communication being sent by telegraph gives notice that expedition is the main object in view; so that it is not necessary to bring to its [558] attention the circumstances which call for sending the message without delay, or even to couch the message in language which may be understood: Western Union Tel. Co. v. Way, 83 Ala. 542, 4 South. 844.

It must be acknowledged that this element of damage is very vague and uncertain; that it is very difficult, if not impossible, for a jury to ascertain how much mental anguish a person endures, and to translate it into dollars and cents; and also that, if this principle should be applied to contracts generally, it would be very far-reaching, and possibly ruinous to many commercial transactions. Consequently our court has said that it is to be allowed only in case of messages between persons occupying close degrees of relationship, relating to exceptional events such as sickness or death, and that "to extend as a natural result the allowance on other occasions 'would tend to promote and encourage a species of litigation more or less speculative in its nature, and unjust and oppressive in its results' ": Western Union Tel. Co. v. Westmoreland, 151 Ala. 319, 44 South. 382; Western Union Tel. Co. v. Ayers, 131 Ala. 391, 90 Am. St. Rep. 92, 31 South. 78.

It is contended by the appellant that, according to the overwhelming weight of authority, no recovery can be had for mental suffering where the connection of the plaintiff with the message is not brought home to the telegraph company. The cases referred to in appellant's brief do not seem to rest upon any peculiarity in regard to mental suffering as an element of damage, but rather upon the general principle, held by some courts, in construing the Hadley-Baxendale case, which we have seen does not obtain in this state in cases against telegraph companies, to wit, that the company is not liable unless informed of the circumstances which would cause the loss or suffering. Thus the principal case relied on [559] (Helms v. Western Union Tel. Co., 143 N. C. 386, 118 Am. St. Rep. 811, 55 S. E. 831, 8 L. R. A., N. S., 249) argues upon the general principle, while the case of Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 Sup. Ct. Rep. 1098, 38 L. ed. 883, involved a cipher message about a commercial transaction. The case of Western Union Tel. Co. v. Luck, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469, and Western Union Tel. Co. v. Kirkpatrick, 76 Tex. 217, 18 Am. St. Rep. 37, 13 S. W. 70, and others which it is unnecessary to cite, rest upon the same general principle.

For these reasons it is the opinion of the writer that, without overruling or modifying our previous decisions this contenton cannot be sustained; but the majority of the court (consisting of Tyson, C. J., and Dowdell, Denson and Anderson, JJ), hold that, the plaintiff's relation to the contract not having been disclosed to the telegraph company, and it not appearing in the telegram, she is not entitled to recover for mental pain and anguish; and in support of that proposition they cite Helms v. Western Union Tel. Co., 143 N. C. 386, 118 Am. St. Rep. 811, 55 S. E. 831, 8 L. R. A., N. S., 249, 10 Ann. Cas. 643; Poteet v. Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113; Western Union Tel. Co. v. Kirkpatrick, 76 Tex. 217, 18 Am. Rep. 37, 13 S. W. 70; Squire v. Western Union Tel. Co., 98 Mass. 237, 93 Am. Dec. 157; Western Union Tel. Co. v. Proctor, 6 Tex. Civ. App. 300, 25 S. W. 811; Weatherford etc. R. R. Co. v. Seals (Tex. Civ. App.), 41 S. W. 841; Elliott v. Western Union Tel. Co., 75 Tex. 18, 16 Am. St. Rep. 872, 12 S. W. 954; Western Union Tel. Co. v. Brown, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766; Southwestern Tel. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686; Davidson v. Western Union Tel. Co., 21 Ky. Law Rep.

1292, 54 S. W. 830; Morrow v. Western Union Tel. Co., 107 Ky. 517, 54 S. W. 853; Rogers v. Western Union Tel. Co., 72 S. C. 290, 51 S. E. 773; Cranford v. Western Union Tel. Co., 138 N. C. 162, 50 S. E. 585; Western Union Tel. Co. v. Kerr, 4 Tex. Civ. App. 280, 23 S. W. 264; Western Union Tel. Co. v. [560] Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961; Western Union Tel. Co. v. Weniski, 84 Ark. 457, 106 S. W. 486.

Mental suffering, resulting from the absence of some one whose presence would be consoling in the time of grief is recognized as a proper subject of damage: Jones on Telegraph and Telephone Companies, p. 519, sec. 543. From what has been said, it results, from the opinion of the majority of the court, that the averments of the complaint in regard to mental suffering should have been stricken on motion, and that the charges requested by the defendant on the ground of mental suffering should have been given.

The plaintiff, when on the stand as a witness, was asked this question, to wit: "I will ask you if, on account of the absence of your father from the time your husband was killed, and after you sent the telegram, and up to the time he was buried, up to the time he came there, and on account of that absence, you suffered any injury to your feelings and mental anguish." This question was objected to, and the answer (which was "Yes") was moved to be excluded, and the motion overruled. This was error. In an attachment case, in which it was sought to recover for wounded feelings, this court held that it was improper to permit the plaintiff to testify that he was "much distressed, and harassed in body and mind"—that he "was almost crazy." The court, speaking through Stone, J., said: "Such testimony as this can be legal, only on the theory that for wrongs, identical in nature and degree, the man of delicate organism and acute sensibilities is entitled to greater damages than one of more stoical nature. But such suffering is not the subject of direct proof. It is an inference to be drawn by the jury from the manner and causelessness of the wrong": City National Bank v. Jeffries, 73 Ala. 193. In the case of Roberts v. Western Union Tel. [561] Co., 73 S. C. 520, 114 Am. St. Rep. 100, 52 S. E. 985, there was no objection to the testimony; but, in discussing a charge, the court merely remarks that "the plaintiff may testify to the fact that he suffered, after the circumstances from which the

suffering might arise have been brought out; but he cannot testify as to his peculiar apprehensions, fears and conclusions, because these might be due to individual temperament."

Another reason why this testimony should be excluded is that it relates to her mental suffering from the time her husband was killed; whereas, if the defendant was liable at all, it could only be for the time between the hour when the father could have gotten there, if the telegram had been promptly delivered, and the time when he did get there.

It was error to allow the plaintiff to ask her own witness—Northcutt—if he was not very much distressed at the time and hardly knew what he was doing. The evident purpose of this was to discredit plaintiff's own witness, who had testified in certain matters differently from what the plaintiff had testified. This could not be done: Winston v. Moseley, 2 Stew. 137; Southern Bell Tel. & Tel. Co. v. Mayo, 134 Ala. 641, 33 South. 16; Dundas v. Lansing, 75 Mich. 499, 13 Am. St. Rep. 457, 42 N. W. 1011, 5 L. R. A. 143; Bullard v. Pearsall, 53 N. Y. 230.

The objection to the question to the witness Northcutt as to his age and the age of Jack Northcutt was not made until after it was answered, and the objection was properly overruled for this, if for no other, reason.

The court erred in refusing to admit the delivery sheet, after proof of the genuineness of the signature. If there was evidence contradicting the genuineness of the signature, it was a question for the jury to determine whether [562] the telegram was received at the time therein specified: 2 Wigmore on Evidence, sec. 1261; 3 Wigmore on Evidence, sec. 2134.

There was no error in admitting the telegram received by Van Horn. The matter of the letters and figures thereon was open to proof as to their meaning, and as to when and by whom they were placed on it, as was also the matter as to whether the person who delivered it was the agent of the defendant: Collins v. Western Union Tel. Co., 145 Ala. 412, 41 South. 160, 8 Ann. Cas. 268.

The court was in error, after this paper had been introduced, in remarking to counsel for defendant, who denied the delivery of the said message, "you are responsible for it."

The court erred in refusing to give charges 13, 15, 16, "o," and "p," requested by the defendant. The plaintiff

could recover only on the theory that Northcutt, in sending the telegram, sent it as her agent. In order to constitute an agency, it requires the concurrence of the minds of both the principal and the agent: Western Union Tel. Co. v. Adams, 154 Ala. 657, 47 South. 228; Heathcoat v. Western Union Tel. Co., 156 Ala. 339, 47 South. 139; Western Union Tel. Co. v. Heathcoat, 149 Ala. 623, 43 South. 117; Western Union Tel. Co. v. Adair, 115 Ala. 441, 22 South. 73.

Charge "c," requested by the defendant, was an argument, and was properly refused; and charge "f" was misleading and faulty, for referring to the jury to determine what the negligence charged in the complaint was.

Charges 30, 31, "e," and "g" invaded the province of the jury, and were properly refused: Southern C. & C. Co. v. Swinney, 149 Ala. 405, 42 South. 808.

Charge 32 was properly refused, as a passenger train might have passed just after he received the telegram, not leaving sufficient time for him to have reached the depot.

[563] Charge 1, given at the request of the plaintiff, should have been refused. If she was entitled to recover for mental anguish on account of his absence, it would not be "up to the time he could have gotten to her after he received the message," but from the time he could and would have reached, up to the time he actually did reach, her.

Charge 2, given at the request of the plaintiff, should have been refused. Although plaintiff may have requested Northcutt to send the telegram to her father, yet if, as a matter of fact, he did not send it as her agent, but on his own account, he was not acting as her agent.

The judgment of the court is reversed and the cause remanded.

Tyson, C. J., and Dowdell, Anderson and Denson, JJ., concur.

Simpson, J., dissents.

Notice to a Telegraph Company, or Want of Notice, that a failure promptly to transmit a message will probably be attended with special damages, as affecting its liability for negligence in the transmission or delivery of the message, is discussed in the note to Kagy v. Western Union Tel. Co., 117 Am. St. Rep. 316. For subsequent cases on this question, see Suttle v. Western Union Tel. Co., 148 N. C. 480, 128 Am. St. Rep. 631; Amos v. Western Union Tel. Co., 79 S. C. 259, 128 Am. St. Rep. 845.

The Right to Recover Damages for Mental Anguish, due to the negligence of a telegraph company in delaying the transmission or delivery of a message, is discussed in the note to Kagy v. Western Union Tel. Co., 117 Am. St. Rep. 305. Subsequent decisions on this question are Western Union Tel. Co. v. Hollingsworth, 83 Ark. 39, 119 Am. St. Rep. 105; Seifert v. Western Union Tel. Co., 129 Ga. 181, 121 Am. St. Rep. 210; Western Union Tel. Co. v. Lacer, 122 Ky. 839, 121 Am. St. Rep. 502; Western Union Tel. Co. v. Potts, 120 Tenn. 37, 127 Am. St. Rep. 991; Woods v. Western Union Tel. Co., 148 N. C. 1, 128 Am. St. Rep. 581; Amos v. Western Union Tel. Co., 79 S. C. 259, 128 Am. St. Rep. 845; Johnson v. Western Union Tel. Co., 81 S. C. 235, 128 Am. St. Rep. 905.

The Recovery of Damages for Mental Suffering where a telegraph company negligently delays the transmission or delivery of a message so that the sendee is unable to attend the funeral of a relative is discussed in Johnson v. Western Union Tel. Co., 81 S. C. 235, 128 Am. St. Rep. 905; Woods v. Western Union Tel. Co., 148 N. C. 1, 128 Am. St. Rep. 581; Western Union Tel. Co. v. Potts, 120 Tenn. 37, 127 Am. St. Rep. 991.

WESTERN UNION TELEGRAPH COMPANY v. McMORRIS.

[158 Ala. 563, 48 South. 349.]

TELEGRAPH CORPORATIONS. — Mental Anguish and Wounded Feelings Alone and unaccompanied by personal injury, and which naturally and proximately arise from the breach of a contract to deliver a telegraphic message, furnish ground for the recovery of damages, limited, however, to certain degrees of relationship. Brothers fall within the degree recognized by the rule. (pp. 49, 50.)

TELEGRAPH CORPORATIONS—Evidence of Mental Anguish. In an action for damages for breach of contract to deliver a telegraphic message, direct proof of wounded feelings or mental pain is not an indispensable prerequisite to the right of the plaintiff to have the jury consider the mental suffering as an element of recoverable damages, but it may be inferred by the jury from circumstances attending the breach. (pp. 49, 50.)

TELEGRAPH CORPORATIONS—Mental Anguish, When Inferable.—When the evidence was that the corporation receiving a message knew that the sender was the brother of one just dead, and the message itself suggested the obsequies and intimations to friends to meet for the burial, it was a natural presumption therefrom that mental pain would ensue from the miscarriage of the arrangements through failure to deliver the message, and the jury might infer the fact of such suffering without direct proof. (pp. 50, 51.)

TELEGRAPH CORPORATIONS—Evidence.—In an action for breach of contract to deliver a telegraphic message in order to entitle the sender to recover for mental anguish, it is indispensable to prove that if the sendee had received the message promptly he would have complied with its terms. (pp. 51, 52.)

TELEGRAPH CORPORATIONS—Failure to Deliver Message. The want of evidence that if the sendee had received the message promptly, the failure to deliver which was the cause of action, he would have complied with its terms, which were to make immediate

burial preparations, precludes the admissibility of evidence that rain fell on the day of the funeral, which was consequently postponed. (p. 52.)

TELEGRAPH CORPORATIONS—Failure to Deliver Message.—Nominal Damages at the Least should be awarded for the failure to deliver a telegraphic message for which the toll has been paid. (p. 52.)

TELEGRAPH CORPORATIONS—Pleading.—Toll Paid for the Transmission of a Telegraphic Message is not special damage, necessary to be specifically claimed; but averment of it in the complaint authorizes proof and recovery thereof under the general sum claimed as damages. (p. 52.)

TELEGRAPH CORPORATIONS—Strike of Employés.—When the fact of a strike of the employés of a telegraph corporation was not communicated to the sender of a message, it is not available as a defense by the telegraph corporation in an action for failure to deliver such message. (pp. 52, 53.)

TRIAL—Negative Instructions.—A trial court is under no duty to give charges which instruct the jury that there is no evidence of a certain fact. (p. 52.)

Charge 11 (page 52) was an affirmative charge to find for defendant.

Goodhue & Blackwood, for the appellant.

Culli & Martin, for the appellee.

569 DENSON, J. The appellee, as plaintiff in the court below, recovered of the appellant, Western Union Telegraph Company, a judgment in the sum of three hundred dollars for mental anguish alleged to have been suffered on account of breach of contract to promptly transmit and deliver a telegraphic message in the following words and figures:

"Rock Springs, Ala. 9/7/1907.

"Mr. A. Kanter and P. C. Dennis, Clanton, Ala.

"Caldwell died last night. Will 570 be down with remains this evening. Open grave on our lot.

(Signed) "B. Y. McMORRIS."

The principal facts of the case may be summarized as follows: Plaintiff boarded a Louisville and Nashville Railroad train at 11:47 A. M., Saturday, September 7, 1907, at Rock Springs, in Etowah county, Alabama, with his deceased brother's remains, carrying them to Clanton, in Chilton county, Alabama, for interment in the family burial ground, the brother having died Friday night. Plaintiff and his brother had formerly lived at Clanton and were well known there, and at this time a sister of theirs and their stepmother were residing at that place, the sister being the wife of a son of P. C. Dennis. Kanter had been a

friend of the McMorris family for a long time, and he and the deceased had been roommates for a year or two. When plaintiff arrived at Clanton with the remains of his brother, at 6:00 P. M., Saturday, he found no one at the station to meet him, and that no one knew of his coming or was expecting him. The grave had not been opened, nor had the funeral arrangements been made. The funeral and interment did not occur until about 4 o'clock Sunday afternoon. After plaintiff got off the train at Clanton, Mr. Curry approached plaintiff and was informed by him that his brother's remains were on the train. Then plaintiff, with Curry, Van Derveer, and "one or two others," took the remains out of the express-car, placed them on the express truck, and carried them up in front of the depot, where plaintiff stood by the remains twenty or thirty minutes, until P. C. Dennis got to the depot. Dennis and plaintiff then went to a livery-stable and procured a wagon, and carried the remains to a hotel, where plaintiff's stepmother was boarding, about one hundred yards from the depot. Forty-five minutes elapsed from the time the remains arrived at the depot before they were deposited at the hotel. On Sunday morning, [571] about 9 o'clock, the funeral arrangements were made, and at 11 o'clock they were announced at church services in Clanton. On the same morning plaintiff and P. C. Dennis obtained the necessary material and had it carried to the cemetery, and employed a negro man to open the grave and line it with brick, as desired by plaintiff. The remains of the deceased brother were carried to the grave, where funeral services were held, and the interment took place at 4 o'clock in the afternoon, a minister of the gospel officiating.

The plaintiff testified: "A good many people were at the funeral. We had such carriages and such open vehicles as could be obtained on Sunday morning in the town of Clanton." It was raining when the burial took place, but no rain had fallen in the morning. The body was in a good state of preservation at the time of the burial. Deceased had died of inflammatory rheumatism, and decomposition did not set in quickly. The plaintiff is a man, being at the time of the death of his brother twenty-nine years of age, and the deceased was a man thirty-four years of age. Neither Kanter nor Dennis were related to plaintiff or deceased, but had been acquainted with them for ten years. The message was not delivered until Monday, the day subsequent to that on which the burial took place; nor had the sendees any notice of the death of the de-

ceased until after the plaintiff, accompanying the remains, reached Clanton, Saturday afternoon. At the time the defendant company's agent received the telegram for transmission (9:10 A. M., Saturday), he knew that "Caldwell," referred to in the message, was the brother of plaintiff, the sender of the message. Plaintiff paid defendant's operator at Rock Springs about forty cents toll for the transmission of the message. The message was delivered to the Rock Springs operator, for the plaintiff, by a Mr. Howard, at said hour and date, and [572] within twenty minutes it was transmitted to Anniston; the usual route of messages to Clanton being via Anniston and Birmingham, Alabama—that is to say, from Anniston the messages were repeated to Birmingham, and from the latter point to Clanton—and the time usually necessary for the transmission of a message over said route being twenty minutes.

Phillips, the operator at Rock Springs, testified: "While the gentleman who delivered the message for transmission was in the office, I said: 'You tell Mr. McMorris I got the message off; but it is going to be subject to delay, I think, on account of the strike.'" Howard testified that, when he delivered the message to Phillips, he told him that McMorris said to get it off as quickly as he could, and that Phillips replied, "Certainly." The plaintiff testified that when he went to the station at Rock Springs to take the train, about 11 o'clock Saturday morning, he asked Phillips if he got the message off, and that he replied: "Yes, I tried to get it off as soon as Howard delivered it to me; but the wires were busy, and I did not get it off right then, but did get it off a few minutes later."

While it is probably in accordance with the decisions of a majority of the state courts that mental anguish and wounded feelings, alone and unaccompanied by personal injury, do not furnish ground for recovery of damages, yet in this jurisdiction the contrary view prevails, as it does in a number of other states: Western etc. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419; Western etc. Co. v. Haley, 143 Ala. 586, 39 South. 386; Western etc. Co. v. Whitson, 145 Ala. 426, 41 South. 405; Western etc. Co. v. Merrill, 144 Ala. 618, 113 Am. St. Rep. 66, 39 South. 121; Western etc. Co. v. Long, 148 Ala. 202, 41 South 965. Perhaps the strongest and most satisfactory reasoning in support of the doctrine that mental [573] anguish without accompanying personal injury affords ground for recoverable damages is to be found in the case of Mentzer v. West-

ern Union Tel. Co., 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1, 28 L. R. A. 72. The appellant, conceding that the law in this state is settled as above stated, yet contends that the undisputed testimony in the present case does not afford basis for a reasonable inference that the plaintiff suffered mental anguish. It is true no witness—not even plaintiff himself—testified directly that plaintiff suffered mental pain or anguish. So we have for determination the question, Was that an indispensable prerequisite to the right of the plaintiff to have the jury consider mental suffering as an element of recoverable damages?

In cases of physical injury it has been held that mental suffering cannot be dissociated from physical pain, and where the latter is found the former is implied: Montgomery etc. Ry. Co. v. Mallette, 92 Ala. 209, 9 South. 363. Therefore, in that class of cases direct proof of mental suffering is not required, to entitle a plaintiff to recover for such: International etc. Co. v. Mitchell (Tex. Civ. App.), 60 S. W. 996. And it may be stated to be the rule generally, in Alabama, that, in cases where wounded feelings or mental pain form an element of recoverable damages, direct proof of such suffering is not necessary, but it may be inferred by the jury from circumstances attending the particular breach of duty or contract (City Nat. Bank v. Jeffries, 73 Ala. 183. See, also, Trinity etc. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; 13 Cyc. 205); although in a telegraph case it has been held that the natural utterances and expressions indicative of pleasure, displeasure, pain or suffering are competent original evidence that may be received in proof of the physical or mental state they signify, whenever that state is a pertinent inquiry: Western etc. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419.

574 In recognition of the well-established rule that "when two parties have made a contract, which one of them has broken, the damages which the other ought to have for such breach should be such as may fairly and reasonably be considered as arising naturally from such breach, or as may reasonably be supposed to have been in the contemplation of the parties at the inception of the contract as the possible result of a breach of it," this court said: "When the sender of a message has the right to sue a telegraph company for breach of contract in failing to deliver the message, he can also recover damages for mental anguish of which said failure was the proximate consequence": Western etc. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419.

Under this rule the mental anguish which may be said to arise naturally and proximately from the breach of contracts to transmit telegraphic messages is limited to certain degrees of relationship; and, without here stopping to define the extent of the limitation, it suffices to say that that of brothers falls within the degree recognized by the rule: Western etc. Co. v. Haley, 143 Ala. 586, 39 South. 386.

Here, when the message was received for transmission, the defendant's operator knew the relationship existing between the sender (plaintiff) and the deceased person referred to in the message was that of brotherhood; and we cannot doubt that the perusal of the message naturally suggested that the purpose was, not only that a grave might be opened and adequate preparations for the funeral made, but that the friends and relatives of the sender might be notified to meet him at the train; and it is likewise not to be questioned that it was a natural presumption therefrom that plaintiff would suffer mental pain should he find, on his arrival at Clanton, that by reason of failure to deliver the message all these objects had miscarried: Western etc. Co. v. Long, 148 [575] Ala. 202, 41 South. 965; Western etc. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; Western etc. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734; Western etc. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961; Cashion v. Western etc. Co., 123 N. C. 267, 31 S. E. 493. The injury in such a case may be said to be the natural result of a failure to deliver the message, and must have been in the contemplation of the parties when the contract for the transmission of the message was made. Then, if the facts showing liability are proved, we believe it is the settled law that the jury may infer the fact of mental suffering, because it is recognized as a common result under such circumstances, and the direct proof is not indispensable to show that mental suffering did ensue: Western etc. Co. v. Crocker, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; Western etc. Co. v. Merrill, 144 Ala. 618, 113 Am. St. Rep. 66, 39 South. 121; Willis v. Western etc. Co., 69 S. C. 531, 104 Am. St. Rep. 828, 48 S. E. 538, 2 Ann. Cas. 52, and notes and cases cited therein.

But we notice, in this evidence, the lack of a link which we deem indispensable to a case of liability against the defendant for damages for mental suffering. While the testimony shows that Kanter and P. C. Dennis, the sendees of the message, resided within a fourth of a mile of defendant's office in Clanton, and that their places of business were prob-

ably within one hundred and fifty yards of defendant's office, there seems to have been no effort to prove that they were at home or at their places of business during Saturday, except that it is shown that plaintiff, after the train arrived, found Dennis at his place of business; nor is there any evidence to show that the sendees, if they had received the telegram promptly Saturday, would have made arrangements for the funeral, and have had the grave prepared, any earlier. These were [576] facts involved in the issues, provable by the sendees, and we know of no rule of evidence which authorizes the presumption that the sendees were at home or at their places of business, or that they could or would have notified the relatives and friends of the plaintiff and of deceased of plaintiff's expected arrival on the train, or that they could or would have made arrangements for the funeral and a grave at an earlier hour: Bright v. Western etc. Co., 132 N. C. 317, 43 S. E. 841; Hancock v. Western etc. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

On these considerations, charges 8, 9, 16, 17 and 18 assert correct principles, and should have been given; while charge 14 is subject to criticism, if at all, merely for being more favorable to plaintiff than warranted under the facts.

For the same reasons, evidence that rain fell Sunday afternoon was improperly admitted.

Some portions of the oral charge of the court excepted to (in view of what has been said above) are abstract.

A trial court is under no duty to give charges which instruct the jury that there is no evidence of a fact, and therefore no error is involved in the refusal of charges 10, 12, 13 and 15 in defendant's series: Mobile etc. Co. v. Walsh, 146 Ala. 295, 40 South. 560.

Charge 11 was properly refused, as plaintiff, under the facts, was entitled to nominal damages at least.

The amount paid by the plaintiff as toll for the transmission of the message is not special damages, necessary to be specifically claimed in the complaint as a condition of its recovery; but if it is averred in the complaint as having been paid, this authorizes proof and recovery thereof under the general sum claimed as damages: 5 Ency. of Pl. & Pr. 748; Wilkinson v. Searcy, 76 Ala. 176; Dowdall v. King, 97 Ala. 635, 12 South. 405. It follows, therefore, that the demurrers to counts 4, 6, and 7, insisted [577] by appellant as being well taken, were properly overruled; and for the same reasons the affirmative charges requested by the appellant in respect to

these counts, based upon the theory that the toll paid is not claimed as a part of the damages, were properly refused.

According to Phillips' (the transmitting operator's) own evidence, he said nothing to Howard (who delivered the message for the plaintiff) in regard to the message being subject to delay on account of the strike until after he had accepted same and transmitted it to Anniston; and what he said did not amount to a contract limiting defendant's liability for failure to transmit, or for delay in transmitting, on account of a "strike," or of any other cause. Then, too, the undisputed testimony shows that Phillips accepted the toll from plaintiff, and informed him he had gotten the message off, without mentioning any limitation on the liability of the company. Under these conditions, the fact that some of the company's employés were on a strike was not available as a defense to the defendant, and the court committed no error in refusing to allow proof of that fact: 27 Am. & Eng. Ency. of Law, 1026, 1050.

We have considered all the grounds of error which have been pressed upon our attention; and for the errors pointed out the judgment of the city court must be reversed and the cause remanded.

Tyson, C. J., and Simpson and Anderson, JJ., concur.

The Right to Recover Damages for Mental Anguish, due to the negligence of a telegraph company in delaying the transmission or delivery of a message, is discussed in the note to Kagy v. Western Union Tel. Co., 117 Am. St. Rep. 305. Subsequent decisions on this question are Western Union Tel. Co. v. Hollingsworth, 83 Ark. 39, 119 Am. St. Rep. 105; Seifert v. Western Union Tel. Co., 129 Ga. 181, 121 Am. St. Rep. 210; Western Union Tel. Co. v. Lacer, 122 Ky. 839, 121 Am. St. Rep. 502; Western Union Tel. Co. v. Potts, 120 Tenn. 37, 127 Am. St. Rep. 991; Woods v. Western Union Tel. Co., 148 N. C. 1, 128 Am. St. Rep. 581; Amos v. Western Union Tel. Co., 79 S. C. 259, 128 Am. St. Rep. 845; Johnson v. Western Union Tel. Co., 81 S. C. 235, 128 Am. St. Rep. 905; Western Union Tel. Co. v. Northcutt, 158 Ala. 539, ante, p. 38.

The Recovery of Damages for Mental Anguish where a telegraph company negligently delays the transmission of a message advising the sendee of the death of a relative is discussed in Johnson v. Western Union Tel. Co., 81 S. C. 235, 128 Am. St. Rep. 905; Woods v. Western Union Tel. Co., 148 N. C. 1, 128 Am. St. Rep. 581; Western Union Tel. Co. v. Potts, 120 Tenn. 37, 127 Am. St. Rep. 991; Western Union Tel. Co. v. Northcutt, 158 Ala. 539, ante, p. 38.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

CLUTE v. SUPERIOR COURT.

[155 Cal. 15, 99 Pac. 362.]

INJUNCTION—Contempt Pending Appeal—Remedy—Supersedeas.—Where a contempt consists in the violation of a temporary injunction, the execution of which was claimed to be stayed by appeal, supersedeas, rather than certiorari, is the writ applicable. (p. 55.)

INJUNCTION, MANDATORY—Stay Pending Appeal.—While an injunction which merely has the effect of preserving the subject of the litigation in statu quo is not suspended by an appeal, a mandatory injunction, i. e., one which compels affirmative action by the defendant, cannot be enforced pending a duly perfected appeal. (p. 56.)

INJUNCTION, MANDATORY IN EFFECT—Prohibitive in Terms—Contempt—Supersedeas.—If an injunction, though couched in terms of prohibition, is mandatory in effect, a proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature of the writ; and, if the enforcement of the injunction has been stayed by an appeal, a writ of supersedeas may properly be issued by the appellate court to arrest further action by the court below. (p. 56.)

INJUNCTION, When Mandatory—Appeal—Contempt.—An injunction restraining the manager of a hotel corporation from holding himself out as manager, and from interference with the business or the employés thereof, on the ground of his removal from office by the board of directors, the right and power of such directors to represent the corporation being disputed by him, is mandatory in effect, and, pending appeal, its violation cannot be punished as a contempt. (pp. 56, 57.)

INJUNCTION, When Mandatory.—For the purpose of determining whether the effect of an injunction is mandatory or prohibitory, the result of the enforcement of the writ on the defendant must be considered; and if it compels him affirmatively to surrender a position which he holds, and which, upon facts alleged by him, he is entitled to hold, it is mandatory. (p. 58.)

INJUNCTION—Claim of Right—Manager.—Where the manager of a corporation is enjoined from interfering with the business thereof on the ground of his removal by the board of directors, and such manager challenges the right of such directors, the fact that he simply claimed to be manager and not owner does not affect the

question, which is to whom the business of such corporation is to be intrusted. (pp. 57, 58.)

APPEAL—Readiness to Give Stay Bond.—Where an order for an injunction cannot be stayed on appeal unless the appellant gives a bond in an amount to be fixed by the court, if the appellant has requested such court to fix the amount of the bond, it is the duty of the court to fix it, and until it does, no contempt proceedings for violation of the injunction should have been entertained. (p. 58.)

James Alva Watt and Thomas H. Breeze, for the petitioners.

A. L. Weil, for the respondents.

[17] SLOSS, J. The petitioners, having been by the superior court adjudged guilty of contempt, and ordered committed to the county jail for a term of forty-eight hours, applied to this court for a writ of review. The alleged contempt consisted in the violation of a temporary injunction, the execution of which had, as was claimed by petitioners, been stayed by an appeal. This court, being of the opinion that supersedeas, rather than certiorari, was the writ applicable to the case, issued an order to show cause why such writ of supersedeas should not issue, in the meantime staying all proceedings on the order appealed from.

The action in which the injunction had issued was commenced in the name of Pacific Grand Hotel and Investment Company, a corporation conducting the Pacific Grand Hotel at San Francisco, against E. R. Clute, one of the petitioners herein. The complaint alleges that Clute was on January 3, 1908, elected treasurer and appointed manager of plaintiff; that on April 3, 1908, he was, by a vote of the board of directors, at a meeting duly held, removed from the office of treasurer and the position of manager. It is alleged that, notwithstanding his removal, Clute still claims to be treasurer and manager, and withholds from the corporation its books, property and money, and threatens to continue to do so. The prayer of the complaint is that defendant be required to account for funds received or disbursed by him on account of the corporation; that he be required to surrender all corporate books, records and property to the secretary of the corporation, and that he be enjoined from holding himself out as manager or treasurer or from interfering with the guests or employés of the corporation. Following an order to show cause why an injunction should not issue, the court made an order directing that, upon plaintiff filing an undertaking in the sum of two thousand dollars, a writ of injunction issue re-

straining the defendant Clute from collecting any moneys of the corporation or disbursing the same except on the written order of the president and secretary, also restraining him from representing himself as manager and treasurer of the corporation and "from interfering with, or directing, or attempting to direct or control the employés of said corporation." A writ of injunction, in accordance with the order, was issued and filed. Upon a showing to the court, by affidavit, that [18] Clute, and his copetitioners, who were acting under him, had prevented one Hickman, an employé of the corporation, from entering the office of the hotel or taking possession of the keys of the various rooms, or of the books, an order to show cause why said petitioners should not be punished for contempt was issued. The hearing resulted in the commitment above referred to.

In the contempt proceedings it was made to appear to the court, and it is not here disputed, that, prior to the alleged violation of the injunction, Clute had duly taken an appeal to this court from the order directing the injunction to issue. On that appeal he had filed a three hundred dollar undertaking in due form.

Upon the question whether that injunction was mandatory or purely prohibitory the present application depends. For it is thoroughly settled that, while an injunction which merely has the effect of preserving the subject of the litigation in statu quo is not suspended by an appeal (Merced Min. Co. v. Fremont, 7 Cal. 130; Heinlen v. Cross, 63 Cal. 44; Swift v. Shepard, 64 Cal. 423, 1 Pac. 493; Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333; Rogers v. Superior Court, 126 Cal. 183, 58 Pac. 452), a mandatory injunction, i. e., one which compels affirmative action by the defendant, cannot be enforced pending a duly perfected appeal: Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58; Mark v. Superior Court, 129 Cal. 1, 61 Pac. 436; Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563. If an injunction, though couched in terms of prohibition, is mandatory in effect, a proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature of the writ. It may be likened to an execution, and, if the enforcement of the injunction has been stayed by an appeal, a writ of supersedeas may properly be issued by the appellate court to arrest further action by the court below: Tyler v. Presley, 72 Cal. 290, 13 Pac. 856, and Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 Pac. 123, relied on by

respondent, decide nothing in conflict with this view. Both cases dealt with judgment which were operative without any action by the court in which they had been rendered. All that was held was that supersedeas was not applicable to such self-executing judgments.

[19] At the hearing of the present application, all the allegations of the petition were admitted to be true. Upon the facts set forth, we think it clear that the injunction in question was mandatory. If Clute was in the actual possession of the hotel and the personal property in it, an order punishing him for preventing another person from entering and taking charge of the books, keys, and other property could have no other purpose or effect than to compel him to turn over his possession to such other, or at least to surrender his theretofore exclusive possession. It appears from the record that Clute, while in the actual management and control of the hotel, never asserted any ownership or possession in his own right, but claimed to be entitled to possession as manager of the corporation. It is accordingly contended by the respondent that, as the possession of the servant is, in law, merely that of his master, an order directing the employé to deliver to his employer the latter's property works no change in the possession. The corporation, it is argued, was at all times entitled to the possession and in the actual possession of the hotel and its contents, and a surrender of the custody by one employé to another authorized to receive it leaves the status of the property, so far as possession is concerned, unaltered. But this argument fails to take into account the very point that was in dispute in the court below. While the parties seeking to oust Clute claimed to represent the corporation, it appears that he disputed their right and authority to act for it. His answer to the complaint, and the showing made by him in response to the application for an injunction, show that his contention at all times was that the persons who had assumed to remove him as treasurer and manager and had caused suit to be instituted against him in the name of the Pacific Grand Hotel and Investment Company, were not in fact directors of the corporation, and that, accordingly, he, and not the parties whom he was, by the injunction, required to admit to possession and control of the hotel, represented the company. If his contention was correct, the effect of the order appealed from was to require the possession of the corporate property to be transferred from the corporation itself to strangers. The status of the parties, at the time the injunction was issued, was this: Clute, claiming to hold on

behalf of the corporation, was resisting a right of entry [20] claimed by persons who, as he asserted, had no authority from the corporation to take possession. An order turning over the control of the property from him to the other claimants would certainly, if executed, operate to change that status. The injunction was, therefore, mandatory in effect, and this regardless of the fact that, in law, the corporation rather than Clute, may be said to have been in possession. It is therefore unimportant that the court inserted in its order of commitment a finding that Clute was not in possession of the hotel or its contents. For the purpose of determining the effect of this injunction as mandatory or prohibitory, we must consider the result of an enforcement of the writ on the position of the defendant, as asserted in the court below. If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory.

The point is made by respondent that, if the order for an injunction be construed according to Clute's contention, it is an order requiring the delivery of real and personal property, and its enforcement cannot be stayed on appeal, unless the appellant gives a bond in an amount to be fixed by the court: Code Civ. Proc., secs. 943, 945. While it is not alleged that any such bond was given, it was shown by Clute in the contempt proceedings, without contradiction, that he had requested the court below to fix the amount of an undertaking to stay proceedings. Under the views herein stated it was the duty of the court to comply with this request, and until, by such compliance, the appellant had been enabled to take the steps necessary to procure a stay, no contempt proceedings against him should have been entertained.

It is ordered that all proceedings on the order appealed from be stayed for a period of five days after notice to the appellant that the respondent has fixed the amount of an undertaking to stay execution, and that, if a good and sufficient undertaking, approved by the court, be filed within said five days, all such proceedings be further stayed during the pendency of the appeal.

Lorigan, J., Henshaw, J., Angellotti, J., and Beatty, C. J., concurred.

As to the Nature of Mandatory Injunctions, see the note to Murdock's Case, 20 Am. Dec. 389; Lawrence v. Ingersoll, 88 Tenn. 52, 17 Am. St. Rep. 870, Orne v. Fridenberg, 143 Pa. 487, 24 Am. St. Rep. 567; Allen v. Stowell, 145 Cal. 666, 104 Am. St. Rep. 80;

Louisville etc. R. R. Co. v. Pittsburg etc. Co., 111 Ky. 960, 98 Am. St. Rep. 447.

An Appeal from a Decree Awarding an Injunction does not suspend the force of that writ or stay it in any manner, nor does it dissolve the injunction, and the doing of the forbidden act may be punished as a contempt notwithstanding the appeal: Barnes v. Chicago Typographical Union No. 16, 232 Ill. 402, 122 Am. St. Rep. 129.

TURNER v. THE JAMES CANAL COMPANY.

[155 Cal. 82, 99 Pac. 520.]

RIPARIAN RIGHTS—Origin.—The right of a riparian owner to the use of water bordering upon his land does not arise from the fact that the water is flowing and that any part thereof taken from the stream is immediately replaced by water from the current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages and benefits. (p. 63.)

RIPARIAN RIGHTS—Equality—User.—Out of regard to the equal rights of others, whose lands may abut upon the same water, the use of water for irrigation, so far as it affects the rights of others similarly situated, must be reasonable and confined to a reasonable share thereof. (pp. 63, 64.)

RIPARIAN RIGHTS—Stagnant Waters.—The right to use water upon adjoining land applies as well to the water of a lake, artificial pond made by a dam in a watercourse, slough or any natural body of water, large or small, tidal or nontidal, current or no current, by whatever name it may be called, as to a running stream. (pp. 63, 65.)

RIPARIAN RIGHTS—Stagnant Waters—Source of Supply.—A permanent pond or lake must of necessity have a source of supply and even if that source is an overflow alone which would soon disappear by seepage and evaporation, the riparian owners have a right to the reasonable use of the water both for domestic purposes and for irrigation. (pp. 65, 66.)

RIPARIAN RIGHTS—Slough Fed by River.—Persons owning land abutting on a slough always connected with a river have equal riparian rights to a reasonable share of the water with those owning land abutting on the river itself, regard being had to the proportions of extent of the land, interest in it, quantity of water in the slough, and all other circumstances affecting the reasonable division of the water in case there should not be sufficient for all. (pp. 66, 67.)

RIPARIAN RIGHTS—Origin of Water Supply Immaterial.—The source of the water supply to a slough does not affect the right to use it, but is material only in determining what is a reasonable use, and if the slough is fed by one river, it is part of that river, and riparian rights are to be proportional to the rights and needs of other lands riparian to that river; if fed at a different period

by another river, the same rule applies mutatis mutandis to that one. (pp. 67, 68.)

RIPARIAN RIGHTS—Diversion for Irrigation—Diminution of Flow.—The owner of lands abutting on a slough fed by a river has the right for the purposes of irrigation, during the time the slough receives supply from the river, to take his reasonable share of the water from the river at any convenient point thereon, whether on his own land or not, so long as it does not injuriously affect the rights of other owners abutting on the river between the point of diversion and such owner's land, and so long as no unreasonable waste is caused, other riparian owners below have no right of interference. (pp. 67, 68.)

RIPARIAN RIGHTS—Mode of Diversion.—The fact that a riparian owner in diverting water carries it from the river, by ditch or otherwise, over intervening nonriparian lands, with the consent of the owners of such lands affords no ground for legal complaint on the part of other riparian owners, so long as the one diverting the water causes no unreasonable waste and uses only his share of the water. (pp. 68, 69.)

RIPARIAN RIGHTS — Overflows — Utilization. — A riparian owner is entitled to divert his share of water in a slough during such time as it forms part of the river supplying it, although such diversion may interfere with the natural irrigation of the lands of other riparian owners below by the overflowing of the river in flood time. (p. 71.)

RIPARIAN RIGHTS—Common Law—Modification.—The common-law rule that a riparian owner is entitled to the full flow of the stream in its natural course through his land, undiminished by any diversion, is modified in the state of California to the extent that it is subject to the common right of the other riparian owners to a reasonable share of the water. (p. 71.)

RIPARIAN RIGHTS—Reasonable Share—Jury Question.—The determination of what is a reasonable share of the water for each riparian owner is a question of fact, to be decided in each case according to its circumstances. (p. 71.)

RIPARIAN RIGHTS—Local Proportion.—An upper riparian proprietor is entitled to a reasonable use of the water for irrigation, although it may diminish the flow to a lower proprietor and put him to substantial inconvenience in his use of the stream. (p. 71.)

RIPARIAN RIGHTS—Intermittent User.—It has been held that upper riparian proprietors could be allowed to take the whole stream for certain hours or days, at stated intervals, and that the use of the lower owner could be limited to the intervening periods. (p. 71.)

N. W. Coldwell and W. C. Graves, for the appellants.

J. K. Law, J. W. Knox, Frank H. Short, W. B. Treadwell and Edward F. Treadwell, for the respondents.

[84] SHAW, J. The defendants have appealed from the judgment and from an order denying their motion for a new trial.

There is no substantial conflict in the evidence upon any important fact in issue. The questions presented relate to matters of law applicable to the facts found and to the legal effect of the evidence.

The plaintiffs each own a tract of land in Merced county riparian to the San Joaquin river, their combined holdings aggregating some six thousand acres. They sue to enjoin the defendants from diverting water from said river. The defendant, the J. G. James Company, owns something near twenty thousand acres of land which is riparian to a body of water called Fresno slough. The defendant, The James Canal Company, as successor to the defendant, Enterprise Canal and Land Company, is the owner of a large canal beginning at a point on said river thirty or forty miles above the junction of the river with Fresno slough, and extending over intervening lands belonging to other parties and not riparian either to the river or to Fresno slough, to and upon the lands of the J. G. James Company. The remaining defendants are lessees of portions of said land of the J. G. James Company.

The J. G. James Company claims the right as riparian owner on Fresno slough to take from it a reasonable quantity of its waters to irrigate its said lands. As such riparian owner of lands on the slough, it also claims the right to a reasonable quantity of the water of the San Joaquin river to be used in the irrigation of its said land situated upon Fresno slough, and the right to take such water for that purpose at the head [83] of its canal on the river, and carry it through the canal over the intervening nonriparian land, to the land on the slough. The court below adjudged that the defendants had no right to divert any of the water of the San Joaquin river at the head of said canal, or at all, for use on said lands of the J. G. James Company. With respect to the waters of Fresno slough, the judgment is that the defendants have no right to use the same on the lands of said J. G. James Company, except such waters as should flow into said slough from Kings river. It appears from the findings that water often runs into Fresno slough from the San Joaquin river, but the court held that the defendants had no right to the use of that water by virtue of the ownership of lands riparian to the slough.

Both the San Joaquin and Kings rivers have their sources in the Sierra Nevada mountains. The San Joaquin flows out on the plain of the San Joaquin valley in a westerly direction by the station of Herndon in Fresno county, to a point at or near its junction with Fresno slough, where it turns northerly and runs along the central part of the valley to an arm of San Francisco bay near Stockton. Kings river emerges upon the plain of the San Joaquin valley some thirty miles southerly from the San Joaquin, and runs westerly to about the center

of the valley, from which point its flow, in times of high water, depends upon differing circumstances. If the rivers from points farther south have not filled Tulare lake, which lies to the south of Kings river, that river usually turns south and flows into the lake. If the lake is full, it turns northward, flowing along the center of the valley and into and along Fresno slough until it unites with the water of the San Joaquin river, and the two from thence form one stream to the bay. Sometimes, and especially at extremely high floods, Kings river divides, a part flowing into Tulare lake and a part to the north through Fresno slough to the San Joaquin river. Except at times of high water Kings river does not reach Fresno slough or Tulare lake. Fresno slough is a somewhat crooked body of water about fourteen miles long, extending from its connection with the San Joaquin river in a general southerly direction toward Kings river. Its width varies from one hundred to two hundred feet. The floods referred to come in the summer from the melting of the snows in the high mountains and, occasionally, during the winter [86] season from heavy rains. These rains occur at uncertain intervals, generally when water is not required or used in great quantity, and the floods from this cause are of minor importance to the parties interested in this case. The summer floods come each year during the months of May, June, and July, and sometimes last as long as six or eight weeks. In some years they are not of sufficient volume to bring the water of Kings river to Fresno slough. The court finds that at such times as the floods are sufficiently high to bring the Kings river water to Fresno slough, the waters of the two rivers often flow at different stages or elevations, and that when the San Joaquin is the higher, a part of the water thereof flows or "backs up" into Fresno slough and runs southerly therein for some fourteen miles to the south end thereof, until the slough is filled to the level of the river, or until it meets the rising water of Kings river coming into the slough from the south. Also, that the slough, when not fed from Kings river water, is kept filled by water from the San Joaquin, and rises and falls with that river. It necessarily follows that such current as there may be in the slough changes from time to time, flowing northerly when the San Joaquin river is falling and also when Kings river is the higher of the two, and southerly when the San Joaquin is rising, or when it is higher than Kings river. The court does not find the length of time of each season that it happens that the water of Kings river does not reach Fresno slough and when, conse-

quently, the slough receives water from the San Joaquin river exclusively, nor does it find what proportion of the years this latter condition prevails during the entire year. It clearly appears from the evidence, however, that this is the usual and ordinary condition, that seldom, during the dry season of any year, does Kings river water flow into Fresno slough for more than six weeks, and that, during that season, in some years it does not flow into the slough at all. It also appears that when there is a flood sufficient to bring Kings river water to the slough, the San Joaquin is also very high and the combined waters are of such volume that they are probably a menace rather than a benefit, overflowing, to their damage, the lands of both parties to this action, and that generally, at such times, the diversion of all the water that defendant's canal would carry would have no perceptible or appreciable [97] effect on the volume of the water in the stream reaching the lands of the plaintiffs.

It is clear from these conditions that the privilege of using water from Fresno slough upon their lands during the very considerable period of each year when there is no water from Kings river flowing therein, is one of great value to the defendants. The judgment forbidding such use undoubtedly will cause the defendants substantial injury. The theory of the plaintiffs is that the law of riparian rights, when applied to land bordering upon Fresno slough, does not include the right to take water from the slough for use upon the land, if such taking will diminish the flow in the San Joaquin river to the lands below the junction of the slough. It appears that during a considerable part of the time the water in Fresno slough is stagnant, and the plaintiffs argue that riparian rights in a body of water do not attach to lands bordering thereon except when the water consists of a flowing stream. The right of a riparian owner to the use of water bordering upon his land does not, as plaintiffs contend, arise from the fact that the water is flowing, and that any part thereof taken from the stream is immediately replaced by water from the current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages and benefits: Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. 388. Out of regard to the equal rights of others whose lands may abut upon the same water,

the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the right of others similarly situated, must be reasonable, and must be confined to a reasonable share thereof. But with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough or any natural body of water, by whatever name it may be called, as to a running stream.

There is no decision in this state upon the subject of the riparian rights of the owner of land upon a body of water not flowing. Nor is there anything in any of our decisions intimating [88] that such rights do not exist. In Duckworth v. Watsonville etc. Co., the question was suggested whether the right existed to make an appropriation of the waters of a lake, under the code which refers only to "running water" (Civ. Code, sec. 1410), but as it was held that the finding that there was a running stream was sustained by the evidence, there was no decision further than to hold that it was not necessary to a right of appropriation under the code that the stream should run to the sea or to a junction with some other watercourse. This point has no bearing on riparian rights. It was also held that one owning land upon an outlet of a lake, but not on the lake itself, which outlet was dry for a considerable part of each season, could not take water from the lake above during such dry period to use on his land upon the outlet below. This was not, as counsel suggests, based on the fact that there was no flowing water in the outlet at such times, but on the fact that it then contained no water at all.

Upon the assumption that riparian rights do not exist, except to water in a "watercourse," counsel cite authorities to show that in order to constitute a watercourse there must be water flowing; that it must flow in a particular direction, and that it must have a source and a mouth. As we have concluded that riparian rights do exist in a body of water not flowing, it is unnecessary to discuss the question of the things essential to a watercourse.

No authority is cited in favor of the proposition that riparian rights exist only in flowing streams. After a somewhat exhaustive search we have not succeeded in finding any decision to that effect. That such rights exist in any body of water, whether flowing or not, is shown by the following quotations from text-books and decisions: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist jure naturae, because his land has, by nature, the ad-

vantage of being washed by streams": 1 Farnham on Waters, sec. 63, p. 280. "The principle upon which these rights are founded is equally applicable to all bodies of water, whether large or small, tidal or nontidal": 1 Farnham on Waters, sec. 62, p. 278. "The character of the water is immaterial, and the rights attach to lakes and ponds, where there is no current, as well as to streams": 1 Farnham on Waters, sec. 63, p. 282. "I regard it as immaterial whether a current [89] flows through the bayou or not. Water may be navigable without a current, and it might not be with. Neither is a current essential to the existence of riparian rights. They may exist in lakes or ponds where there is no current": Turner v. Holland, 65 Mich. 453, 33 N. W. 283. "The rules governing riparian rights on streams apply, mutatis mutandis, to grants of land bordering on lakes": Lamprey v. State, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139, 18 L. R. A. 670. "When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value": Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, 45 L. ed. 1141. "The defendant insists that plaintiff held no riparian rights on account of the fact that the natural character of the slough has been changed so as to become, at the place whereon the property of the parties abuts, a pond or body of water without a current. We have never heard that riparian rights depended upon the character of the current in the water upon which these rights extend. They exist if the water be an artificial pond made by a dam in a watercourse, as well as when it is an unobstructed running stream": Finley v. Hershey, 41 Iowa, 389. See, also, Robinson v. Davis, 47 App. Div. 405, 62 N. Y. Supp. 444; Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828, 24 N. E. 686, 8 L. R. A. 578; Priewe v. Wisconsin etc. Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645; Cedar Lake H. Co. v. Cedar C. etc. Co., 79 Wis. 297, 48 N. W. 371; Valparaiso etc. Co. v. Dickover, 17 Ind. App. 233, 46 N. E. 591; Fernald v. Knox Woolen Co., 82 Me. 48, 19 Atl. 93, 7 L. R. A. 459; Draper v. Brown, 115 Wis. 361, 91 N. W. 1001; Delaplaine v. Chicago etc. Co., 42 Wis. 214, 24 Am. Rep. 386; Bassett v. Salisbury Co., 43 N. H. 569, 82 Am. Dec. 179. Many of these decisions relate to rights in the water other than the use of it for irrigation, but the context shows that the principle was considered a general one applicable to riparian rights of every description. The plaintiffs seek to found a distinction upon the assumed fact that the waters of a pond or lake have no

source of supply, and that if the riparian owner takes water therefrom the water of such lake or pond will ultimately become exhausted. It is a mistake to suppose that a permanent pond or lake has no source of supply. There is a constant drain upon such a body of water by evaporation into the air and [90] sometimes by seepage into the surrounding soil. If there were no supply, the lake or pond would soon cease to exist. But even in a case of a pond or lake caused by an overflow, which has no other source of supply, and which by reason of seepage and evaporation will soon disappear, we think it must be conceded that the riparian owners have a right to the reasonable use of the water for domestic purposes and for irrigation of the adjacent land. If such right does not exist, the water would disappear without advantage to anyone, whereas by the use thereof it might be made of great benefit to the adjoining owners. We can see no reason why the law should declare that in such a case all of the adjacent owners of land must abstain from taking any of the water, and thus allow it to remain uselessly in its position until the forces of nature remove it.

The court finds, however, that Fresno slough is always connected with the San Joaquin river, so that water will flow from the river into the slough, or into the river from the slough, as one may be higher than the other at the particular time. Under the circumstances, we think that a person owning land abutting upon the slough has an equal right to take water therefrom, and an equal right to a reasonable share of the water, with another person who owns land abutting upon the main stream. In the case of any enlargement in the width of a flowing stream, it always happens that there is but little current at the sides, and in the case of an extensive enlargement, there would be either a body of still water adjoining the flowing stream in the center, or there would be an eddy whereby a part of the water of the stream would flow back around the edge of the extension and enter the main channel again at the upper end thereof. No line could be fixed beyond which it could be declared that the water could not extend so as to carry riparian rights in the stream to the land along its borders. The only reasonable conclusion is that no such distinction exists, and that the rights of all persons owning land adjoining upon the stream, or upon any bay, inlet or slough connecting therewith, are equal and coextensive with those of persons owning land bordering upon the main current or channel, regard being had, of course, to the quantity of land of each, their respective interests, the

quantity of water in the slough as compared to that in the river, the [91] quantity the slough is capable naturally of diverting from the river, and all other circumstances affecting the question of a reasonable division of the water in case there should not be enough to supply the needs of all.

So far as the right to use a reasonable share of the water of Fresno slough for the irrigation of land riparian thereto is concerned, it is of no consequence how, or from what source, the water comes into the slough, or what causes or forces excavated the channel of the slough, provided both are the results of natural forces. The particular natural cause which made the excavation is immaterial to the question in any event. The source from which the water is derived becomes material only in determining what is a reasonable share of the water. While the water is running into the slough from Kings river the slough is a part of that river, and the reasonable share of the water apportionable to the lands riparian to the slough is to be fixed by reference to the rights and needs of other lands riparian to Kings river. When Kings river does not run into the slough, the latter becomes a part of the San Joaquin river, with which it is then connected, and during that period the lands riparian to the slough are entitled to a share of the water of the whole San Joaquin river, including the slough. The latter right is the result of the fact that while that condition prevails, the slough is really a part of the river, and the taking of water from the slough will affect the flow of the river, either by preventing by that much an addition to the main stream when that stream is so low that the water will flow into it from the slough, or by drawing water into the slough from the river when the slough is lowered by the diversion. There is no more reason for declaring that the owner of lands on the river can prevent the owner of lands on the slough from taking a reasonable share of the water of the slough, although it may affect the flow of the river, than there is for holding that the owner of land in the slough could prevent the riverman from taking his reasonable part of the water of the river to the depletion of the water in the slough. One has as clear a right as the other to the natural advantages of his situation, and an equal right to complain of the deprivation thereof by the undue use of the other.

Inasmuch as the J. G. James Company's lands are riparian to Fresno slough, and the slough is, for a considerable period [92] each year, connected with, and properly a part of, the San Joaquin river, it follows that, for the irrigation of such

lands, it has during such periods a right to take its share of the water from the main river at any convenient point thereon, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land. The fact that it must carry the water from the river over intervening nonriparian lands, belonging to other persons, is of no consequence. The person over whose land it is carried could object, of course, but other riparian owners have no privity with such third person, and cannot avail themselves of his rights. So long as the riparian owner takes no more than his reasonable share and uses it upon his riparian land, without unreasonable waste, other riparian owners below have no right to inquire how, or by what means, or at what place, he manages to divert his share from the stream, whether at a point on his own land or at some point far above, where the elevation of the stream will be sufficient to carry it by gravity to the surface of his land, or whether by a dam and headgate, or by pumps and buckets. This principle was practically decided in Charnock v. Higuerra, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190, and Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905. Its necessity is illustrated in the first-named case by the suggestion of the obvious fact that unless the water can be obtained by a dam on land above, in many instances it could not be obtained at all, owing to the fact that the surface of the adjoining land is of necessity higher than the surface of the stream. To restrict the riparian right in such cases to the taking of water by pumps operating only upon the land where it is to be used, would be to make it often practically valueless, and would be unreasonable. In Rose v. Mesmer it is said: "A riparian owner may, for the more convenient use of the water on his riparian land, go upon the land of another farther up the stream, with the consent of such land owner, and there divert the water for use upon the land below, or he may raise it to the surface of his land by pumps or other artificial means." In Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, the defendant, a riparian proprietor, was diverting water for irrigation by [93] means of a ditch leading from a dam some two miles above his land. The plaintiff owned land on the stream below the defendant's land. The court said: "The defendant was not a wrongdoer when he used the water of the stream for the purposes of irrigation, nor does the fact that his land lies above the level

thereof, so that it cannot be irrigated by means of ditches wholly on his own premises, affect his right to the use of the water." In such cases it may be that there will be an unreasonable waste of water by carrying it in open ditches subject to evaporation and seepage, and to that extent the method and place of diversion is a proper subject of inquiry in determining the comparative rights of different riparian owners. As to the lands upon the stream between the place of diversion and the place of use, a different question is presented. It has been held that this particular diversion is unlawful, so far as it operates to the injury of such intervening land: California Pastoral etc. Co. v. Enterprise Canal & Land Co., 127 Fed. 741. But no such question as this is presented here.

The decision in Miller & Lux v. Enterprise Canal & Land Co., 145 Cal. 652, 79 Pac. 439, does not conflict with these conclusions, but rather confirms them. In that case there was a finding that Fresno slough was not a part of the San Joaquin river, but was a part of Kings river. The court below had granted a new trial to J. G. James, the owner of the lands bordering on Fresno slough, and the predecessor of the J. G. James Company, a defendant here. The present case, with respect to the character of Fresno slough, was decided largely upon evidence given in the case cited, which upon the trial of this case was read from the record in that case. Referring to that evidence, the court in that case said that it was of such character that it authorized the court below to grant a new trial on the ground that the finding above mentioned was contrary to the evidence.

The level of the plaintiffs' land is such that during the floods above mentioned the water of the San Joaquin river usually overflows and covers an extensive area thereof, deposits sediment thereon, and thereby moistens, fertilizes and enriches the soil, and causes it to yield larger crops of grass than it would otherwise produce, which circumstance materially adds to the value of the land. For the purpose of making [94] such overflow more valuable and beneficial, the plaintiffs, at great expense, have made levees, checks and works for the regulation and control of the overflow and to obtain a greater use of it. The complaint alleges, and the court finds, that the diversion and use of the water of the river by the defendants for the irrigation of defendants' land, as threatened, will materially diminish the overflow of the river, during floods, and will deprive plaintiffs of the benefits of the natural irrigation and fertilization of their said lands

from the overflowing of the river, to their great and irreparable damage. The position of the plaintiffs would require them to assert that they, as owners of riparian land having the above-mentioned advantages of situation, have the absolute right to prevent any diversion of the water of the river above by other riparian proprietors, for irrigation of their riparian lands, to the end that the river may continue high enough to overflow plaintiffs' land during the floods. It was upon this theory that the court gave its judgment, and not upon the theory that the reasonable use of the respective riparian owners required that the defendants should abstain from any use of the water in order to allow the plaintiffs to receive the overflow. In support of this position plaintiffs invoke the alleged common-law rule that a riparian owner upon a stream is entitled as of right to the full flow of the stream in its natural course through his land. The cases are numerous wherein the right of a riparian proprietor to have the stream flow to his land undiminished by any diversion made by an appropriator for use on nonriparian land has been declared. Among them may be cited Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Heilbron v. Last Chance etc. Co., 75 Cal. 117, 17 Pac. 65; Heilbron v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535. It is obvious, of course, that if this supposed rule were strictly enforced against riparian owners, as well as appropriators, the waters of the streams in the state could not be used at all, but would flow to the sea, or until they disappeared in the sands and washes, without benefit to anyone, except in the few instances where floodwaters might escape naturally and flow upon lands situated similarly to those of the plaintiffs. The rule is evidently not suited to the conditions of a dry climate such as we have in this state. It is accordingly well settled here that each riparian owner [95] has a right to a reasonable use of the water on his riparian land for the irrigation thereof, and that the so-called common-law right of each to have the stream flow by his land without diminution is subject to the common right of all to a reasonable share of the water: Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Wiggins v. Muscupiabe, 113 Cal. 182. 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Hargrave v. Cook, 108 Cal. 77, 41 Pac. 18, 30 L. R. A. 390; Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. 308, 598; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Heilbron v. '76 Land & Water Co., 80 Cal.

189, 22 Pac. 62; Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589; Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905. These cases also declare that the determination as to what is the reasonable share of each riparian owner is a question of fact, to be decided according to the circumstances of the case, and that an upper riparian proprietor is entitled to a reasonable use for irrigation, although it may diminish the flow to a lower proprietor, and put him to substantial inconvenience in his use of the stream. Thus, in Harris v. Harrison, 93 Cal. 676, 29 Pac. 325, Wiggins v. Muscupiabe, 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, 32 L. R. A. 667, and Smith v. Corbit, 116 Cal. 587, 48 Pac. 725, it was held that the upper proprietors could be allowed to take the whole stream for certain hours or days, at stated intervals, and that the use of the lower owner could be limited to the intervening periods.

It is clear from these principles that the J. G. James Company is entitled to a reasonable use of the water of the San Joaquin river on its lands riparian to Fresno slough, during the times when the slough is properly a part of that river, although such use may interfere with the natural irrigation of the plaintiffs' lands by the overflowing of the river during floods. To what extent such interference can be allowed without being unreasonable is a question of fact for the trial court, upon a consideration of the needs of each, the comparative benefits of the respective uses, the comparative injuries caused to each by the deprivation ensuing from the use by the other, and all other circumstances bearing thereon. The court below held that the defendants were not riparian owners, that they had no right to any use of the water, and that [96] the rights of the plaintiffs were paramount. In so holding the court erred, and for this error the judgment and order must be reversed.

The question of the right of plaintiffs to have the river maintained at its high flood level for the natural irrigation of their lands, as against an appropriator for public or private use on nonriparian land, is not here presented, and we express no opinion on the subject, mentioning it only to distinguish it.

The judgment and order are reversed.

Angellotti, J., Sloss, J., Lorigan, J., Henshaw, J., and Hall, J., pro tem., concurred.

Justice Hall, one of the justices of the district court of appeal for the first appellate district, participates herein

pro tempore, pursuant to section 4 of article 6 of the constitution, and an order filed August 4, 1908, pursuant thereto, having heard the oral argument in place of the late Justice McFarland, who was at the time of such argument unable to act by reason of sickness.

Rehearing denied.

As to Riparian Rights in a lake or pond, see Lamprey v. State, 52 Minn. 181, 38 Am. St. Rep. 541; Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828; as to such rights in a slough, see Chamberlain v. Hemingway, 63 Conn. 1, 38 Am. St. Rep. 330; Lamb v. Reclamation District No. 108, 73 Cal. 125, 2 Am. St. Rep. 775; as to such rights in springs, see Nielson v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910; and as to such rights in the overflow waters of a river, see Uhl v. Ohio River R. R. Co., 56 W. Va. 495, 107 Am. St. Rep. 968.

HANSON v. FOX.

[155 Cal. 106, 99 Pac. 489.]

VENDOR AND VENDEE—Purchase on Installments—Premature Tender—Rescission.—Where a contract for the sale of land provides for payment by installments, bearing interest, the vendee cannot tender the whole amount due prior to the maturity of the last installment, so as to place the vendor in default and thereby entitle the vendee to rescission for breach of the contract. (p. 73.)

VENDOR AND VENDEE—Want of Title in Vendor.—The fact that at the signing of a contract for sale of land, and at the premature tender of the balance of the purchase price, the vendor had no title to the land sold, affords no reason for the interposition of equity to rescind the contract. (pp. 73, 74.)

VENDOR AND VENDEE—Want of Title in Vendor.—It is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. (p. 73.)

L. M. Fall, for the appellant.

Conkling & Bretherton, for the respondent.

[106] HENSHAW, J. Defendant entered into separate contracts for the sale of two lots of land. The contracts were similar in terms. One was made with plaintiff, the other with plaintiff's [107] assignor. In each case a part of the purchase price was paid at the execution of the contract, and the remainder of the purchase price was to be paid at the rate of ten dollars per month. The unpaid part of the purchase was evidenced by thirty-five promissory notes, each for ten

dollars, bearing interest at seven per cent after the dates when respectively they became due. Plaintiff made a tender of the total sum due under these contracts, and upon defendant's refusal to accept the tender he brought this action, treating the refusal as a breach and asking for a rescission. In addition to the matters above set forth, he charged that defendant does not and never has owned the lots which he contracted to sell, and has no title to them other than that evidenced by a tax title, which he charges to be void. The findings of the trial court adopted plaintiff's view and gave judgment accordingly, from which judgment and from the order denying his motion for a new trial, defendant appeals.

It is shown by the contracts that plaintiff was not entitled to demand his deed until final payment. In other words, defendant had contracted to convey title to plaintiff thirty-five months after the execution of the contract. The plaintiff's offer of a lump sum, under conditions at variance with the terms of the contract, was not a legal tender under the contract and could not operate to place defendant in default. In strictness, plaintiff had no more right to offer the total sum and claim rescission because of defendant's refusal to accept it than defendant would have had to have demanded the lump sum and claim a rescission because of plaintiff's refusal to pay it. The rights of each are prescribed by the contract, and neither party can be put in default by insisting upon a compliance with the terms of the contract, or by refusing to accede to a demand not contemplated by those terms.

Nor does the fact which the court found—namely, that defendant had no title to the lots—afford any reason for the interposition of equity. In a case such as this it is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. Such is, and always has been, the settled rule in his state. Thus, in Joyce v. Shaffer, 97 Cal. 335, 32 Pac. 320, the [108] vendors, under contract of sale, had actually conveyed the land to a third person, and rescission was sought. This court said: "The conveyance by the vendors was not a breach of the contract. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would

be incumbent on him to offer to perform, or to show that at the time of performance the vendor could not furnish the title."

So, in Shively v. Semi-Tropic Land & Water Co., 99 Cal. 259, 33 Pac. 848, this court, declaring that a transfer of land to third parties during the existence of an executory contract of sale does not constitute abandonment or rescission of the executory contract, said: "Defendant as yet has not defaulted, and might not suffer when the balance of the purchase price was tendered and a deed demanded, and the plaintiff is not entitled to recover the money paid until he shows the default of the defendant." The same principle is announced and rule laid down in Garberino v. Roberts, 109 Cal. 125, 41 Pac. 857, and it is further said: "In order to put the defendant [vendor] in the wrong, it is incumbent upon him [the vendee] to await the time of performance provided in the contract, and thereupon make his tender of performance and demand his deed." So, here, whatever may have been the condition of defendant's title, under the contract he had thirty-five months in which to perfect it, and could not be placed in default until at the expiration of thirty-five months, payments having been duly made by the vendee and demand by the vendee made for the deed, defendant was able to comply with such demand. The effort to place defendant in default by a tender made in advance of the time, and under circumstances not contemplated by the contract, and to claim the right of rescission, because then the vendor could not convey merchantable title, was unavailing and nugatory.

The judgment and order appealed from are reversed and the cause remanded.

Lorigan, J., and Melvin, J., concurred.

As to the Right of a Vendee to Rescind His Contract to Purchase Land because of failure of title, see Burks v. Davies, 85 Cal. 110, 20 Am. St. Rep. 213; Worley v. Nethercott, 91 Cal. 512, 25 Am. St. Rep. 209. A vendor who by his own acts has deprived himself of the power of fulfilling his contract of sale cannot require the vendee to make further payments to him: Brodhead v. Reinbold, 200 Pa. 618, 86 Am. St. Rep. 736. And a vendor cannot, because of a default in payments, forfeit the rights of the vendees when he himself is not in a position to perform the contract of sale: Higinbotham v. Frock, 48 Or. 129, 120 Am. St. Rep. 796. In Arentsen v. Moreland, 122 Wis. 167, 106 Am. St. Rep. 951, it is held that if a person contracts to sell and convey land to which both he and the purchaser knew he had no title, the latter may, nevertheless, on the breach of the contract, recover for the loss of his bargain. Compare, however, Rohr v. Kindt, 3 Watts & S. 563, 39 Am. Dec. 53.

IN RE HOFFMAN.

[155 Cal. 114, 99 Pac. 517.]

MUNICIPAL ORDINANCE—Construction—Standard for Milk. A municipal ordinance prescribing the standard for milk, "Total milk solids, 12.5 per centum by weight; butter fat, 3.5 per centum by weight; water, 87.5 per centum by weight," is not void for vagueness, uncertainty or contradictory propositions; the proper construction being that the 3.5 per centum of butter fat is included in the 12.5 total milk solids. (p. 76.)

MUNICIPAL ORDINANCE—Conflict with State Laws.—Where a conflict exists between the ordinance of a municipality and a statute, the ordinance must give way to the paramount law of the state. (p. 77.)

MUNICIPAL ORDINANCE—Ancillary Provisions not Necessarily Conflicting with Statute.—The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. (p. 77.)

MUNICIPAL ORDINANCE—Statute—Nonconflicting—Illustration.—Where the legislature declares that it is unlawful to sell milk containing less than a given percentage of solids, of which a certain portion shall be milk fat, an ordinance requiring of the milk vended in the municipality a larger percentage of solids, if not in its exactions unreasonable, does no violence to the laws of the state. (pp. 77, 78.)

MUNICIPAL ORDINANCE—Statute—Nonconflicting.—It is no objection to the validity of an ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law. (p. 79.)

MUNICIPAL ORDINANCE—Reasonableness—Milk Standard. The fact that the municipal standard for milk is higher than that of a particular breed of cow is not sufficient to tender an issue of the unreasonableness of the ordinance. (p. 79.)

MUNICIPAL ORDINANCE—Immediate Operation—Urgency, What is.—Where a municipal charter declares that no ordinance, except one for the immediate preservation of the public peace, health or safety, and which must be passed by a two-thirds vote and contain a statement of its urgency, shall go into effect before thirty days from its final passage, a statement in an ordinance merely echoing the words of the charter without stating the nature of the urgency is neither conclusive nor sufficient. (p. 79.)

MUNICIPAL ORDINANCE—Urgency—Nature—Want of Description.—Where a municipal charter declares that no ordinance, except one for the immediate preservation of the public peace, health or safety, and which must be passed by a two-thirds vote and contain a statement of its urgency, shall go into effect before thirty days from its final passage, an ordinance purporting to be within the exception, but containing no statement of the nature of its urgency, is not on that account nullified, but takes effect as an ordinary ordinance after the expiration of thirty days. (p. 80.)

MUNICIPAL ORDINANCE — Urgency. — Raising the milk standard by increasing the milk fat and decreasing the water each .5 per centum cannot be a matter for the immediate preservation of the public health, so as to bring an ordinance within the category of urgent measures justifying bringing it into immediate operation under the powers contained to that effect in the municipal charter. (p. 80.)

On habeas corpus.

R. A. Ling, Powers & Holland and John J. Fleming, for the petitioner.

Leslie R. Hewitt, city attorney, Lewis R. Works, assistant city attorney, and Guy Eddie, deputy city attorney, for the respondent.

[116] HENSHAW, J. The city of Los Angeles passed an ordinance, No. 13,171 (new series), regulating the sale of milk and cream. The ordinance contained many regulatory provisions making for hygienic conditions which are not necessary here to consider, for the petitioner was charged with and convicted of a violation of a single section of the ordinance. That section is No. 9, and fixes the standard of milk sold in the city. It does this in the following language:

"Section 9. The standard of milk in and for the city of Los Angeles is hereby defined and prescribed as follows:

"For milk:

"Total milk solids, 12.5 per centum by weight.

"Butter fat, 3.5 per centum by weight.

"Water, 87.5 per centum by weight."

Against the validity of this section petitioner advances several arguments.

1. He insists that the section is void because its provisions are vague, uncertain and contradictory. In this his argument is that the required standard is 87.5 per centum water, 12.5 per centum milk solids, and 3.5 per centum butter fat, or a total of 103.5 per centum of ingredients, which, as is very justly argued, is a physical impossibility, since the component parts of a single article cannot constitute more than 100 per centum, else the whole would be greater than all its parts. The answer to this, however, obviously is that the ordinance means that of the 12.5 per centum milk solids, at least 3.5 per centum shall be butter fat. So read, the ordinance is not objectionable upon the ground urged.

2. Subsequent to the passage of this ordinance, the state in 1907 placed upon its statute books, "An act to prohibit adulteration and deception in the sale of dairy products, defining adulteration in dairy products, and to provide for enforcing [117] its provisions": Stats. 1907, p. 265. This statute declared that it shall be unlawful for any person to produce, manufacture or prepare for sale, or to sell or offer for sale, or have on hand for sale, any milk that is adulterated within the meaning of the act. As to what should constitute adul-

teration, the act provided (section 2) that milk should be deemed adulterated that did not conform with the following definition and standard: "Milk is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows and contains not less than three per cent of milk fat, and not less than eight and five-tenths per cent of solids—not fat." The constitution (article 11, section 11) empowers a city to make and enforce within its limits "all such local, police, sanitary, and other regulations as are not in conflict with general laws." It is insisted that the state having thus provided a standard for pure milk, the attempt of the city ordinance to vary that standard creates a conflict in the law, with the necessary result that the ordinance must fall.

Undoubtedly if such a conflict exists, the ordinance must give way to the paramount law of the state. But does such a conflict exist? For, if it does not, then it is well settled that the mere fact that the state in the exercise of the police power has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there be no conflict between the two, and so long as the requirements of the municipal by-law are not in themselves pernicious as being unreasonable or discriminatory, both will stand: Ex parte Hong Shen, 98 Cal. 681, 33 Pac. 799; In re Murphy, 128 Cal. 29, 60 Pac. 465; Bellingham v. Cissna, 44 Wash. 397, 87 Pac. 481. In the first case cited the principle is fully recognized and expounded, and assent is refused to the argument there advanced, that an ordinance is in conflict with the general laws when it makes another and different regulation for the sale of an article of commerce than that provided by the statute of the state. In the last case cited, the city of Bellingham had by ordinance declared it unlawful for an automobile to be driven on public streets at a greater rate of speed than six miles per hour. Subsequently the state passed an act prohibiting the driving of automobiles "within the thickly-settled or business portion of any city at a greater speed than twelve miles an hour." [118] There, as here, the state law was passed subsequent to the enactment of the municipal ordinance. There, as here, a conflict between the terms was urged, but it was held, upon the soundest principles, that there was no conflict, and that it was competent for the authorities of Bellingham to prescribe a rate of speed less than that which the state law permitted. The correctness of the principle may not be doubted. If the state should pass a law declaring it unlawful to erect a chimney of a height

exceeding one hundred and fifty feet, would anyone seriously contend that a city of the state within the earthquake zone might not by ordinance, in the clear exercise of the police power, for the benefit of its citizens, still further restrict the height of chimneys? Such, in principle, is the present case. The legislature has in effect declared that it shall be unlawful to sell milk containing less than 11.5 per centum solids, 3 per centum of which solids shall be milk fat. An ordinance of a municipality requiring of the milk vended therein a larger percentage of solids, if not in its exactions unreasonable, does no violence to the law of the state. The state's declaration merely is that milk shall not be sold containing less than 11.5 per centum of solids, 3 per centum of which shall be milk fat. If the city of Los Angeles had provided that milk might be vended which contained less per centum of milk fats than that exacted by the state law, there would be presented a plain case of conflict. The municipality would be endeavoring to legalize that which the state had declared to be unlawful. But what the city has in fact done has been to impose not fewer but additional qualifications upon the milk which may be vended to its consumers. The state in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs) upon the people of the state, urban and rural, but it may often, and does often, happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities; so that it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements. Such is the nature of the legislation here questioned.

3. Petitioner charges that this particular ordinance is unreasonable and in restraint of trade in exacting too high a [119] standard for the milk permitted to be sold. In his petition he avers "that milk may come direct and pure in its natural state from the cow, and especially from Holstein cows, and yet be below the standard fixed by the city ordinance, and, upon his best information and belief, the milk used in his restaurant, and upon which his conviction is based, could have been milk from Holstein cows." This averment stands unchallenged and is, therefore, to be taken as true: Ex parte Smith, 143 Cal. 368, 77 Pac. 180. It may be that a municipality may pass an ordinance imposing a standard for milk which would be unreasonable, oppressive, in restraint of trade, and therefore void. It may even be, for aught that this

court can judicially know, that this ordinance is of that character. But the mere averment that milk below standard might come from one or another cow is not sufficient to tender an issue of this character. Nor is it any objection to the validity of the ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law. If prosecution is had under the state law, a defendant is entitled to the protection which the state law affords him; if under the ordinance, then his rights and duties are governed by that enactment.

4. Section 198b of the charter of the city of Los Angeles declares that no ordinance passed by the council ("except an ordinance for the immediate preservation of the public peace, health or safety which contains a statement of its urgency and is passed by a two-thirds vote of the council) shall go into effect before thirty days from the time of its final passage and its approval by the mayor. If during said thirty days a petition, signed by the electors of the city equal in number to at least seven per cent of the entire vote cast for all the candidates for mayor at the last preceding general election at which a mayor was elected, protesting against its passage be presented to the council, the same shall thereupon be suspended from going into operation," etc. This ordinance declared (section 18) that "it is urgently required for the immediate preservation of the public peace, health and safety." It is contended that the provision under consideration can by no possibility be one required for the immediate preservation of the public peace, health or safety; that the declaration of the council to that effect is of no binding force, 120 and that the ordinance, therefore, is a bold attempt to destroy the right to the referendum preserved to the people in section 198b, above quoted. We agree that it cannot be a matter for the immediate preservation of the public health that milk vended must contain 3.5 per centum of milk fat instead of 3 per centum, and that the total amount of water shall be 84.5 instead of 85 per centum. Furthermore, we agree that the mere declaration of the council in such a case that the ordinance is passed for the immediate preservation of the public health is neither conclusive nor yet sufficient. The nature of the ordinance itself will, in most instances, be determinative, and where a sudden emergency has arisen, a statement of the nature of the urgency finds proper place to support the declaration. So says the supreme court in Wheeler v. Chubbuck, 16 Ill. 361, in discussing the effect of the emergency clause necessary to put a law into immediate

force: "But such direction must be made in a clear, distinct, and unequivocal provision and cannot be helped out by any sort of intendment or implication." But, conceding this, the effect of the concession is not to destroy the ordinance. By the very terms of the charter, if the ordinance be not one of emergency, the date of its operation is postponed for thirty days. So here, the utmost for which petitioner could contend was that the date when section 8 went into operation was thirty days from its passage. But as more than thirty days had elapsed before his arrest for a violation of its provisions, he is entitled to no relief.

For the foregoing reasons the writ is discharged and the prisoner remanded.

Lorigan, J., Shaw, J., Melvin, J., Angellotti, J., Sloss, J., and Beatty, C. J., concurred.

A Municipal Ordinance Fixing the Standard of Quality of Milk sold within the city limits is constitutional: St. Louis v. Liessing, 190 Mo. 464, 109 Am. St. Rep. 774. As to the constitutionality of an ordinance forbidding the sale of milk containing preservatives, see State v. Schlenker, 112 Iowa, 642, 84 Am. St. Rep. 360; People v. Biesecker, 169 N. Y. 53, 88 Am. St. Rep. 534; as to the constitutionality of an ordinance providing for the inspection of milk and requiring milk venders to take out a license, see City of Norfolk v. Flynn, 101 Va. 473, 99 Am. St. Rep. 918; People v. Vandecarr, 175 N. Y. 440, 108 Am. St. Rep. 781; and as to the constitutionality of an ordinance requiring the inspection of dairy cows to determine whether they are infected, see City of New Orleans v. Charouleau, 121 La. 890, 126 Am. St. Rep. 332. A statute forbidding the sale of milk from cows fed on "still slop, or brewers' grains," is a valid police regulation: Sanders v. Commonwealth, 117 Ky. 1, 111 Am. St. Rep. 219. And an ordinance requiring that every glass bottle or jar in which milk is sold shall have its capacity legibly and permanently indicated thereon, and fixing a penalty for using such receptacles of less capacity than they purport to contain, is a valid exercise of the police power to prevent fraud in the sale of milk: City of Chicago v. Bowman Dairy Co., 234 Ill. 294, 123 Am. St. Rep. 100.

In Case of a Conflict Between a Municipal Ordinance and a Statute of the State, the former must give way: Katzenberger v. Lawo, 90 Tenn. 235, 25 Am. St. Rep. 681; Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 74 Am. St. Rep. 602. But so long as there is no conflict, the municipality and the state may legislate in the same field: See the note to Thrower v. City of Atlanta, 110 Am. St. Rep. 149.

NORDSTROM v. CORONA CITY WATER COMPANY.

[155 Cal. 206, 100 Pac. 242.]

GARNISHMENT—Construction of Statute.—Under section 720, Code of Civil Procedure, as it read in October, 1906, in proceedings supplementary to execution, where one indebted to the judgment debtor denied the debt, the court or judge might "authorize, by an order made to that effect, the judgment creditor to institute an action," etc. An order that the judgment creditor "be permitted to bring an action, etc.," while not following the precise language of the code, is in substantial compliance with the law. (p. 83.)

GARNISHMENT—Denial of Garnishee's Indebtedness—Order to Bring Action Unnecessary.—A judgment creditor, having prosecuted supplementary proceedings to the point of securing from the garnishee a denial of indebtedness to the judgment debtor, has the right to sue without any order permitting him to do so. (p. 83.)

GARNISHMENT—Pleading of Judgment—Variance.—Where the complaint of the judgment creditors alleged a judgment against the judgment debtor, and the evidence disclosed that such judgment was the aggregate of the amounts awarded to the judgment creditors severally, they having united in the original action, the variance was one which could not have misled the garnishee to his prejudice, and should be disregarded. (p. 83.)

GARNISHMENT—Consolidated Suit—Single Judgment—Sufficient.—Where a statute authorizes a union of plaintiffs in one action, a single judgment is properly made and entered, although the causes of action may be distinct. (p. 83.)

GARNISHMENT—Code Provisions—Death of Judgment Debtor After Levy of Execution—Claim of Personal Representatives.—When, after a garnishment upon execution, the judgment creditor proceeds by supplementary proceedings (designed to take the place of the equitable remedy by creditor's bill), any judgment recovered by him relates back to the levy of the garnishment and intervening rights are cut off; and such levy creates a lien within the purpose of section 1500 of the Code of Civil Procedure, which is designed to dispense with the necessity of presenting a claim against the estate of a decedent where recourse is sought only against property which is bound as security for the claimant's demand, the death of the debtor after the creation of the lien not necessitating the presentation of a claim against his estate precedent to its enforcement. (p. 85.)

GARNISHMENT—Setoff—Subsequent Judgment.—The setoff which may be claimed by a garnishee must be one which existed at the time of the garnishment. A judgment obtained afterward by the garnishee against the estate of the judgment debtor, deceased, not founded on a liability owing at the time of the garnishment, is not a defense entitling him to set it off. (pp. 86, 87.)

GARNISHMENT.—The Statute of Limitations has no application if the obligation of the garnishee to the judgment debtor is not barred, the same rules applying to both garnishment on attachment and on execution. The liability created by the garnishment is never barred. (p. 87.)

E. W. Freeman and A. D. Laughlin, for the appellant.

Peck & Palmer, Wilfred M. Peck, William F. Palmer, M. E. C. Munday and F. L. Binford, for the respondent.

[208] SLOSS, J. This is an action to recover the sum of $3,384.10 and interest from defendant as garnishee. The plaintiffs, nineteen in number, had, under the authority of section 1195 of the Code of Civil Procedure, joined in an action against one A. L. McConnell, as contractor, and defendant, Corona City Water Company, as owner, to foreclose mechanics' liens for amounts claimed to be due the said plaintiffs for work done. On July 6, 1903, judgment was entered in said action, declaring that plaintiffs were not entitled to liens, but awarding them, severally, judgments against McConnell for different amounts, aggregating $3,125.33, with interest and costs. On July 7, 1903, execution was issued on this judgment, and placed in the hands of the sheriff. On July 8, 1903, the sheriff duly levied said execution upon the indebtedness of the Corona City Water Company to McConnell, and made return. On July 17, 1903, McConnell recovered a judgment against said water company for $3,441.50, which, upon appeal to this court, was affirmed for $3,315.50 and costs. On said July 17, 1903, after the recovery of said judgment by McConnell, a second execution was issued upon plaintiffs' judgment against McConnell, and was, on the same day, levied by the sheriff upon all debts owing from the Corona City Water Company to McConnell, and returned. It is found by the court that at the time of the levy of each of said executions the water company was indebted to McConnell in the sum of $5,200. Said water company failed and refused to pay [209] to the sheriff upon the levy of said executions, and its indebtedness to McConnell has never been paid. The plaintiffs instituted proceedings supplementary to execution in the action in which they had recovered judgment against McConnell, and such proceedings resulted in an order made on the thirteenth day of October, 1906, authorizing plaintiffs to bring this action against the Corona City Water Company to recover so much of the debt due from the water company to McConnell as would satisfy plaintiffs' judgment against McConnell. The present action resulted in a judgment in favor of plaintiffs, and defendant appeals from the judgment and from an order denying its motion for a new trial.

1. The order authorizing plaintiffs to maintain this action is assailed as failing to comply with the requirements of section 720 of the Code of Civil Procedure. Under that section (as it read at the time of the order in question), when, in proceedings supplementary to execution, a person or corporation alleged to be indebted to the judgment debtor denies the debt,

the court or judge may "authorize by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such debt." The order here made was that plaintiffs "be permitted to bring an action against the Corona City Water Company for the recovery of their judgment." While the order did not follow the precise language of the code, it was, when read in the light of the proceedings leading up to its making, in substantial compliance with the law. But even if it was not, in itself, sufficient as an order authorizing suit under section 720, the plaintiffs had the right, after having prosecuted their supplementary proceedings to the point of securing from defendants a denial of indebtedness to the judgment debtor, to bring this action without any order permitting them so to do: Phillips v. Price, 153 Cal. 146, 94 Pac. 617.

2. It is argued that there is a variance between the allegations and the proof regarding the judgment of plaintiffs against McConnell. The averment of the complaint is that the plaintiffs obtained a judgment against McConnell for the sum of $3,125.33 and costs. This form of statement implies, as is claimed, that the judgment was one in which the plaintiffs were equally interested to the extent of the whole amount recovered, whereas in fact the judgment was several in favor [210] of each plaintiff, and each was limited in interest to the amount awarded to him. The plaintiffs were, however, while setting forth distinct causes of action against McConnell, authorized by statute to unite in one action, and in that action a single judgment was properly made and entered: Willamette etc. Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Marble Lime Co. v. Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164. The allegation that plaintiffs recovered "a judgment" was therefore sustained by the proof offered. But even if a variance may be said to appear, it was one that could not possibly have misled the defendant to its prejudice, and it must be disregarded here: Code Civ. Proc., sec. 469.

3. On May 15, 1905, after the levy of the executions above referred to, McConnell died, and his widow was appointed administratrix of his estate. Notice to creditors was duly given, but plaintiffs' judgment against decedent was not presented to the administratrix for allowance, and the time for presenting claims had expired before the filing of the complaint herein. The appellant's position is that the plaintiffs, by reason of their failure to present to the administratrix a claim upon their j[illegible] st her intestate, have lost

their right to maintain any action upon such judgment. Any claim against the estate of a decedent, arising upon contract, must be presented within the time limited by the notice to creditors, and if not so presented, "is barred forever": Code Civ. Proc., sec. 1493. A judgment against the decedent for the recovery of money must be presented "like any other claim": Code Civ. Proc., sec. 1505. The assets of a decedent come to the hands of his personal representative charged with the burden of discharging, in addition to the expenses of administration, all the debts of the decedent, in the order of priority declared by law: Code Civ. Proc., sec. 1643. No execution (except in certain cases) is to issue against the property of the decedent (Code Civ. Proc., sec. 1505), but all debts, after allowance by the executor or administrator, and approval by the court, are to be paid, subject to the direction of the court, in due course of administration: Code Civ. Proc., secs. 1504, 1647. No holder of a claim can, except in the case of a demand secured by mortgage or lien, maintain an action thereon unless the claim is first presented: Code Civ. Proc., sec. 1500. There may be a [211] question whether this prohibition covers only actions against an administrator or executor as such, or includes actions (like the present) instituted against third persons for the purpose of subjecting to the payment of a debt of the decedent assets belonging to his estate. Assuming that this is one of the actions referred to in section 1500, we think it comes within the exception declared in that section. The argument of appellant is that the levies of execution (garnishment) created neither a liability from the water company to the plaintiffs, nor a lien in favor of plaintiffs upon the debt due from said company to McConnell. The present action is one brought under the authority of sections 717 to 720 of the Code of Civil Procedure, to compel a debtor of the judgment debtor to apply the debt due the latter to the satisfaction of the judgment. It is a statutory "proceeding supplementary to execution," and is designed to take the place of the equitable remedy by creditor's bill, formerly the only method of reaching assets which could not be seized on execution: Herrlich v. Kauffmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; Matteson & W. Mfg. Co. v. Conley, 144 Cal. 483, 77 Pac. 1042. While the code (Code Civ. Proc., sec. 688) authorizes the levy of execution upon debts and credits, "in like manner as upon writs of attachment" (i. e., by garnishment), the right to maintain an action, like the one at bar, to recover debts due the judgment debtor is in no way dependent upon any precedent garnish-

ment of such debts: Carter v. Los Angeles Nat. Bank, 116 Cal. 370, 48 Pac. 332. There is, furthermore, this peculiarity in the code sections regulating garnishments. By the express terms of the statute relating to attachments, persons indebted to the defendant are, upon receiving notice that such debts are attached, made directly liable to the plaintiff for the amount thereof: Code Civ. Proc., sec. 544. No such direct liability is, however, provided in the case of a levy of execution upon such debts, and this court has, on several occasions, pointed out that the levy of execution upon a debtor of the judgment debtor does not give the plaintiff a cause of action against the garnishee: Roberts v. Landecker, 9 Cal. 262; Herrlich v. Kauffmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; Carter v. Los Angeles Nat. Bank, 116 Cal. 370, 48 Pac. 332. Accordingly, says the appellant, the plaintiffs acquired no rights against it until [212] the institution of this action, and at that time they had lost their right to proceed against the judgment debtor, and could not proceed against assets of his estate. But this argument assumes, not merely that the garnishment, when made, creates no direct liability to the plaintiffs, but that, under our code, such garnishment on execution has no effect whatever upon the title to the fund garnished, unless the debt is, by the garnishee, paid to the sheriff. Under this view, the creditor would be subject, after levy, to be defeated in his efforts to collect the debt by collusion between the judgment debtor and the garnishee, or by the act of either. The judgment debtor might render the levy useless by assigning his claim against the garnishee, while the latter could accomplish the same result by paying the claim to the judgment debtor or acquiring an offsetting demand against him after garnishment. We cannot accept an interpretation leading to such results. It is true that the code does not specifically define the effect of levying execution upon debts due the judgment debtor. It does, however, authorize such levy, and it is not to be supposed that the legislature intended to confer upon the judgment creditor the right to levy an execution, which could have no effect beyond that of warning the adverse parties and thus facilitating a possible effort to defeat the collection of the judgment. In Lean v. Givens, 146 Cal. 739, 106 Am. St. Rep. 79, 81 Pac. 128, it was held that the levy of an execution on land (where the judgment itself was not a lien) creates a lien upon the land from the date of the levy. The sections of the code relied upon to sustain this conclusion (Code Civ. Proc., secs. 537, 681, 683, 688) nowhere declare in express terms that a lien

is created. The same sections are applicable to the levy of execution on debts, and the reasoning there used justifies the conclusion that a garnishment on execution fixes the rights of the judgment creditor so as to make his right to recover the debt from the garnishee superior to any claim or demand accruing subsequently. Section 688 provides that "until a levy, property is not affected by the execution," a form of statement carrying with it the clear implication that, from and after the levy, it is so affected. When, therefore, after a garnishment upon execution, the judgment creditor proceeds by supplementary proceedings or creditor's bill to collect the debt, any judgment recovered by him relates back to the levy [213] of the garnishment, and intervening rights are cut off. It is somewhat difficult to define the exact nature of the right which the creditor secures by such levy. It may be regarded as an involuntary assignment of the debt, or as the creation of a lien thereon. The term "lien," defined by the Civil Code (section 2872) as a charge imposed upon specific property, may not perhaps be accurately applied to a charge upon a chose in action. But, having in view the purpose of section 1500 of the Code of Civil Procedure, which is designed to dispense with the necessity of presenting a claim against the estate of a decedent where recourse is sought only against property which is bound as security for the claimant's demand, we find no difficulty in holding that, within the meaning of this section, the levy of execution upon debts due a judgment debtor does create a lien upon such debts. An argument in support of this conclusion may be drawn from section 1505 of the Code of Civil Procedure, which provides that if execution is actually levied upon property of the decedent before his death, the same may be sold. While debts levied on cannot be sold, the section does indicate that the legislature did not intend to give to the death of the judgment debtor the effect of destroying executions already levied. The failure of plaintiffs to present their claim to the administratrix of McConnell's estate did not, therefore, affect their right to reduce to possession the debt due from the water company to the judgment debtor, such debt having been levied on by execution prior to McConnell's death.

4. The answer alleged and the court found that in February, 1906, the Corona City Water Company, defendant herein, recovered a judgment against the administratrix of the estate of McConnell for $7,121, payable in course of administration, and that no part of this judgment has been paid. This judgment against the estate of the original judgment debtor is re-

lied on as an offset to the demand herein in suit. As a general rule the garnishee may offset against the claim of the judgment creditor whatever demand he might be able to set off against the claim of the judgment debtor against him. "Of course the garnishee can plead any defense he may have against his creditor": Carter v. Los Angeles Nat. Bank, 116 Cal. 370, 48 Pac. 332. But the setoff which may be claimed by the garnishee must be one which existed at the [214] time of the garnishment: Freeman on Executions, sec. 417. We have already, in discussing the effect of McConnell's death, stated our reasons for holding that the effect of the levy of an execution upon debts due the judgment debtor is to fix the rights of the parties, so that neither the judgment debtor nor the garnishee can, by subsequent action, destroy the effect of the garnishment. If this view be correct, it must follow that the judgment recovered by the water company against McConnell's estate could not be set off against plaintiff's demand, such judgment having been recovered long after the levy of the writs of execution, and there being neither allegation nor proof that it is founded on a liability owing to the defendant at the time of the garnishment.

5. There is no merit in the appellant's contention that the action is barred by the statute of limitations. The judgments obtained by McConnell against the water company were rendered less than four years before the commencement of this action, and a suit on these judgments by McConnell or his administratrix would, of course, not have been barred then: Code Civ. Proc., sec. 336. If the obligation of the garnishee to the judgment debtor is not barred, the statute of limitations has no application. "As to the statute of limitations, if the garnishee is entitled to the plea as against the defendant in the attachment suit, he can plead it. The liability created by the garnishment is never barred": Carter v. Los Angeles Nat. Bank, 116 Cal. 370, 48 Pac. 332. The case just cited was one of a garnishment on attachment. The same rule must apply to garnishment on execution. In this action, the defendant occupies the same position that it would hold if it were being sued by McConnell, the judgment debtor (2 Wade on Attachments, sec. 453), and if such suit would not be barred by limitation, the present action is not.

The judgment and order appealed from are affirmed.

Shaw, J., and Angellotti, J., concurred.

Hearing in bank denied.

Proceedings Supplementary to Execution, authorized by the statutes of California, are a substitute for creditors' bills, and supplant proceedings in equity, unless some special ground exists upon which to invoke the power of chancery: Herrlich v. Kaufmann, 99 Cal. 271, 37 Am. St. Rep. 50. See, also, Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653. Supplementary proceedings are merely auxiliary to the original action: Flood v. Libby, 38 Wash. 366, 107 Am. St. Rep. 851.

A Garnisher may Commence an Action Against the Garnishee, it seems, for the protection of his contingent interest in the debt or property attached before he obtains a judgment in the attachment suit: Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 113 Am. St. Rep. 253.

A Creditor can Acquire no Greater Right to the Effects of the defendant in the hands of the garnishee, or to any debt owing from the garnishee to the defendant or against the garnishee, than the defendant himself had at the time of the garnishment, unless it may be in cases of voluntary or fraudulent conveyances. He can succeed only in putting himself into the position with respect to the effects of debts attached that the defendant occupied: Shelton v. Wolthausen, 80 Conn. 599, 125 Am. St. Rep. 131. A judgment creditor stands in exactly the same attitude in relation to a garnished fund that the judgment debtor does: Shuler v. Murphy, 91 Miss. 518, 124 Am. St. Rep. 708.

VARNEY & GREEN v. WILLIAMS.

[155 Cal. 318, 100 Pac. 867.]

MUNICIPAL CORPORATIONS—Ordinance Prohibiting Billboards Except on Business Premises—Public Notice—Injunction.—If billboards erected in defiance of an ordinance are a public nuisance, a court of equity will refuse any writ designed to perpetuate them, regardless of the validity of such ordinance. (p. 89.)

MUNICIPAL CORPORATIONS—Ordinances Ultra Vires—Sweeping Prohibition—Restriction of Owner's User of Property.—A municipal ordinance which absolutely forbids the erection or maintenance of any billboard for advertising purposes, is beyond the power of the promulgators. (p. 90.)

MUNICIPAL CORPORATIONS—Ordinance for Esthetes.—The fact alone that ordinary advertising billboards may be offensive in the eyes of persons of refined taste does not justify their suppression. Esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation. (p. 90.)

Heller, Powers & Ehrman, for the appellant.

Jackson Hatch, for the respondents.

sfs SLOSS, J. The plaintiff, a corporation engaged in the business of posting bills, painting advertising signs, and

conducting a general advertising business, brought this action to enjoin the municipal authorities of the town of East San Jose from tearing down certain billboards maintained by plaintiff in said town. The defendants based their contemplated action upon the provisions of an ordinance passed by the town trustees. Section 1 of this ordinance provides: "That every person [319] who, within the corporate limits of the town of East San Jose, shall erect or maintain, or cause to be erected or maintained, any billboard, sign-board or other structure for the purpose of painting or otherwise delineating or picturing or displaying thereon or thereby any advertisement of any goods, wares or merchandise whatsoever shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding two hundred dollars, or by imprisonment not exceeding two months or by both such fine and imprisonment." Section 2 makes it the duty of the marshal, in the event of the erection or maintenance of a billboard in violation of section 1, to remove such board, after notice to the offender. By section 3, the preceding sections are not to apply to any person having a fixed place of business in the town of East San Jose, "who shall erect or maintain any advertisement sign on the premises where his said business is carried on provided that such advertisement sign shall advertise only goods, wares and merchandise for sale by him at his said place of business."

The court finds that plaintiff is maintaining, within the corporate limits of East San Jose, three billboards for advertising. These boards were constructed and are maintained with the consent of the owners of the property on which they are located; they are substantially constructed, and not liable to be blown down except in case of extraordinarily high winds. It is found that each of said boards is "offensive to the senses and an obstruction to the free use of property," and that "since their construction, and during their maintenance, they have been, and they are still, a public nuisance." Judgment was entered in favor of defendants. Plaintiff appeals from the judgment and from an order denying its motion for a new trial.

If the billboards constituted a public nuisance, a court of equity would refuse any writ designed to perpetuate their maintenance, regardless of the validity of the ordinance under which defendants assume to proceed: McQueen v. Phelan, 4 Cal. App. 695, 88 Pac. 1099. But the finding that the boards did constitute a nuisance is attacked as contrary to the evidence. It is not contended by respondents that any

nuisance in fact existed, unless it resulted from the mere circumstance that structures were maintained contrary to the terms of the ordinance. The single question for decision, therefore, [320] is whether the enactment of this ordinance was within the legislative power of the town of East San Jose.

Except for the limited exemption conferred by section 3, the effect of the ordinance is to absolutely prohibit the erection or maintenance of billboards for advertising purposes. There is no attempt to restrict the operation of the enactment to billboards that may be insecure or otherwise dangerous, or to advertising that may be indecent. The town trustees have undertaken to make criminal the maintenance of any billboard, however securely it may be built, and however unobjectionable may be the advertising matter displayed upon it. Such prohibition, involving a very substantial interference with the rights of property, can be justified, if at all, only to the extent that the subject matter of the legislation is embraced within the police power of the state. Bearing in mind that the ordinance does not purport to have any relation to the protection of passers-by from injury by reason of unsafe structures, to the diminution of hazard of fire, or to the prevention of immoral displays, we find that the one ground upon which the town council may be thought to have acted is that the appearance of billboards is, or may be, offensive to the sight of persons of refined taste. That the promotion of esthetic or artistic considerations is a proper object of governmental care will probably not be disputed. But, so far as we are advised, it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way. Such restriction is, if not a taking, pro tanto, of the property, a damaging thereof, for which, under section 14 of article 1, of the constitution, the owner is entitled to compensation. To this extent the authorities are all in accord. "No case has been cited," says the court of errors and appeals of New Jersey in City of Passaic v. Paterson etc. Co., 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995, "nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." In Commonwealth v. Boston [321] Advertising Co., 188 Mass. 348, 108 Am. St. Rep.

494, 74 N. E. 601, 69 L. R. A. 817, an enactment forbidding the maintenance of business signs so near a parkway as to be plainly visible to the naked eye of persons in the parkway, was held to be invalid as amounting to a taking of property for a public use without compensation. To the same effect are Bryan v. City of Chester, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894, and People v. Green, 85 App. Div. 400, 83 N. Y. Supp. 460. Analogous, in principle, is the case of City of St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226, in which the court declared invalid a statute authorizing cities to establish along boulevards a building line to which all structures must conform: See, also, City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892.

In most or all of the cases dealing with prohibitions of the right to erect or maintain billboards, it is recognized that the legislature may, under the police power, prohibit advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the persons or property of the public. Ordinances limiting the height of billboards have been sustained as having a tendency to protect passers-by from physical injury: City of Rochester v. West, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673, 53 L. R. A. 548; Gunning System v. City of Buffalo, 75 App. Div. 31, 77 N. Y. Supp. 987; Whitmier etc. Co. v. City of Buffalo, 118 Fed. 773; In re Wilshire, 103 Fed. 620. On the other hand, ordinances requiring every billboard to be constructed not less than ten feet from the street line (City of Passaic v. Paterson etc. Co., 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995), or at a distance from the street exceeding by at least five feet the height of the billboard (Crawford v. City of Topeka, 51 Kan. 756, 37 Am. St. Rep. 323, 33 Pac. 476, 20 L. R. A. 692), have been held to be unreasonable restrictions upon individual rights, and invalid. We are not here, however, concerned with the extent to which the legislative power may, in the effort to protect the public safety or morals, regulate the manner of erecting or using billboards. The ordinance in question does not attempt such regulation, but undertakes to absolutely forbid the erection or maintenance of any billboard for advertising purposes. We have no doubt that this sweeping prohibition was beyond the power of the town trustees.

223 The judgment and the order appealed from are reversed.

Angellotti, J., and Shaw, J., concurred.

THE POWER OF A MUNICIPALITY TO PREVENT OR REGULATE THE USE OF PROPERTY FOR ADVERTISING PURPOSES, BY BILLBOARDS OR OTHERWISE.

I. The Power to Prevent, 92.
II. The Power to Regulate.
a. Reasonable Exercise, 93.
b. Unreasonable Exercise, 93.
III. Maxims Applicable, 94.

I. The Power to Prevent.

The legislature may prohibit structures which expose those using parks or streets to danger and may prevent the exhibition of immoral advertisements or pictures, or the use of property in a way which would endanger the health of the community, and, therefore, may delegate such powers to municipalities to enforce according to their respective charters. But where the ordinance exceeds these limits and prohibits the posting of bills and placards or advertising on property adjacent to public parks, it is an appropriation of private property to public use without compensation, without due process of law, and falls within the prohibition by the constitution forbidding the taking of property for public use without compensation: Varney & Green v. Williams, 155 Cal. 318, ante, p. 88, 100 Pac. 867; Commonwealth v. Boston Advertising Co., 188 Mass. 348, 108 Am. St. Rep. 494, 74 N. E. 601, 69 L. R. A. 817; City of St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; Bill Posting Sign Co. v. Atlantic City, 71 N. J. L. 72, 58 Atl. 342; People v. Green, 85 App. Div. 400, 83 N. Y. Supp. 460; Bryan v. City of Chester, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894. And the opinion in People v. Green, 85 App. Div. 400, 83 N. Y. Supp. 460, was a corollary to those in the Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636, wherein Judge Earl said: "Property may be destroyed or its value may be annihilated. It is owned or kept for some useful purpose, and it has no value except it can be used, ... and hence any law which destroys it, or its value, or takes away any of its essential attributes, deprives the owner of his property. Under the mere guise of police legislation, personal rights and private property cannot be arbitrarily invaded." And in People v. Otis, 90 N. Y. 48, wherein Judge Andrews echoed a part of the proposition: "Depriving an owner of some of its attributes is depriving him of his property within the constitutional provision."

The case of the City of Rochester v. West, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673, 53 L. R. A. 548, is not in conflict with this view: People v. Green, 85 App. Div. 400, 83 N. Y. Supp. 460.

In addition to the prohibition of insecure billboards, a city may require the owners of such as are already erected to maintain them in a safe condition, and may provide for their removal at the expense of the owner in case they become dangerous to the public: Crawford v. City of Topeka, 51 Kan. 756, 37 Am. St. Rep. 323, 33 Pac. 476, 20 L. R. A. 692.

II. The Power to Regulate.

a. **Reasonable Exercise.**—To provide for the safety or welfare of persons passing along the streets, the legislature has power to confer upon a municipal corporation authority to regulate boards erected for bill posting: City of Rochester v. West, 164 N. Y. 510, 79 Am. St. Rep. 629, 58 N. E. 673, 53 L. R. A. 548; Gunning System v. City of Buffalo, 75 App. Div. 31, 77 N. Y. Supp. 987. The phrase "to regulate" is defined "to govern by or subject to certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted": City of Rochester v. West, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673, 53 L. R. A. 548.

So long as the restriction is reasonable, the ordinance, if within the authority assigned, is valid. Thus regulations prohibiting the erection of billboards more than seven feet high without permission of the local authorities were sustained: Whitmier v. Buffalo, 118 Fed. 773; and a Los Angeles ordinance limiting the height of billboards to six feet was sustained, although Judge Ross admitted "that the limit prescribed approaches very closely, if it does not reach, the point of unreasonableness. But between the line above which the height prescribed would be obviously unreasonable, and below which it would be obviously unreasonable, there is a range concerning which reasonable and fair-minded men may well differ. The action of the municipal authorities, exercised within that range, ought not, in my opinion, to be interfered with by the courts": In re Wilshire, 103 Fed. 620.

Under the building code of New York, regulating the construction of buildings and structures in the city, a sky sign erected on the roof of a building for advertising purposes is a structure within the meaning of the code, and hence subject to control thereby: New York v. M. Wineburgh Advertising Co., 122 App. Div. 748, 107 N. Y. Supp. 478; Kobbe Co. v. New York, 122 App. Div. 755, 107 N. Y. Supp. 489. The instant, however, such billboards exceed their legitimate use from any cause and become a public nuisance, the courts of equity would refuse any attempt to continue them, and that, too, regardless of the fact whether they were or were not permitted by any ordinance: McQueen v. Phelan, 4 Cal. App. 695, 88 Pac. 1099; Varney & Green v. Williams, 155 Cal. 318, ante, p. 88, 100 Pac. 867, 21 L. R. A., N. S., 741.

b. **Unreasonable Exercise.**—In general, the owner of real estate may erect upon it such structures as he pleases, so long as they do not interfere with the public health, safety or comfort, or otherwise injuriously affect the rights of others: Ex parte Sing Lee, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245, 24 L. R. A. 195; Ex parte Whitwell, 98 Cal. 73, 35 Am. St. Rep. 152, 32 Pac. 870, 19 L. R. A. 727; Schwarz v. Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Durham v. Musselman, 2 Blackf. 96, 18 Am. Dec. 133; Trustees etc. v. Spears, 16 Ind. 441, 79 Am. Dec. 444; Armstrong v. Medbury, 67 Mich. 250, 11 Am.

St. Rep. 585, 34 Am. St. Rep. 566; State v. Tenant, 110 N. C. 609, 28 Am. St. Rep. 715, 14 S. E. 387, 15 L. R. A. 423; Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511.

The municipal authority, in endeavoring to regulate the dimensions, etc., of billboards, must refrain from making restrictions which by pandering to some esthetic or illegal consideration amount to an interference with proprietary right beyond the extent of legal authority. The following ordinances have been held on such grounds to be unreasonable and invalid: One entirely prohibiting billboards except on the business premises of the advertiser: Varney & Green v. Williams, 155 Cal. 318, ante, p. 88, 100 Pac. 867, 21 L. R. A., N. S., 741; one requiring billboards to be set back from the lot line five feet more than their height: Crawford v. City of Topeka, 51 Kan. 756, 37 Am. St. Rep. 323, 33 Pac. 476, 20 L. R. A. 692; one limiting their height to eight feet and requiring them to be constructed not less than ten feet from the street line: City of Passaic v. Paterson etc. Co., 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995; one forbidding the erection of billboards, because they were unsightly or might become a nuisance: Bryan v. City of Chester, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894; one requiring billboards to be made of noncombustible material, not to exceed one hundred feet in superficial area, to be set twenty-five feet back from the lot line with a base three feet above the level of the street and to be distant five feet from any other such board: City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892; one forbidding the erection of billboards on any boulevard, drive or street where three-fourths of the buildings were residences, without the written consent of three-fourths of the residents on each side of the street: City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas 892; one requiring that owners of billboards already erected when the ordinance was made, and exceeding certain specified dimensions, should pay an annual license of fifty cents per square foot thereof—in default, the boards to be torn down: City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L R. A. 230, 2 Ann. Cas. 892; one requiring billboards to be a distance from the street line at least two feet more than the height of the board: State v. Whitlock, 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123; one prohibiting sky signs more than nine feet above the front wall or cornice of the building, as arbitrarily prohibiting an advertisement without prohibiting other structures of equal or greater height: People v. Murphy, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A., N. S., 735.

III. Maxims Applicable.

"Cujus est solum, ejus est usque ad coelum," is the general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land, above, upon, or beneath the surface: Cooley on Torts, 576.

"Sic utere tuo ut alienum non laedas"—"Salus populi suprema est lex." Regulations for the health, safety and comfort of the citizens all rest upon these maxims. The power to restrain a private injurious use of property is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner: 1 Dillon's Municipal Corporations, 4th ed., 211.

EX PARTE BAILEY.

[155 Cal. 472, 101 Pac. 441.]

FISHERIES—Pacific Ocean—Municipal Ordinance—Construction—Ultra Vires—Habeas Corpus.—A municipal ordinance of Santa Monica making it a misdemeanor to set, draw or use any fishing net in the Pacific Ocean at any point or place within that town less than one thousand feet from any wharf, dock or pier located in said town is an ordinance to protect and add to the piscatorial advantages of such wharves, docks and piers, and is void as beyond the power of the town to enact. One held for violating such ordinance is, on habeas corpus, entitled to his freedom. (pp. 96–98.)

FISHERIES—Pacific Ocean—Municipal Ordinance—Construction.—A municipal ordinance of Santa Monica making it a misdemeanor to set, draw or use any fishing net in the Pacific Ocean at any point or place within that town less than one thousand feet from any wharf, dock or pier located in said town is manifestly not designed as an aid to navigation in the vicinity of such wharves, docks and piers, and to enable vessels to reach them conveniently, and safely. (p. 98.)

FISHERIES—Title to Wild Game.—The ownership of wild game, not reduced to actual possession by private parties of which the fish in our waters constitute a part, is in the people of the state, in their collective capacity. (p. 96.)

FISHERIES—Title to Wild Game—No Local Proprietary Interest.—The people of Santa Monica have no such proprietary interest in the fish swimming in the Pacific Ocean within the corporate limits of the town, as authorizes them to protect and preserve them therein, simply that they may be taken by those fishing from the wharves. (p. 97.)

FISHERIES—Title to Wild Game.—While the common right of fishery in any public water must give way to the right of navigation so far as is necessary for the fair, useful and legitimate exercise of the latter right, it cannot be unnecessarily and unreasonably impeded thereby. (p. 98.)

W. H. Savage and M. C. Hester, for the petitioner.

Towser, Taft & Odell, for the respondent.

[473] ANGELLOTTI, J. At the time of the issuance of the writ herein, the petitioner was in custody under a judgment

pronounced upon his conviction of a violation of the provisions of an ordinance of the town of Santa Monica, adopted November 19, 1900. His claim was that the ordinance is void. His application was pending unsubmitted at the time of the fire of April 18-20, 1906, and the record was destroyed. It is only within the last few weeks that the record has been restored and the matter submitted for decision.

The ordinance in question is as follows:

"Ordinance 346. An ordinance regulating seining in certain portions of the town of Santa Monica.

"The board of trustees of the town of Santa Monica do ordain as follows:

"Section 1. It shall be and is hereby made unlawful for any person to set, draw or use any fishing net or seine in the Pacific Ocean at any point or place within said town less than one thousand feet from any wharf, dock or pier located in said town.

"Section 2. Any person violating section 1 of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction, shall be [474] fined in a sum not exceeding fifty dollars, or be imprisoned in the town jail, for not more than thirty days, or both, at the discretion of the trial court."

We think it is manifest from the terms of the ordinance that it was in no sense designed for the preservation and protection of fish for the benefit of the people of the state, as are the laws enacted by the state legislature in that behalf to be found in title 15 of the Penal Code, and it will therefore be unnecessary to consider the claim that a municipality in the exercise of the police power may enact such regulations for the protection of wild game within its borders as may not be in conflict with general laws of the state. We do not desire to be understood, however, as suggesting that a municipality has any such power.

It is unnecessary to decide this point, for such manifestly was not the purpose of the ordinance. The prohibition against the use of fishing nets and seines extends only to places "less than one thousand feet from any wharf, dock or pier located in said town." The presence of a wharf, dock or pier is the material thing, and it was clearly the sole object of the ordinance to protect and add to the piscatorial advantages of the wharves, docks and piers in the town.

The ordinance conveys the idea that the object was to make such wharves, etc., advantageous for fishing with hook and line, the idea being that more fish could be thus taken by

those fishing therefrom if seining and netting were prohibited within a thousand feet. If this was the object of the ordinance, and it appears clear to us that this is the only object that can reasonably be inferred from the language used, it was clearly beyond the power of the town to enact. Nothing is better settled than the doctrine that the ownership of wild game, not reduced to actual possession by private parties, of which the fish in our waters constitute a part, is in the people of the state in their collective sovereign capacity: People v. Truckee etc. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581. The people of the town of Santa Monica have no such proprietary interest in the fish swimming in the waters of the Pacific Ocean within the corporate limits of the town as authorizes them to protect and preserve them therein, simply that they may be taken by those fishing from the wharves. Until actually reduced to possession, the fish belong to all the people of the state [475] in common, and those engaged in the exercise of the common right to take them from what is a public highway, open to all people alike, cannot be impeded in the slightest degree in the exercise of that right solely for the purpose of making the wharves, etc., of the town a more advantageous place from which to fish. To allow this would practically amount to a segregation of a portion of the fish at large in the ocean to the uses of the town of Santa Monica, to the injury of persons otherwise entitled to take them in such manner as they saw fit. Such legislation could be sustained only on the theory that Santa Monica has some sort of a proprietary interest in the fish in that part of the ocean which is within the corporate limits of the town, but, as we have seen, such a theory has no foundation in fact. It is said by counsel for respondent that it has been held that the right of the riparian owner to take fish from the water on, or fronting on, his land is exclusive, but this is too broad a statement of the rule. The ruling in People v. Truckee etc. Co., 116 Cal. 307, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581, cited by him, was simply that "the right of fishery upon his own land is exclusively in the riparian proprietor." The rule is stated in 2 Farnham on Waters and Water Rights, section 375, as follows: "An exclusive right of fishery in the water adjacent to property is not one of the rights of the riparian owner. He can claim such right only when he owns the soil under the water, or the right has been expressly conferred upon him. By reason of the location of the riparian owner and his exclusive right to use his land in connection with the fishery, he has certain advantages

not common to the public, and in some cases this will give him a virtual monopoly of the fishery; but the fact that he has the exclusive right to draw a seine on his property does not exclude the public from the right to draw seines if they can do so without trespassing on the shore." Again, in section 401, with relation to municipalities, it is said: "But except in private waters of which the municipality has the title, it has, in the absence of statute or custom, no title to or exclusive control over, the fisheries within its limits."

It is said that there is nothing before this court to show that it is not a necessary provision "for the proper conduct of traffic upon and about the wharves, that seining should be excluded within the limit provided by the ordinance." Except [476] in so far as it might operate to reduce the number of fish available to those fishing from the wharves, a matter entirely beyond the control of the town, learned counsel has not suggested, and it is impossible to conceive, how the acts prohibited by the ordinance could impede in the slightest degree anything that it was desired to do on the wharves. The only other theory that has occurred to us upon which it might be claimed that the ordinance was a valid exercise of power on the part of the trustees of the town was that it was in aid of navigation in the vicinity of the wharves, docks and piers, and to enable vessels to conveniently and safely reach the same. This claim, however, is not made, and manifestly the ordinance was not designed for any such purpose. The absolute prohibition of any use of any kind of fishing net or seine within a thousand feet of each and all of the wharves, docks and piers in the town of Santa Monica could not have been considered essential to easy and convenient access thereto by vessels. While the common right of fishery in any public water must give way to the right of navigation so far as is necessary for the fair, useful and legitimate exercise of the latter right, it cannot be unnecessarily and unreasonably impeded thereby: Farnham on Waters and Water Rights, secs. 33a, 393. We can see no ground upon which the ordinance in question can be sustained. It is an interference with the common right of fishery not warranted in the lawful exercise of the police power.

It is ordered that the petitioner be discharged from custody.

Shaw, J., Sloss, J., Henshaw, J., Melvin, J., and Lorigan, J., concurred.

Fish and Fisheries.—The Principal Case is Cited in the note to Hume v. Rogue River Packing Co. (Or.), 131 Am. St. Rep. 732, on the law of fishing. Respecting the right to fish, see note to the same case.

NOLAN v. NOLAN.

[155 Cal. 476, 101 Pac. 520.]

VENDOR'S LIEN—Unsecured Note—Transfer for Collection—No Loss of Lien.—When a vendor takes an unsecured note for unpaid purchase money of land, and for the purpose of collection only transfers and indorses it to an agent, and on nonpayment resumes possession of it and seeks foreclosure of his lien, such lien is not lost thereby. (p. 101.)

NEGOTIABLE INSTRUMENTS—Transfer for Collection.—Where the holder of a note indorsed and gave it for collection to his agent, who returned it to him on its nonpayment, such facts being proved by the evidence of both, a finding that there was no absolute transfer of the note is sustained by their evidence. (p. 101.)

NEGOTIABLE INSTRUMENTS—Animus Endorsandi Evidence.—Where the holder of a note indorsed and gave it for collection to his agent, who returned it to him on its nonpayment, it was not error to allow the holder and his agent to testify to these facts and the holder further to testify the purpose for which he gave the note, and that he did not intend to part with its ownership. (p. 103.)

TRIAL—Evidence—Witnesses—Opinions and Conclusions.—There is no general rule of evidence which permits a witness to substitute opinions for facts. It rests largely in the discretion of the trial court, which will not be reviewed unless it is made plain that the admission of the evidence worked an injury. Such injury is unlikely where fair latitude is allowed on cross-examination. (p. 102.)

HOMESTEADS—Mortgage of Two Lots.—Where there are no prior equities and the owner of two distinct lots has mortgaged them, and there exists as to one of such lots a homestead declaration, the weight of authority shows that equity will direct the sale first of that lot on which the homestead is not in order to preserve the homestead, if possible. (pp. 104, 105.)

HOMESTEADS—Mortgage of Two Lots—Marshaling of Assets.—Where there are no prior equities, and the owner of two distinct lots, on one of which there exists a homestead declaration, has mortgaged both lots to one mortgagee, and subsequently, but excepting the piece of that lot in respect to which the homestead declaration existed, to a second mortgagee, upon foreclosure proceedings, it has been held by a preponderance of authority that the second mortgagee could not compel the first to resort first to a sale of the homestead, to the end that their security might not be impaired, but the mortgagor and his wife, by the equity of their homestead, could compel the first mortgagee first to exhaust the lot not affected by the homestead, even though it resulted in the destruction of the second mortgagee's security. (p. 104.)

HOMESTEADS—Marshaling of Assets—Mortgage—Vendor's Lien.—Where a vendor takes an unsecured note for unpaid purchase money of land and allows his lien to be subordinated to the claims of a subsequent mortgagee, and the purchaser, before the maturity of the note, causes a homestead to be declared on another lot adjoining, belonging to him, but subject to the same mortgage, for the obvious purpose of defrauding the vendor out of the security of his lien, the after-declared homestead will not carry with it an equity superior to the vendor's lien, and the vendor will be entitled to a marshaling of securities and to a decree that the lot holding the homestead shall be sold first in satisfaction of the mortgage before resort to that on which exists his lien. (p. 109.)

Arthur J. Thatcher and J. C. Ruddock, for James Nolan, appellant and respondent.

Thomas, Pemberton & Thomas, for Arthur M. Nolan and wife, respondents and appellants.

[478] HENSHAW, J. In 1891 plaintiff was the owner of a parcel of land in Mendocino county, which, for brevity, may be called the "Nolan place." In that year he sold this land to his son, Arthur M. Nolan, defendant, taking in payment the son's unsecured promissory note for the purchase price, payable fifteen years after date and bearing interest at the rate of two and one-half per cent per annum. The defendant Arthur also purchased an adjoining tract of land, the "Kennedy place." Thereafter he married. In 1901, subsequent to his marriage, he executed a mortgage to defendant Cathrin Morgan to secure the payment of a promissory note for five thousand dollars. This mortgage covered both the Nolan place and the Kennedy place. On January 11, 1906, the defendant Maud Nolan, wife of Arthur, recorded her declaration of homestead on the Kennedy place. On January 22, 1906, the plaintiff commenced this action to recover the amount due on his promissory note, to have adjudged to him a vendor's lien on the Nolan place to secure its payment, and to have his lien foreclosed. Cathrin Morgan pleaded by answer and cross-complaint, setting up her mortgage and her ignorance of any claim of lien upon the part of plaintiff. The court decreed to Cathrin Morgan a mortgage lien upon both the Kennedy place and the Nolan place paramount to the vendor's lien which it found to exist in favor of the plaintiff upon the latter. Cathrin Morgan's judgment was for five thousand six hundred and sixty-three dollars and fifty cents and costs. Plaintiff was decreed a vendor's lien upon the Nolan place, subordinate to the [479] Morgan mortgage, for four thousand two hundred and sixty-nine dollars and twenty cents and costs. The court, however, further adjudged and decreed, against the protest of the plaintiff, that Cathrin Morgan do not resort to the Kennedy place (upon which had been declared the homestead) unless under sale the Nolan place should prove insufficient to satisfy her judgment, and that plaintiff, under his vendor's lien, should have only the surplus, if any remaining, after the sale of the Nolan place and the satisfaction of the Morgan judgment. Plaintiff appeals from that portion of the judgment so directing the order of the sale of the properties, and this appeal is numbered 4892. Defendants Nolan had ten-

dered issue upon the ownership in plaintiff of the promissory note, contending that he had parted with it by assignment absolute, and so had lost his vendor's lien. From the findings of the court against them upon this issue they appeal, and their appeal is numbered 4891. Upon both of these appeals Cathrin Morgan stands indifferent.

S. F. 4891: It is not disputed that under the sale by plaintiff to his son, the former acquired a vendor's lien (Civ. Code, sec. 3046), but it is said that the evidence establishes the loss of this lien by an absolute transfer of the promissory note: Civ. Code, sec. 3047. It is insisted that the finding of the court to the contrary is not supported by the evidence, and, further, that the court erred in its rulings in admitting and rejecting evidence upon the question. The finding of the court was that plaintiff had never made any absolute transfer of the note. The evidence shows that after holding the note for some years there was placed upon it the words "Assigned to Ann O'Neil. James M. Nolan." It shows also that Ann O'Neil, who was the daughter of plaintiff and sister of defendant Arthur Nolan, wrote several letters to her brother, notifying him that she held the note, would demand payment of it when due, and would entertain propositions looking to an adjustment and cancellation of it before that time. But it is testified to both by the father and the daughter that this indorsement was not designed to effect an absolute transfer, that an absolute transfer was never made, that plaintiff never parted with the ownership, that Ann O'Neil never in fact owned the note, that she assumed ownership only for the purpose of compelling her brother to pay her father, who was about ninety years of age. Plaintiff, in testifying that [490] he never parted with the ownership, explains the indorsement by saying that he proposed to make a journey, and that he entertained the idea that these words would be necessary as an authorization to his daughter to collect the note for him in his absence. This evidence was sufficient to support the finding that there was no absolute transfer, and a conditional assignment for collection or other like purpose would not destroy the vendor's lien in the event that he was subsequently compelled to resume full ownership of the note: Bancroft v. Cosby, 74 Cal. 583, 16 Pac. 504.

It is further insisted by appellants that the court erred to their injury in overruling their objections to certain questions propounded to plaintiff and to his daughter, Mrs. O'Neil, as follows:

"Q. [Asked of plaintiff.] Is this note not your own property? A. It is.

"Q. [Asked of Mrs. O'Neil.] Did you ever own it [the note]? A. I never did.

"Q. Do you know who owns it? A. My father does.

"Q. [Asked of plaintiff.] Now, when you signed this [the indorsement] did you intend to part with the ownership to your daughter?"

It is argued against the first three questions that they were improper, in calling for the opinion or conclusion of the witness and not for the facts. Of the last it is said that it was improper, as permitting parol evidence to contradict the legal effect of a writing. Upon the first proposition the industry of counsel has collated numerous cases where appellate courts have discussed the impropriety of permitting the opinion of witnesses to be substituted for facts in cases not calling for expert evidence. A review of these cases would not be profitable. Each one depends upon its own particular circumstances. Of course, there is no general rule of evidence which permits a witness to substitute opinions for facts. Such a rule would lead to the utter confusion and confounding of the administration of justice. The true rule is simple and, so far as this state is concerned, well established; to permit, or to refuse to permit, such questions is a matter [481] resting largely in the discretion of the trial court, which discretion will not here be reviewed unless it is made plain that the court's ruling in admitting the evidence has worked an injury. Generally speaking, the admission of the answer to such a question cannot work an injury where a fair latitude upon cross-examination is allowed, for under such cross-examination the facts are certain to be adduced. It will be found frequently that an appellate tribunal upholds the rulings of the trial court in sustaining an objection to such questions, but the cases are far less numerous where it has felt compelled to reverse the inferior tribunal for permitting them. Thus in Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109, this court had under review the ruling of the trial court in permitting answers of a witness to the following questions:

"Q. And your work is in every way according to the contract that you agreed to do with Von Herlich? Q. What is the character of the work on the Eighth Street side as regards the contract? Is it in accordance with the contract?" This court, holding that the trial court did not err in overruling the objections to the questions, quoted with approval

from Brink v. Hanover Fire Ins. Co., 80 N. Y. 108: "While it would not have been a legal error to have sustained the objection, I am of the opinion, under the circumstances of this case, that it was not a legal error to overrule it. The object of all examinations in judicial tribunals is to elicit truth, and there are many cases where the form of questions and the manner of examination must be left to the discretion of the trial judge. No injustice could have been done, because the answer would not be likely to prevail against facts which might be drawn out on cross-examination, or proved by other witnesses, inconsistent with it": See, also, Alexander v. Central L. & M. Co., 104 Cal. 532, 38 Pac. 410; Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061; Bunting v. Salz (Cal.), 22 Pac. 1132; Hardison v. Davis, 131 Cal. 635, 63 Pac. 1005. Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272, is instructive upon this question. There the following question was propounded: "Who has had the management and control of your wife's earnings during the past fifteen years?" An objection to the question was sustained. It was argued on appeal that only "the facts" were permissible in evidence, [482] and that this called for a mere conclusion of the witness. It was held, after discussion, that even if it did call for a conclusion, it was not such a conclusion as rendered the question obnoxious under objection. It was rather the declaration of an ultimate fact within the knowledge of the witness.

The question as to the intent of the plaintiff in placing the indorsement upon the note was proper and permissible. In principle it is like the rule permitting the introduction of parol evidence to show the true consideration of a written instrument. It did not vary the terms of the writing, for those terms did not express an absolute transfer. It was merely evidence that the transfer was made conditionally, and that the plaintiff retained the beneficial ownership of the contract. If such evidence were not admissible, then it must follow that whenever an assignment is made for purposes of collection, the assignor's lips are sealed, and the assignee, who under such circumstances is but a trustee, could never be held accountable for the trust property. The appeal of defendants Arthur M. Nolan and Maud Nolan, his wife, from certain portions of the judgment and from the order of the court denying their motion for a new trial is denied.

S. F. 4892: The question presented upon this appeal is one of more complexity, and, in the jurisprudence of this state, a new one. It may be thus stated: Where A has a lien upon two parcels of land, and B has a lien on but one of those

parcels, may the common debtor, by virtue of the equity of an after-declared homestead upon one of these parcels, compel the creditor A, in marshaling securities, first to exhaust the security upon the land to which B alone can resort, where the inevitable result will be the impairment, if not the destruction, of B's security? In stating the question we have spoken of the declaration of homestead as having been made by the common debtor, after the attachment of the creditors' liens. In this instance the homestead was declared by the wife; but this circumstance is immaterial. It was a declaration, made upon the separate property of her husband, after the liens had attached, and can have no higher place in equitable regard than if it had been placed upon the property by the debtor himself.

The doctrine of the marshaling of assets and securities is of equitable creation, and in its early application was considered [483] solely with regard to the respective rights of the creditors. The debtor was given no hearing and allowed no voice in the matter: 1 Story's Equity Jurisprudence, sec. 640 et seq. It was to many courts a startling and reprehensible extension of the doctrine, when it was first announced that the creditors' rights could be interfered with by an equity arising in favor of the husband or wife by virtue of a homestead. Of the states which announced this extension California was among the earliest, if not the first. In Bartholomew v. Hook, 23 Cal. 277 (decided in 1863), a judgment had been recovered against the husband and it had become a lien on his land. Subsequently the wife filed a declaration of homestead upon the land, and it was by this court decided that, though the creditor could have recourse to the homestead property if necessary for the recovery of his debt, yet the wife had by her declaration of homestead acquired such an interest in the land as to justify her in maintaining an action against the sheriff to compel him first to resort to the other property of the debtor husband before proceeding against the homestead. Following this came the case of McLaughlin v. Hart, 46 Cal. 638 (decided in 1873), which held that where A and his wife had given to B a mortgage upon a tract of land, upon fifty acres of which there was a declaration of homestead, and subsequently A had given mortgages upon the same land, excepting the fifty acres affected by the homestead, to C and D, upon foreclosure proceedings the junior mortgagees could not compel B to resort first to a sale of the homestead, to the end that their security might not be impaired; but, to the contrary, A and his wife, by the equity of their homestead, could

compel B first to resort to and exhaust the lands not affected by it, even though the result of such procedure would be the destruction of the security of C and D. The justice of this determination was soon recognized and declared in McCreery v. Schaffer, 26 Neb. 173, 41 N. W. 996; Colby v. Crocker, 17 Kan. 527; Brown v. Cozard, 68 Ill. 178; McArthur v. Martin, 23 Minn. 74; Mitchelson v. Smith, 28 Neb. 583, 26 Am. St. Rep. 357, 44 N. W. 871; White v. Fulghum, 87 Tenn. 281, 10 S. W. 501; Equitable Life Ins. Co. v. Gleason, 62 Iowa, 277, 17 N. W. 524; Flowers v. Miller (Ky.), 16 S. W. 705; Wilson v. Patton, 87 N. C. 318. Yet it is interesting in this connection to note that the propriety of this extension [484] of the doctrine of the marshaling of assets and securities did not appeal to all of the courts with equal force. Thus, in 1876, we find the eminent Chief Justice Gray of the supreme court of Massachusetts deciding that the creditors' action in enforcing collection of his debts could not be controlled by the tenant who had acquired a homestead right before the mortgage deed, and who urged that the estate was sufficient to satisfy the mortgage without having recourse to the homestead. He says: "The power of a court of chancery to compel a mortgagee to resort, in the first instance, to one of several estates mortgaged, is exercised only for protection of equities of different creditors and encumbrancers or of sureties, and not for the benefit of the mortgagor. As against him, the mortgagee has the right to enforce the contract between them according to its terms, and is not obliged to elect between different remedies or securities"; citing Story's Equity Jurisprudence. The decisions of this state, and of other states which have followed them, are then sweepingly, if not satisfactorily, disposed of by the learned chief justice in the following language: "The cases in some of the western states, cited by the learned counsel for the tenant, so far as they countenance any equity in the owner of a right of homestead as against a party in whose favor he has waived or released it, are supported by no reasons": Searle v. Chapman, 121 Mass. 19. The supreme court of Wisconsin met the same question in White v. Polleys (1866), 20 Wis. 503, 91 Am. Dec. 432, and held that where a mortgage covers the homestead and also other property which is subject to the lien of a subsequent judgment, the debtor has no right to have the latter exhausted to satisfy the mortgage, in order to preserve the homestead. White v. Polleys quotes from an earlier decision of that court in Jones v. Dow, 18 Wis. 241, to the following effect: "Until the legislature shall have de-

clared the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this." Following which forcible declaration the legislature did so declare: Laws Wis. 1870, p. 198, c. 133, sec. 1.

Still, notwithstanding some contrariety of opinion, it may be said that, by the great weight of authority, the debtor who has mortgaged an existing homestead will be heard, upon a [485] marshaling of securities, to insist that recourse shall last be had to the homestead property; that a lienholder, whose security affects the homestead with other land, will, at the instance of the debtor, be compelled to resort first to the other lands, even though by so doing the security of still other creditors upon these other lands is impaired or destroyed. Mr. Freeman considers the question in the following language: "The more reasonable view is, that the equities of the homestead claimants to retain their home is at least equal to that of their creditors to have it sold, and therefore that chancery will not aid the latter by compelling the judgment creditor to first resort to the homestead. Perhaps a more difficult question is, May one who has a lien on the homestead and other property be compelled by the homestead claimants to first resort to the latter? On the one side, it is insisted that the right to compel a marshaling of assets never existed in favor of judgment debtors, but only in behalf of persons claiming under them, and that the creation of the lien by the homestead claimants was, in effect, an agreement on their part that the lienholder might, at his discretion, sell any of the property which was subject to such lien, and that such agreement precludes such claimants from exercising any control over such discretion. But homestead laws should be liberally construed, and no intention should be presumed, nor should any interpretation be indulged which is at variance with the natural and obvious purpose of the parties. The claimants, in the absence of any expression of a contrary intent, should be presumed to intend no further peril to their homestead than necessity demands, while he who receives a mortgage from them should be regarded as obtaining a mere security for his debt, and not the right to employ that security in such a mode as to needlessly imperil the homestead": 2 Freeman on Executions, 440. This right of the homestead claimants, as we have seen, is one which they may exercise even to the detriment of junior encumbrancers of the other lands. This is so upon the principle that they have taken their junior encumbrances with knowledge of the equities which the homestead carries, amongst

which is the important one to direct the senior mortgagee to have recourse first to lands other than the homestead. That the weight of authority supports this view, in accordance with the early enunciation of this court in McLaughlin v. Hart, [486] 46 Cal. 638, may be seen by an examination of the authorities collated in 26 Cyc. 933; 19 Am. & Eng. Ency. of Law, 2d ed., 1269; Century Digest, col. 34, sec. 3.

So far as we have proceeded, the question offers no feature of especial difficulty. But the judgment here under consideration leaves the solid ground of the decision in McLaughlin v. Hart and enters an entirely new territory. McLaughlin v. Hart, and all other cases which have heretofore been cited, deal with the equities as they arise in favor of or against a junior encumbrancer who has taken his lien with knowledge of an existing homestead. Here we are asked to hold that the debtor, by declaring a homestead after the liens have attached, may, as he elects to declare the homestead upon one or the other parcel, protect or defeat a creditor's just claim. Thus in the case at bar, Nolan, by declaring a homestead upon the Kennedy place, and thus forcing a sale of the Nolan place to satisfy the demands of the senior mortgagee, leaves the plaintiff stripped of his security and remediless, whereas if he had declared his homestead upon the Nolan place, the Kennedy place would first have been sold to satisfy the demand of Mrs. Morgan, and this plaintiff in turn would have had the right to subject the Nolan place to sale to satisfy his vendor's lien. The whole doctrine of the marshaling of assets for the protection of the common debtor, as well as of the creditors, is, as we have said, of equitable origin and growth. It will be extended so far as may be necessary to protect the rights of all. But an extension of it will be withheld when the manifest result is to promote a subsequent equity into a position of superiority over a prior equity, to the injury of the holder of the earlier. The rule, like all equitable rules, will not be enlarged, or, if enlarged, will not be enforced, to the displacement of a countervailing equity, or where, for any special facts, it would be inequitable to enforce it: Miller v. McCarthy, 47 Minn. 321, 28 Am. St. Rep. 375, 50 N. W. 235. And that such would be the result, if the contention of respondent was to prevail, can admit of no doubt. This precise question was presented in Abbott v. Powell, 6 Saw. 91, Fed. Cas. No. 13, and was learnedly considered by Hoffmann, J. Bartholomew v. Hook, 23 Cal. 277, and McLaughlin v. Hart, 46 Cal. 638, were cited in support of the contention. The learned judge declared:

[487] "But neither of these cases contains the slightest intimation that where a person has made a mortgage on two pieces of property, and afterward makes a second mortgage on one of them, the equitable right of the junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he has an exclusive claim can be taken away or impaired by a (subsequent) declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. I have been referred to no case which hints at so inequitable a rule. The junior mortgagee, when accepting the security of a second mortgage, had a right to repose upon the protection afforded him by the familiar rule of equity, and to act upon the assurance that the first encumbrancer would be compelled to resort to the property on which he had an exclusive claim, before coming on the property covered by the second mortgage, and that no act of the mortgagor could deprive him of the right to compel him to do so. I can conceive no reason, of justice or policy, why this right, which confessedly existed as between the first and second mortgagees, and which grew out of the contracts of the mortgagor himself, should be destroyed or impaired by the filing by the latter or his wife of a declaration of homestead." To the same effect is State Sav. Bank v. Harbin, 18 S. C. 425. Excepting where express legislative declaration gives superiority to the homestead under such circumstances, no case has been called to our attention where a court has done so, saving the one case of Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553. The judgment in that case was precisely that in the case at bar, and it was held that the junior mortgagee was not entitled to a marshaling of securities so as to compel the senior mortgagee first to resort to the after-declared homestead. But no reason is assigned, the court contenting itself with the declaration that "a court of equity will never displace or impair one equity for the purpose of asserting or upholding another," forgetting that this is essentially what a court of equity is always called upon to do (Salter v. Barker, 54 Cal. 140), and what that court itself did, though we think erroneously, when it displaced the equity of the junior mortgage to give preference to the equity of the after-declared homestead. The practical result of upholding such a doctrine in this case merits brief consideration. A father [488] sells to his son his home place, upon terms of great indulgence—a note running for fifteen years, with interest at the low rate of two and a half per cent. He holds a vendor's lien upon the land, which, by reason of this same

indulgence is subordinated to the claims of a subsequent mortgagee. During the fifteen years the son has occupied and enjoyed the land. When the time for the payment of the note is about due, the note and accumulations of interest remaining unpaid, he causes a homestead to be declared upon an adjoining tract, which is also covered by the mortgage, for the very obvious purpose, not of protecting his father in his vendor's lien, but of defrauding him out of the security of that lien. This bare statement should be enough to dispel the notion that such an after-declared homestead carries with it an equity superior to such a vendor's lien. It follows herefrom that the plaintiff is entitled to a marshaling of securities and to a decree declaring that the Kennedy place shall first be sold in satisfaction of the Morgan mortgage, before resort shall be had to the land in which he has the security of his vendor's lien.

Upon the appeal of James Nolan it is ordered that such part of the judgment be reversed and a judgment be entered in conformity with the foregoing.

Melvin, J., and Lorigan, J., concurred.

Hearing in bank denied.

Where a Mortgage upon a Homestead and Other Real Estate is being foreclosed, the mortgagor has the right, as against the mortgagee, and all other creditors and lienholders whose rights are not prior or superior to those of the mortgagee, to require that, before the homestead shall be resorted to for the purpose of satisfying the mortgage, all the other property shall be first exhausted: Frick Co. v. Ketels, 42 Kan. 527, 16 Am. St. Rep. 507. See, also, Mitchelson v. Smith, 28 Neb. 583, 26 Am. St. Rep. 357; Miller v. McCarty, 47 Minn. 321, 28 Am. St. Rep. 375. And if the whole of a tract is subject to a vendor's lien, and part of it is a homestead, the owner has a right to have the part which is not a homestead first applied to the satisfaction of such lien, and a voluntary conveyance of the whole tract to his wife is not a fraud as against his creditors, if the part not exempt as a homestead is not of sufficient value to satisfy such lien: Keith v. Albrecht, 89 Minn. 247, 99 Am. St. Rep. 566. According to Pearson v. Pearson, 59 S. C. 367, 82 Am. St. Rep. 846, unsecured creditors of a decedent have no right or equity to compel a mortgagee of the homestead to exhaust such homestead, set apart to the widow and children, before he can claim any part of the assets of the estate as applicable to his mortgage. And according to First Nat. Bank of Talladega v. Browne, 128 Ala. 557, 86 Am. St. Rep. 156, it is not the policy of the homestead law to apply the doctrine of marshaling assets or of subrogation, in order that the property may be subjected to encumbrances not created by the debtor himself. In Koen v. Brill, 75 Miss. 870, 65 Am. St. Rep. 633, it is held that a mortgagee of real property, part of which is a homestead, will not be permitted nor required to resort to the homestead alone for the satisfaction of his lien.

PEOPLE v. TONG.

[155 Cal. 579, 102 Pac. 263.]

ROBBERY—Grand Larceny.—An Information for robbery is insufficient which does not state that the property was taken from the possession of the person robbed, but such an information may be found to contain an averment of grand larceny. (p. 111.)

CRIMINAL LAW—Once in Jeopardy.—Where the defendant has been tried and convicted on an information for robbery, and a demurrer thereto that the offense was insufficiently alleged was overruled, but the averments in such information were sufficient to cover the charge of grand larceny, it was error in the court of appeal, when reversing the conviction, to order the defendant's discharge on the ground that a retrial would violate the principle of "once in jeopardy." (p. 113.)

CRIMINAL LAW—Once in Jeopardy—Cases Overruled.—If it be the doctrine of the cases of People v. Arnett, 129 Cal. 306, 61 Pac. 930, People v. Smith, 136 Cal. 207, 68 Pac. 702, People v. Tilley, 135 Cal. 61, 67 Pac. 42, and People v. Curtis, 76 Cal. 57, that the defendant has been once in jeopardy in every case wherein a verdict of guilty of a crime not strictly embraced within the pleadings has been returned and the jury has been discharged without consent, then those cases should be overruled. (p. 111.)

CRIMINAL LAW—Erroneous Judgment in Criminal Cases, Effect of.—The rule that where a court has power to hear and determine a question, the fact that it erred in such decision does not render its judgment void applies in criminal as in civil cases. (pp. 111, 112.)

CRIMINAL LAW—Pleading—Once in Jeopardy.—Where the defendant has been tried and convicted on an information for robbery, and denied a motion for a new trial, and such information contained averments sufficient to sustain the charge of grand larceny, he was never in jeopardy upon the latter charge, and therefore, on the reversal of the judgment of conviction for robbery, he may be tried upon the charge of grand larceny. (p. 114.)

CRIMINAL LAW—Pleading—Once in Jeopardy—Waiver.—A defendant's successful effort to set aside a verdict and judgment of conviction by means of a motion for new trial and an appeal is a waiver of his constitutional right to object to being placed again in jeopardy, because, in effect, he consents to be tried anew. (p. 115.)

Peter J. Crosby and Nathan C. Coghlan, for the appellant.

U. S. Webb, attorney general, and J. Charles Jones, for the respondent.

580 MELVIN, J. This case was identical with that of the People of the State of California v. Ho Sing and followed the same course in the district court of appeal: 6 Cal. App. 752, 93 Pac. 204. That court held that the information did not properly charge the crime of robbery, but that there was a full and adequate allegation of the crime of grand larceny. In the information there was no statement that the property was taken from the possession of Chung Kee, and

the district court of appeal, following the authority of People v. Walbridge, 123 Cal. 273, 55 Pac. 902, determined that there was not a sufficient pleading of the crime of robbery. The attorney general concedes the correctness of this ruling and also of the one whereby it is found that there is an averment of grand larceny. The only question presented for our determination is whether or not the court of appeal properly ordered the discharge of the defendant from custody upon the authority of People v. Arnett, 129 Cal. 306, 61 Pac. 930. In that case the defendant had been charged with the crime of assault with intent to commit murder and had been convicted of assault with a deadly weapon. The verdict was held to be a nullity (People v. Arnett, 126 Cal. 680, 59 Pac. 204), and on a second appeal (People v. Arnett, 129 Cal. 306, 61 Pac. 930), it was determined that the defendant had been once in jeopardy, and that he was entitled to his discharge, as it appeared from the minutes of the trial court, which were before the supreme court, that he had not consented to the discharge of the jury without verdict. If it be the doctrine of the cases of People v. Arnett, 129 Cal. 306, 61 Pac. 930, People v. Smith, 136 Cal. 207, 68 Pac. 702, People v. Tilley, 135 Cal. 61, 67 Pac. 42, and People v. Curtis, 76 Cal. 57, 17 Pac. 941, that the defendant has been once in jeopardy in every case wherein a verdict of guilty of a crime not strictly embraced within the pleadings has been returned and the jury has been discharged without consent, then those cases [581] should be overruled. Section 1140 of the Penal Code, which is the basis of the decision in the cases just cited, is as follows: "Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." In the case before us the learned district attorney attempted to set forth a charge of robbery in the information. The defendant was tried and the jury instructed upon the theory that the crime of robbery was fully alleged and supported by testimony sufficient, if believed, to establish the fact of the commission by defendant of the crime. There was a demurrer to the information which the court overruled. The court had the right to hear and determine this question: Pen. Code, sec. 1002 et seq. It is a general rule that where a court has power to hear and determine a question, the fact

that it erred in such decision does not render its judgment void: Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8; Washburn v. Kahler, 97 Cal. 58, 31 Pac. 741; Disque v. Herrington, 139 Cal. 1, 72 Pac. 336; Franklin Union No. 4 v. People, 220 Ill. 355, 110 Am. St. Rep. 248, 77 N. E. 176, 4 L. R. A., N. S., 1001. We see no reason why this rule should not be applied in criminal as well as in civil cases.

It has been well settled by decisions in this state that the discharge of the jury for failure to agree does not enable a defendant to avail himself effectively of the plea of once in jeopardy: People v. Greene, 100 Cal. 140, 34 Pac. 630; People v. James, 97 Cal. 400, 32 Pac. 317. It is true that section 1140 of the Penal Code gives the judge a right to discharge a jury without verdict when there is no probability that an agreement can be reached, but there is authority for the same rule in many American jurisdictions where no such statute exists: People v. Green, 13 Wend. 55; United States v. Perez, 9 Wheat. 579, 6 L. ed. 165. In People v. James, 97 Cal. 400, 32 Pac. 317, although the jury refused to agree upon a verdict under a condition of the record entitling the defendant to an acquittal, and although such refusal was in [582] the face of an instruction to acquit, this court held that a plea of former jeopardy could not be effectively set up upon the discharge of the jury. In the opinion in that case Mr. Justice McFarland wrote: "No doubt it would have been the duty of the jury to have acquitted the appellant, under these circumstances, at the first trial; and if they had returned a verdict of guilty, the court would, no doubt, have granted a new trial. But we do not see that appellant is in a position different, in point of law, from that of any other defendant, whom the jury should have acquitted, but failed, through erroneous notions of some of the jurors, to agree upon a verdict, and, after a reasonable time, were discharged." Can it not be said with greater force in this case, that failure of the jury to return a verdict upon the charge of grand larceny was mere error, entitling the defendant only to a new trial? The jurors were acting under the law as given them by the court. It is true that the court was in error upon the question of the sufficiency of the information to charge robbery—error which seems to have been shared by the district attorney who drafted the information, and by defendant's attorneys who specified in their demurrer not that the crime stated was grand larceny instead of robbery, but that both robbery and grand larceny had been alleged. The decision of the court that there

was a valid, sufficient, properly drawn information averring robbery was the law of that case until the ruling was set aside or reversed, and the jury acting under that law rendered "their verdict" as that term in section 1140 of the Penal Code should be interpreted. If the information, though purporting to be one charging robbery, had contained no sufficient allegation of any crime at all, the case would be under the rule announced in People v. Lee Look, 137 Cal. 590, 70 Pac. 660, and People v. Lee Look, 143 Cal. 216, 76 Pac. 1028. In those cases it was held that the original information was defective because it contained no statement that the person killed was a human being; but this court decided that the defendant had not been in jeopardy upon the first trial. The difference between the Lee Look cases and this one is that in this case there was a disregarded pleading in which the defendant was accused of grand larceny; but he was not called upon under the court's instructions to defend against that accusation. Under the circumstances he was never in danger [883] of conviction upon a charge of grand larceny. In other jurisdictions it has been held that a plea of former jeopardy cannot be sustained on proof that the conviction of the accused on the previous trial was set aside because of a void or illegal verdict: See 12 Cyc. 277, and cases there cited. In State v. Redman, 17 Iowa, 329, Mr. Justice Dillon, after reviewing the decisions, wrote: "And we understand the settled doctrine to be, that where the verdict is a nullity (or so defective that no judgment can be rendered upon it), the defendant may again be put upon his trial, certainly where the verdict was intended to be one of conviction, for in such case it is rather a mistrial than a legal putting in jeopardy." In Fitts v. State, 102 Tenn. 141, 50 S. W. 756, the jury found the defendant guilty of murder in the second degree with a term of imprisonment for fifteen years. Upon a former trial, misled by the instructions of the judge, a verdict of guilty of murder in the second degree was returned fixing the term of imprisonment at twenty-one years—one year more than the maximum term allowed by the statute. It was held that a plea autrefois convict was properly stricken from the files. The supreme court found that "the former verdict was unwarranted, and, being a nullity, no valid judgment could be pronounced upon it. It was therefore no bar to a second prosecution." There are few questions upon which courts have differed more radically than they have disagreed upon those arising from considerations of jeopardy. We find all shades of opinion. There is the English rule that in felony cases the

prisoner must be recommended to a pardon—granted as of course—whenever it appears that the judge at the trial committed error to his prejudice. It is now the generally accepted American doctrine that "whenever a verdict, whether valid in form or not, has been rendered on an indictment either good or bad, and the defendant for any cause moves in arrest of judgment, or applies to the court to vacate a judgment already entered, ... he will be presumed to waive any objection to being put a second time in jeopardy; and so he may ordinarily be tried anew": 1 Bishop's Criminal Law, 7th ed., sec. 998. Starting with the same rule, which is substantially Blackstone's oft-quoted maxim, "No man is to be brought into jeopardy of his life more than once for the same offense," the courts of England and of the various American states have [584] reached diametrically opposite conclusions in answering the most important question: "Does the reversal for error at the defendant's own request of a verdict of conviction waive jeopardy?" The other problems arising in connection with this subject have received diverse solutions.

For example, it is held in some of the states, including California, that conviction of a lesser offense included within the charge of a greater is an acquittal of the major crime: People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; People v. Apgar, 35 Cal. 389; People v. Gordon, 99 Cal. 227, 33 Pac. 901; People v. Defoor, 100 Cal. 150, 34 Pac. 642; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Belden, 33 Wis. 120, 14 Am. Rep. 748; State v. Smith, 53 Mo. 139; while elsewhere there is, as Bishop says, "some authority either contrary to or qualifying this doctrine": 1 Bishop's Criminal Law, 8th ed., sec. 1004. Some courts have decided that a verdict of guilty of a lower degree of crime is no bar upon a new trial to conviction of the higher offense charged in the indictment: State v. Behimer, 20 Ohio St. 572; Bailey v. State, 26 Ga. 579. In short, so hopelessly at war are the decisions on the subjects of jeopardy, autrefois acquit and autrefois convict, that we find little settled doctrine upon any phase of these matters. Perhaps the safest rule is that announced in Stocks v. State, 91 Ga. 831, 18 S. E. 847, that the question of the propriety of discharging a jury depends upon the facts of each particular case. In the case here considered, the entire theory of the court was based upon the supposition that there was a perfect charge of robbery. The court solemnly found and declared the pleading sufficient as an allegation of robbery, by overruling the demurrer; by the charge to the jury; and by denying defendant's motion for

a new trial. Why should this form of error entitle a defendant to his discharge any more than should any other misdirection upon a question of law? The jury, acting according to the law as given them by the court, returned "their verdict," erroneous to be sure, but according to that declaration of the law which they were bound to accept as containing the principles to be followed by them in reaching "their verdict."

In view of the above conclusions we see no reason why the defendant should not be tried for the crime of grand larceny charged in the information.

[585] The judgment and the order denying a new trial are reversed.

Angellotti, J., and Henshaw, J., concurred.

SLOSS, J., Concurring. I concur in the judgment. The defendant was in jeopardy as soon as he was placed on trial before a competent court and jury on an information charging grand larceny. If the jury had been discharged without reaching a verdict, and in the absence of one of the statutory grounds for discharging them (Pen. Code, secs. 1123, 1139, 1140), the defendant would have been in a position to interpose the plea of once in jeopardy as a bar to a subsequent trial. But the jury were not discharged without reaching a verdict. They found the defendant guilty of robbery. This verdict, when compared with the averments of the information, was irregular, but it cannot be regarded as an absolute nullity. The judgment entered upon it would, if not directly attacked, have constituted a valid adjudication binding upon the defendant. Its sufficiency could not have been questioned collaterally, as, for example, on habeas corpus. The defendant's successful effort to set aside that verdict and judgment by means of a motion for new trial and an appeal is a waiver of his constitutional right to object to being placed again in jeopardy. In effect, he consents to be tried anew.

Shaw, J., concurred with Sloss, J.

BEATTY, C. J., Concurring. I concur in the judgment. The verdict of the jury was not a nullity. Comparing it with the rest of the record, including the charge of the court, it is clear that it could not have been returned except as the result of a finding by the jury of every element of the crime of larceny. In other words, the jury did actually find the defendant guilty of larceny, but under the erroneous instruction

of the court called it robbery. The verdict, however, is uncertain, for the reason that whether construed by itself or in connection with other parts of the record it cannot be known whether the jury would have found it to be grand or petit larceny. This renders a new trial necessary.

The Accused Waives the Constitutional Safeguard Against Being Twice Put in Jeopardy, and may be tried again for murder, when he procures a new trial on his own motion, on a conviction of manslaughter under an indictment for murder: State v. Gillis, 73 S. C. 318, 114 Am. St. Rep. 95. See, also, Brantley v. State, 132 Ga. 573, 131 Am. St. Rep. 218. If one is indicted in separate counts for burglary and larceny, and being convicted of the latter obtains a new trial, the court has no right to consider the effect of the conviction for larceny in the first instance: State v. Hamilton, 80 S. C. 435, 128 Am. St. Rep. 881, and see cases cited in the cross-reference note thereto.

ESTATE OF PATTERSON.

[155 Cal. 626, 102 Pac. 941.]

WILLS—Accidental Destruction—Probate.—Where a will, executed with all the formalities which the code requires, was accidentally destroyed in the great fire of San Francisco in April, 1906, without the knowledge of the testatrix, it was not revoked, and where the two witnesses agree in their evidence as to a portion only of it, such portion must be admitted to probate under the Code of Civil Procedure, section 1339 (1907 amendment), and as to the remaining portion, as intestacy exists. (p. 122.)

WILLS, LOST—Partial Probate.—The rule is "any substantial provision of a lost will, which is complete in itself and independent of the others, may, when proved, be admitted to probate, though the other provisions cannot be proved, if the validity and operation of the part which is proved are not affected by those parts which cannot be proved." (p. 121.)

WILLS, LOST—Partial Probate—Code Provisions.—The construction of section 1339, Code of Civil Procedure, which declares that no will shall be proven as a lost or destroyed will unless "its provisions are clearly and distinctly proved by at least two credible witnesses," is that a part which is distinctly proven can be given effect, notwithstanding that some other part, not affecting it in any particular, cannot be satisfactorily established. (p. 121.)

WILLS, LOST—Probate and Administration Allocation of Debts.—Where that portion of a lost will admitted to probate contained a devise of realty and a specific legacy and an intestacy was declared as to the residuary estate, the payment of debts and expenses of administration should be made out of the residuary estate, if sufficient, leaving the devise as a final resort. (p. 122.)

WILLS—Effect—Common Law and Code.—Destruction of a will by accident or without intention to revoke is not a prescribed method of revocation. By the common law a will, once duly executed, has a recognized legal existence during the lifetime of the testator,

if not revoked; it merely remains in abeyance until his death; and then becomes an effective instrument. (p. 125.)

WILL, Effect of as a Muniment of Title.—A will is regarded in England and the United States as a conveyance, and takes effect as a deed, upon proof of its execution, unless there is some statute requiring it to be probated. The probate is operative as the authenticated evidence, rather than the foundation, of the executor's or devisee's title. (p. 125.)

WILLS—Prospective Construction of Statutes—Code Civ. Proc. Amendment, sec. 1339.—This amendment is not retrospective, and applies only to trials which take place after its enactment. It is remedial in its nature, and designed to preserve the testamentary right. The legislation on the subject passed after the great fire of San Francisco was intended to preserve rights that would otherwise have been lost for want of evidence, and the construction of the amendment is unaffected by the death of the testator prior to its becoming law. (p. 127.)

WILLS, Proof of—Statute Removing Impediments—Rights of Heirs Defeated.—The right of heirs to the ancestor's estate is by statute contingent on the nonproving of a will; and if a will was not capable of proof under existing statutes, and the legislature removes the obstacle to probate by an alleviating measure, the heirs have no remedy for the divestment. (p. 122.)

EVIDENCE—Rules of.—The Power of the Legislature to Alter the Rules of Evidence and to make rules applicable to pending cases is paramount; and it is competent for the legislature to dispense with the requirement that proof should be made that a will was in existence at the death of a testator. (p. 123.)

Bourdette & Bacon and Andrew Thorne, for the appellant.

Heller, Powers & Ehrman and Percy E. Towne, for the respondents.

SHAW, J. This is an appeal from an order refusing to admit a will to probate as a destroyed will.

Catherine Patterson executed a will in December, 1904. It was prepared for her by her attorney, George A. Connolly, and was duly attested by him and by one Mary McFaul. It was then given by the testatrix into the custody of Connolly for safekeeping, and was by him kept in his office in the Parrott building in San Francisco until April 18, 1906, when it was destroyed by fire in the great conflagration in that city following the earthquake of that date. The testatrix died on December 27, 1906. She had not been informed that the will was destroyed and, so far as appears, she died in ignorance of that fact. Letters of administration upon her estate were issued to Ella Quigley, a respondent herein, on January 24, 1907. On February 5, 1907, Fannie Smith, the appellant, filed a petition for the probate of the alleged will. Opposition was made thereto by said administratrix and also by J. C. O'Hare, a brother of the deceased. Upon the trial

the court denied probate upon the ground that its provisions were not proven by two credible witnesses, and that it was not in existence at the time of the death of the testatrix and had not been fraudulently destroyed in her lifetime. The questions presented are whether or not these two grounds are sustained by the evidence and by the law applicable to the case.

The estate of the testatrix consisted of three parcels of real estate, some fifteen hundred dollars in money, deposited in bank, and some wearing apparel and household goods of the probable value of three hundred dollars. The evidence shows that the entire estate was worth only six thousand dollars. The deceased was the widow of James Patterson, and the property [629] was derived from him as the widow's share of his community property. The testatrix had no children and left no family. Patterson, her deceased husband, had three children who had been brought up by the testatrix and whom she usually spoke of as her children—namely, Frank Patterson, George Patterson, and the appellant, Catherine Frances Smith, formerly Patterson, usually known as Fannie Smith.

1. The attorney who drew and attested the will testified that it devised the real estate in equal parts, one-third to Fannie Smith, one-third to Frank Patterson and one-third to the children of George Patterson; that it gave a legacy of two hundred and fifty dollars to Joseph P. McQuaid; that it gave all the residue, without describing it, to Bridget Quigley, sister of the testatrix, and that it contained a general provision that all her debts should be paid. Mary McFaul, the other attesting witness, testified that she was present while the will was being written in the presence of the testatrix and that she heard it read by the attorney to the testatrix before its execution. Her account of the disposition of the real property is the same as that of Connolly. As to the personal property she testified that the will declared that the testatrix possessed fifteen hundred dollars on deposit in bank; that it gave a legacy of two hundred and fifty dollars to McQuaid, and provided that after the payment of debts and expenses the residue of the fifteen hundred dollars should go to Bridget Quigley, and that nothing was said in the will about any other personal property.

The respondents contend that Mary McFaul testified in effect that the entire fifteen hundred dollars constituted a specific bequest to Bridget Quigley, subject to reduction only

for its proportion of the debts and expenses of administration. We do not think it can be fairly construed as having that effect. Making due allowance for her ignorance of technical terms and forms, her testimony on this point in effect was that the McQuaid legacy and also the debts and expenses were to be paid out of the money in bank, the legacy to have preference therein.

When the provisions of law and the character of the estate are considered, the differences in the two accounts are substantial and important only with regard to the respective rights and interests of Bridget Quigley as legatee or heir and her brother, J. C. O'Hare, as an heir. For the payment of debts and general money legacies resort must be had: 1. To property [630] expressly appropriated by the will for that purpose; 2. To property not disposed of by the will; and 3. To property devised or bequeathed as a residue: Civ. Code, secs. 1359, 1360. Substantially the same rule applies to expenses of administration; if not otherwise provided for, specific devises and legacies are ordinarily exempt therefrom, if there is a sufficient residue, or sufficient property undisposed of: Code Civ. Proc., sec. 1563. According to Connolly's account, the burden of paying the legacy to McQuaid, together with the debts and expenses of administration, would, by the provisions of the law, fall upon the property given to Bridget Quigley, being the entire residue, including the clothing and household goods. According to McFaul, the specific legacy of the fifteen hundred dollars to Bridget Quigley was charged with the payment of the debts, the expenses, and the McQuaid legacy and the clothing and household goods were not disposed of by the will. If her statement was correct, the legacy to Bridget Quigley would have to bear all these charges, and she, as an heir, would divide the household goods and clothing equally with O'Hare. If Connolly was right, her residuary bequest would have to bear the charges, as in the other alternative, but she would get all the household goods and clothing. The only difference the respective alternatives would make to her and O'Hare would be that in the former case O'Hare would get nothing, while in the latter he would get one-half of the property not disposed of. The devises of the land to the descendants of James Patterson would remain unaffected in either case. If Mary McFaul was right, and the fifteen hundred dollars proved insufficient to pay the charges upon it, the property undisposed of would be next resorted to, and the land devised to the Pattersons

would be taken only as a last resort. If Connolly gave the true version, the entire residue would be first taken for the debts, expenses, and specific legacies, leaving the land to the devisees.

The contention of the respondent is that the lost or destroyed will cannot be admitted to probate at all, unless the whole of its provisions are clearly and distinctly proven by two credible witnesses; that if the two witnesses differ as to any provision of the will the probate thereof must be refused, although the other dispositions would be entirely unaffected by the portion of the will concerning which the witnesses do not agree.

[631] The great weight of authority is contrary to this proposition. The prevailing rule, and clearly the most reasonable one, is that stated by Lord Chief Justice Cockburn in Sugden v. Lord St. Leonards, 1 Pr. Div. 144, 230. In that case the estate was very large, there were some small legacies the particulars of which could not be ascertained and some limitations, "remote, indeed, and unlikely to come into effect, but which still are undoubtedly omitted from the document for which probate" was granted. Justice Cockburn says: "We have the substantial dispositions brought to our minds, and it would not be right to enable any wrongdoer or any accident which might happen to a will, and which would prevent the court which had to deal with it from being perfect master of its contents, to prevent the will from being carried into effect so far as the dispositions of the testator had become known. I think there could not be a more mischievous consequence; and although it may be unfortunate that the will cannot be carried into execution to the full extent of the testamentary dispositions of the testator, I think that of the two evils or two inconveniences it is far better, where the court can see its way to the essentially substantial dispositions made in a will, that it should give effect to them, although possibly some of the intentions of the testator may not be carried into effect." In Dickinson v. Stidolph, 11 Com. B., N. S., 357, the court says: "The apparent testamentary intentions of a testator are not to be disappointed merely because she made other dispositions of her property which are unknown by reason of the testamentary paper which contained them not being forthcoming." The will referred to two prior testamentary memoranda, declaring that both should remain in force, and one of them could not be found. In Steele v. Price, 44 Ky. (5 B. Mon.) 58, several money lega-

cies were not proven and as to that money there was intestacy. The court said: "As the principal devises, those in which the testator took the deepest interest, and about which he showed the most solicitude, are sufficiently proved, the failure of proof as to the minor provisions of the will, should not defeat the whole by preventing the admission to record of that which is proved; and especially as it does not appear that the establishment of the devises as proved, though it would greatly reduce the fund to be distributed, will affect the relative [632] proportions which the heirs will receive." To the same effect see Offutt v. Offutt, 42 Ky. (3 B. Mon.) 162, 38 Am. Dec. 183; Skeggs v. Horton, 82 Ala. 352, 2 South. 110; Woodward v. Goulstone, L. R. 11 App. Div. 476; Jackson v. Jackson, 4 Mo. 210; Dickey v. Malechi, 6 Mo. 177, 34 Am. Dec. 130; Burge v. Hamilton, 72 Ga. 568. It is also held that where the only part of a lost will that can be proven is a clause revoking a former will, such clause may be given effect for the purpose of showing a revocation: Wallis v. Wallis, 114 Mass. 510; Nelson v. McGiffert, 3 Barb. Ch. 158, 49 Am. Dec. 170; Stevens v. Hope, 52 Mich. 65, 17 N. W. 698; In re Cunningham, 38 Minn. 169, 8 Am. St. Rep. 650, 36 N. W. 269; Barksdale v. Hopkins, 23 Ga. 332; Laughton v. Atkins, 18 Mass. (1 Pick.) 535. Underhill sums up the authorities thus: "Any substantial provision of a lost will, which is complete in itself and independent of the others, may, when proved, be admitted to probate, though the other provisions cannot be proved, if the validity and operation of the part which is proved are not affected by those parts which cannot be proved. This view seems to be consistent with reason and common sense": 1 Underhill on Wills, sec. 278. See, also, Thornton on Lost Wills, sec. 111.

This rule is, of course, subject to the statutory provisions of the several states. Our statute on the subject declares that no will shall be proven as a lost or destroyed will, unless "its provisions are clearly and distinctly proved by at least two credible witnesses": Code Civ. Proc., sec. 1339. This does not say that a part which is distinctly proven cannot be given effect, if some other part, not affecting it in any particular, cannot be satisfactorily established. It would be a rare case in which two witnesses testifying from memory to the contents of a will would agree about every detail as to the testamentary dispositions. If it were required that their testimony should coincide in every particular, however minute and unimportant, in order to establish a lost will, the possi-

bility of proving such will would be extremely remote, except where a copy in writing had been preserved and could be produced. If that were the case, the practical effect of our statute would be the same as in those states where the production of a written copy or draft of the lost will is required. We cannot agree to the proposition that the legislature could have [633] intended such inconsequential results from this statute as would ensue if it were given the construction contended for. We think it was not intended to change the rule above stated.

In the present case, upon the proof made, the bulk of the estate is composed of the land given to the Patterson children as devisees. As to this disposition of the real property there is no discrepancy and the provisions of the will are clearly and distinctly proven. With regard to the personal property, the question whether the money was given as part of the residue and as such charged by statute with the debts and specific legacies, or whether it was given as a specific legacy charged by the will with those burdens, while more a matter of form than substance, is nevertheless a question which materially affects the disposition of the personal estate. It is obvious that, in view of the decision of the court below, we must hold that the part of the will disposing of the personal estate was not clearly or distinctly proven by two witnesses, and it must be declared ineffective as to that property, except with respect to the legacy to Joseph P. McQuaid. Proof of that legacy was clear and distinct, and the testimony of the two witnesses regarding it was the same. Under the rule we have stated the proof was sufficient to authorize the admission to probate of that part of the will devising the real estate and bequeathing the two hundred and fifty dollars to McQuaid. The consequence is that as to the other personal property Catherine Patterson would be declared to have died intestate. The property undisposed of would be first liable for the debts, expenses of administration, and the McQuaid legacy, the residue, if any, going to the brother and sister as the heirs at law, while the real estate will go intact to the devisees, except in the event that some part of it is required for the payment of debts and expenses of administration.

2. The second question arising and presented is whether or not the amended section 1339 of the Code of Civil Procedure applies to this will. At the time of the death of the testatrix that section read as follows: "No will shall be proved as a lost or destroyed will, unless the same is proved

to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses."

634 On March 6, 1907, after the filing of the written grounds of opposition to the probate of the will, and more than a year prior to the conclusion of the trial of the matter, the section was amended so as to read as follows: "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently or by public calamity destroyed in the lifetime of the testator, without his knowledge, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses": Stats. 1907, p. 122.

The will was not in existence when the testatrix died and it was not fraudulently destroyed in her lifetime. Consequently, it could not be proven as a destroyed will, except by virtue of the amendment of 1907 aforesaid. If that amendment applies to wills of persons who died before it was enacted, it would permit the probate of the will in question. The evidence shows that the will was destroyed by public calamity in her lifetime, without her knowledge, but the court below deemed the fact immaterial and made no finding to that effect, it being of the opinion that the amendment of 1907 did not apply.

The contention of the contestants is that under the law as it existed at her death the will was not merely incapable of proof because of lack of evidence, but that it was absolutely void and constructively nonexistent, that, consequently, the deceased died intestate, that the estate immediately thereupon vested in the heirs, and that the legislature could not, by a subsequent law enlarging the classes of destroyed wills admissible to probate, take that estate from them.

There can be no doubt of the rule that if the estate once vested in the heirs the legislature had no power thereafter by a subsequent law to devest it. And it is a well-settled proposition that where some essential ceremony in the matter of executing a will has been neglected, so that the will is not lawfully executed, and such essential requisite has been dispensed with by a law enacted after the death of the person attempting to make such will, the law cannot be applied thereto, and the person must be held to have died intestate: McCarty v.

Hoffman, 23 Pa. 507; Walter's Appeal, 67 Pa. 341, 5 Am. Rep. 433; Giddings v. Turgeon, 58 Vt. 106, 4 Atl. [635] 711. These cases rest upon the general rule that a will not executed in the prescribed manner is no will, and has no potential existence. One who dies leaving such a testamentary paper only, dies intestate, and his property at once vests in his heirs: Estate of McCabe, 68 Cal. 519, 9 Pac. 554; Civ. Code, sec. 1384. The opinions in the cases above cited do not especially emphasize this proposition, but they are all manifestly based upon it as a postulate.

This rule does not apply to the present case. The will of Catherine Patterson was executed with all the formalities which the code requires. From the time of its execution, in December, 1904, until its destruction in April, 1906, it was in all respects a valid will, having a potential existence as such, and subject to be defeated only by the act of the testatrix wholly or partially revoking or altering it. After its destruction without her knowledge, and until she became aware thereof, we must assume that she still believed it had such existence and that it would become effectual upon her death. She died in that belief. The essential question involved is, Had this will, after its destruction, a potential existence, subject to defeat only by reason of the impossibility of proof under the law then existing, or did such destruction make it absolutely void in the sense that it was thereafter no will at all?

Our statute nowhere declares that such destruction during the lifetime of the testator destroys the status of a will as an executed instrument. The Civil Code provides that any person over the age of eighteen years and of sound mind may dispose of all his estate by will, and directs the manner in which wills may be executed and revoked: Civ. Code, secs. 1270, 1276, 1277, 1289, 1292, 1304. The sections concerning the revocation of wills are elaborate and specific. It is expressly declared that a revocation can be made only in the manner and by the means prescribed in that chapter: Civ. Code, sec. 1292. Destruction, without intention to revoke, or by accident, is not a prescribed method of revocation. Under the code, therefore, such destruction does not operate to revoke a will. These provisions plainly imply that a will, once duly executed, has a recognized legal existence during the lifetime of the testator, if not revoked; that it merely remains in abeyance until his death, and then becomes an effective instrument.

[636] This is in accordance with the rule at common law. "A will is regarded by the courts of England and the United States as a conveyance, and takes effect as a deed, upon proof of its execution, unless there is some statute requiring it to be probated": Castro v. Castro, 6 Cal. 158; Grimes' Estate v. Norris, 6 Cal. 621, 65 Am. Dec. 545; Tevis v. Pitcher, 10 Cal. 465; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Adams v. Norris, 23 How. (U. S.) 353, 16 L. ed. 539. In the case above cited it was held that wills made by persons who died prior to the passage of the first probate act of this state were not required to be probated, and that they could be proven in the same manner as a deed or other instrument in writing, either by the production of the original, or, after proof of loss, by secondary evidence of its contents.

It has been held by this court that a will cannot be given in evidence as the foundation of a right or title, unless it has been duly probated: McDaniel v. Pattison, 98 Cal. 86, 32 Pac. 805; Castro v. Richardson, 18 Cal. 478. The amendment of 1895 (Stats. 1895, p. 72), to section 738 of the Code of Civil Procedure, makes an exception to this rule in suits brought under that section. Under our system, the probate of the will is made a condition precedent to the introduction of evidence of its contents, in the subsequent settlement and distribution of the estate, and in any collateral matter, except in the cases provided in the amendment aforesaid to section 738. But although the probate of a will is generally necessary to its introduction in evidence, such will is not brought into legal existence by the judgment admitting it to probate. Such probate merely declares in a formal way the existence of facts which have previously occurred and furnishes official evidence of those facts. In speaking of the title of the executor, under the common law, to the personal estate of the testator, Mr. Williams says: "The probate is, however, merely operative as the authenticated evidence, and not at all as the foundation, of the executor's title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death": 1 Williams' Executors, 7th Am. ed., 354, p. *243. A devise of lands at common law was considered "not so much in the nature of a testament, as a conveyance by way of appointment of particular lands to a particular devisee": 1 Williams' Executors, [637] 7th Am. ed., 4. Under our code the devisees and legatees take at the moment of the testator's death, and their title comes from the will itself and not from the pro-

bate thereof. The probate procedure was established to furnish an exclusive mode for the settlement of all disputes concerning the executions of wills, and to provide conclusive evidence of their contents. It is remedial in its nature. It relates to the remedy, and is not the foundation of the rights of those claiming under the will. "Whatever belongs to the remedy may be altered according to the will of the state": Cooley's Constitutional Limitations, pp. 406, 409, 515.

The testatrix, Mrs. Patterson, had exercised her testamentary power by a duly executed will, which would take effect upon her death, but which could not be admitted in evidence against the heirs until after it was probated. In her lifetime, but without her knowledge, it was destroyed in a public calamity. Because of its destruction in her lifetime the probate court, under the law as it existed at her death, could not allow it to be probated, because there could be no legal proof of it. After her death the legislature removed this impediment by making wills destroyed in a public calamity provable. The heirs had no vested right to have this law forbidding the probate of such wills continued in force. Their right to the estate of the ancestor was given by statute, and it was contingent upon the fact of there being no will in existence which could be proved. If a will had been duly executed and had not been destroyed, but was filed for probate, and could not be probated because of lack of proof of its execution, the heirs would take the estate and it would be deemed to vest in them at the death of the testatrix, although the right thereto could not be positively known until it was demonstrated by the failure of proof upon the trial of the petition for probate. The statute provides what evidence may be taken in proof of a will upon such a proceeding. Can there be a doubt that if a law were passed after the death of a testator, allowing evidence of execution previously forbidden as hearsay, such proof could not be accepted and the will established, although, but for that evidence, the will would be defeated and the estate would go to the heirs? Or, in the case of a lost will, would it be questioned that a law making one witness sufficient would not apply to wills of persons who [638] had died prior to the passage of such law? The legislature has full power to alter the rules of evidence and the degree of proof and make such rules applicable to pending cases: Cooley's Constitutional Limitations, p. 409. It was competent, therefore, for the legislature to dispense with the requirement that proof should be made that the will was in existence at the death of the testatrix.

It is a mistake to characterize the amendment of section 1339 as a retrospective law. It relates wholly to what shall be done upon the trial of the application for probate, the proof that must be furnished and the facts which must be established. It applies only to trials which take place after its enactment. It can have no effect whatever upon previous trials or judgments. It is prospective only in its nature. It is remedial in its nature and is designed to preserve the testamentary right. The public calamity referred to in the amendment is doubtless the great fire of San Francisco in which this will was burned, a calamity which has caused much legislation intended to alleviate its effect and preserve rights that would otherwise be lost for want of evidence. Such laws should be given a liberal construction to promote the purposes for which they are designed. We are of the opinion that section 1339 should apply to all cases subsequently tried, regardless of the time of the testator's death.

The order denying probate of the will is reversed.

Angellotti, J., and Sloss, J., concurred.

Hearing in bank denied.

The Probate of Lost or Destroyed Wills is the subject of a note to Williams v. Miles, 110 Am. St. Rep. 445. Secondary evidence is admissible to show the contents of a lost will, but the burden is upon the proponent to clearly establish its execution. When it is shown, in a proceeding to probate a will alleged to have been lost, that the will was duly executed, the presumption is strong in favor of its existence, and its revocation must be clearly proved: In re Miller's Will, 49 Or. 452, 124 Am. St. Rep. 1051.

CRIM v. UMBSEN.

[155 Cal. 697, 103 Pac. 178.]

VENDOR AND PURCHASER—Destruction of Records—Rescission Because of.—Where a contract for the sale of land was made shortly before the great fire of San Francisco, the 18th of April, 1906, which destroyed all the records of the land except the general index, and in consequence the vendor was unable to show within the time limited in the contract a record title of his ownership of such land or a title fairly deducible from the entire record, the purchaser was entitled to rescind the contract and recover the money paid on account thereof. (pp. 130, 132.)

VENDOR AND PURCHASER—Title of Vendor—Destruction of Records—Patchwork Title—Right of Purchaser to Reject.—Where the records relating to a lot of land were destroyed in the great fire of San Francisco, the 18th of April, 1906, and a contract dated prior

thereto for the sale of the land called for a good title, which the vendor was unable, by reason of the fire, to furnish, the vendor's recording a deed to himself within the time limited and his attempted completion of the chain of title, by recording other deeds and certified copies, do not establish the title to which the vendor has a right under the contract—a title free from possible defect or encumbrance, fairly deducible of record—and such vendor cannot enforce the contract. (pp. 130–133.)

VENDOR AND PURCHASER—Title of Vendor.—The record from which title should be fairly deducible is the entire record, which alone determines whether or not the chain of title is sufficient; and, if this setting—the entire record—has been destroyed, there can be no title furnished by the vendor in accordance with the terms of a contract of sale calling for a good title, and in default, the repayment of the deposit. (p. 130.)

VENDOR AND PURCHASER—Title—Implied Condition in Contract.—In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unencumbered with defect. (p. 131.)

VENDOR AND PURCHASER—Title of Vendor—Destruction of Records.—Where records have been destroyed and only the general index preserved, the position of a vendor who has contracted to prove a good title is not helped by it; such index, containing the mere mention of persons and instruments, only serving its original purpose of giving clues to the documents and no information as to the substantial part of their contents. (p. 131.)

VENDOR AND PURCHASER—Records—Destruction by Great Fire—Effect—McEnerney Act.—The destruction of the records in San Francisco on the 18th of April, 1906, made all titles for the time practically unmerchantable. The McEnerney Act was passed for the removal of this objection to the titles by enabling owners to secure a decree which shall furnish a publicly authenticated evidence of title. (p. 132.)

VENDOR AND PURCHASER—Contract—Rescission.—The motive for the rescission of a contract is immaterial if there has been a breach entitling the one who rescinds to do so. (p. 132.)

Edward C. Harrison and Cushing, Grant & Cushing, for the appellants.

Bishop & Hoefler and Cook & Harwood, for the respondent.

[698] MELVIN, J. This case furnishes one of the peculiar problems growing out of the great conflagration of April 18, 1906. On April 10th of that year plaintiffs (who are appellants [699] here) entered into a written contract with defendant and respondent, for the sale to the latter of a tract of land in the city and county of San Francisco, for the sum of one hundred and fifty thousand dollars, of which amount fifteen thousand dollars were paid at that time, the receipt thereof being evidenced by the contract. By the terms of this agreement thirty days were allowed the defendant for examination of the title. At the expiration of this period

the balance of the purchase price was to be due and payable upon tender by appellants of a good and sufficient deed. If the title proved to be defective, thirty additional days were allowed the sellers to perfect it, and if, at the expiration of that term, the title should be incurably defective, then the deposit was to be returned. The contract also provided that if the buyer should fail to consummate the purchase in accordance with the conditions of the instrument, the deposit was to be forfeited.

At the time of the execution of the contract the vendors placed in the hands of the purchaser an abstract of title. This was destroyed in the great fire of the following week and at the same time the greater part of the records of the county recorder's office, as well as most of the other public and official records of San Francisco were burned. The general index in the county recorder's office was saved, however. This showed the date and character of, and the names of, the parties to all instruments that had been recorded there. Prior to the ninth day of May, 1906, the time for the examination of title was extended for a further period of thirty days by written memorandum subscribed by the vendors, and on June 7, 1906, defendant gave a written notice to plaintiffs alleging that their title was defective. The specification was as follows: "That there is no record whatever showing that you, or either of you, or any other person or persons, are the owners, or have any interest in said property, or any part thereof."

It is conceded that prior to June 11, 1906, there was no record title showing that the plaintiffs, or either of them, had any ownership of, or interest in, the property described in the contract. But on the last-mentioned date they placed of record in the county recorder's office of San Francisco a deed, purporting to convey the title of said property to themselves from certain grantors in whom the fee would rest according to the chain of title which they afterward established of record. [700] On July 6, 1906, appellants recorded certain conveyances and other instruments, some of which were originals and others certified copies. By these documents, originals of which had been of record prior to the fire, a chain of title was established, beginning with the patent issued by the government of the United States. Immediately after the recordation of these instruments plaintiffs exhibited to defendant the recorder's receipt therefor, and at the same time tendered him their deed of conveyance of the property, accompanied by a release of a certain lien of the Bank of Cali-

fornia. Defendant refused to accept the proffered deed or to pay the balance of the purchase price, and on July 30, 1906, gave a written notice of rescission of the contract.

Thereafter this action was brought. In the complaint the facts above set forth were alleged and damages demanded in the sum of thirty-four thousand nine hundred and fifteen dollars for breach of contract. Defendant answered, denying plaintiff's allegations of good title, and he also filed a cross-complaint setting up affirmatively a want of record title in plaintiffs, stating that his sole purpose in entering into the contract of purchase was that he might obtain a tract of land which, in the course of his business as a dealer in real estate, he might sell at a profit, either as a whole or in subdivisions, as speedily as possible; averring that for this purpose it was necessary that he should obtain a good marketable title, fairly deducible from the record; alleging the rescission of the contract; and praying for return of the fifteen thousand dollars paid as a deposit on the purchase price of the land. Judgment was given for defendant on the main case and for the return of the deposit according to the prayer of the cross-complaint. This appeal is from the judgment and from the order of the superior court denying the motion of plaintiffs for a new trial.

Respondent's theory, which the court below adopted, was that the chain of title offered by appellants is not the record contemplated by the terms of the contract; but that the record from which title should be fairly deducible is the entire record of the city and county; that this setting (the entire record) alone determines whether or not the "chain" is sufficient; and that the setting having been destroyed, there could be no title furnished by appellants in accordance with the terms of their contract of sale.

[701] Appellants concede that the vendee should have a title "fairly deducible of record," but contend that, having furnished a chain of title leading from a recognized source, the government of the United States, they have fulfilled their part of the agreement, and that the burden is upon the vendee to point out defects in the title. They further assert that the preservation of the general index in the recorder's office furnishes the vendee with sufficient means of determining whether or not there is any outstanding title in opposition to their proffered chain of title, or any cloud upon it. In support of their first contention they cite Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280. In the case at bar, however, the vendee did point out a defect

in their title which was admittedly good when made, as at that time they had no deed of record conveying or purporting to convey the title to them. They sought to remedy this defect, and doubtless did everything in their power to offer a perfect title; but if their theory be correct, the burden of proof would have been as effectually shifted to the vendee if they had met his objection to the sufficiency of their title by merely filing a quitclaim deed from someone, releasing to them that person's interest in the property. This cannot be the correct rule of law, because "in every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unencumbered with defect": See Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280, and cases cited.

In relation to the preservation of the general index, it may be said that the mere mention (if any were therein contained) of persons and instruments having relation to the land here in litigation would furnish the intending purchaser with nothing more than clues to the documents, without apprising him of any substantial part of their contents. Such data as the index contained might constitute constructive notice of the existence of the recorded instruments relating to this property, but would not have any higher function.

That the destruction of the records in San Francisco by the great fire of April, 1906, made all titles for the time practically unmerchantable, cannot be doubted. The very purpose of the McEnerney act was the removal of this objection to titles in that city and county. In commenting upon that statute this [702] court has used the following language: "The general purpose of the statute is plain. It was intended to provide a method whereby owners in possession of real estate in counties where the records are destroyed to such an extent as to make it impossible to trace a record title may secure a decree which shall furnish a publicly authenticated evidence of title. It is hardly necessary to point out that under the system of registration of land titles which has grown up in all of the states of this Union it is practically essential to the security of ownership in real property that there exist some method by which the title can be made clear of record. Without regard to the effect of duly recorded instruments as constructive notice (whether or not the record remains in actual existence), the registration of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and

established by some form of public record is practically unmerchantable. It is also matter of common knowledge that in the city and county of San Francisco at least, if not in other counties, the disaster of April last worked so great a destruction of the public records as to make it impossible to trace any title with completeness or certainty. That some provision was necessary to enable the holders of real estate in this city to secure to themselves such evidence of title as would enable them not only to defend their possession, but to enjoy and exercise the equally important right of disposition, is clear": Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199, 88 Pac. 356, 8 L. R. A., N. S., 682.

We cannot consider the motives which prompted respondent to rescind the contract of sale. It was his right under that instrument to receive a perfect title of record at the time or within the time specified in the agreement. This the plaintiffs could not give him. He was entitled to rest upon the provisions of the contract, whether or not his real purpose was to avoid taking and paying for a tract of land that had depreciated in value. In determining his rights we must only consider the title as it existed at the time fixed for the performance of the contract and the delivery of the conveyance: Reynolds v. Borel, 86 Cal. 538, 25 Pac. 67; Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; Wilcox v. Lattin, 93 Cal. 588, 29 Pac. 226; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Calhoon v. Belden, 3 Bush (66 Ky.), 674. In [703] Calhoon v. Belden, the court considered a problem somewhat like that presented to us. The litigants had entered into an executory contract for the exchange of houses. Each had delivered possession to the other and their agreement provided for conveyances of titles at a day certain. Before that date one of the houses burned, and subsequently the courthouse was destroyed by fire. The entire record of Calhoon's title was burned. Calhoon brought suit for specific performance, and Belden answering denied the sufficiency of the plaintiff's title and prayed for a rescission of their agreement. Belden was successful in the lower court, and the decree refusing to enforce specific performance and rescinding the contract according to Belden's prayer was sustained on appeal. The following significant language is used by the court: "If, in fact, Calhoon's title be perfect, Belden is not bound to accept his conveyance without such proof of it as will arm him with the recorded means of vindicating its validity in after times, and there is

no such proof, or even allegations, in this case. He cannot, therefore, be entitled to a specific execution of the contract, but is equitably bound to take back the damaged lot and restore to Belden that which was exchanged for it. As the contract implied that perfect titles were to be interchanged and guaranteed, a rescission is the inevitable consequence in equity": See, also, Hooe v. O'Callaghan, 10 Cal. App. 567, 103 Pac. 175; Cabrera v. Payne, 10 Cal. App. 675, 103 Pac. 176.

In view of the conclusion which we have reached, it is unnecessary to examine respondent's assertion that the appellant's chain of title is deficient in itself. As plaintiffs were not able to furnish to defendant, according to the terms of the agreement, a title "fairly deducible of record," because there was no complete record from which he could determine the nature and defensibility of the offered title, it follows that the judgment of the superior court denying plaintiffs' prayer and decreeing restoration of the deposit to defendant must be sustained, and it is so ordered. The order denying the motion for a new trial is also sustained.

Lorigan, J., and Henshaw, J., concurred.

Hearing in bank denied.

The Principal Case is Cited in the note to Cummings v. Dolan (Wash.), post, p. 991, on what are marketable titles.

CASES

IN THE

SUPREME COURT

OF

COLORADO.

CHAPPELL v. JOHN.

[45 Colo. 45, 99 Pac. 44.]

SURETYSHIP—Liability of Cosurety for Contribution.—To relieve a surety on a note from liability to contribution to his cosurety, there must be a contract, express or implied, to that effect; no immunity arises simply because the cosurety requested him to sign, or assured him that he would not be subjected to loss. (pp. 136, 137.)

EVIDENCE—Res Gestae.—The Declarations of a Grantor made ten days after he executed the deed are not so connected with the transaction as to be considered a part of the res gestae. (p. 137.)

EVIDENCE.—Statements Made in Affidavits and Depositions are not admissible in other proceedings against persons who did not make them. (p. 137.)

SURETYSHIP—Right of Cosurety to Share in Indemnity.—If a surety, prior to his contract of suretyship, has taken a deed of trust from his principal to secure a debt, and subsequently, to indemnify himself as surety, he takes a second deed of trust which covers the same and other land, his cosurety is entitled to the benefit of the indemnity only to the extent of one-half the value of the property not covered by the first deed, the proceeds from the sale of all the property being less than the debt secured by the first deed. (pp. 138, 139.)

Yeaman & Gove, for the plaintiff in error.

Hollenbeck & Bates, for the defendant in error.

[46] STEELE, C. J. The plaintiff and the defendant were sureties upon the promissory note of W. A. Burnett for the sum of ten thousand dollars, dated November 12, 1888. During the year 1890, default having been made by the principal, the defendant paid one-half of the amount due upon the note. Afterward the note was transferred to one McKeough, who obtained judgment against the plaintiff. The plaintiff paid the judgment, amounting to the sum of $9,076.36, and

in July of 1900 brought this action against the defendant (defendant in error here) to recover the amount so paid in satisfaction of the judgment.

The amended complaint contains four causes of action. In the first two the plaintiff asks judgment [47] against the defendant upon the ground, as alleged in the first cause of action, that after the note was executed and the defendant had signed his name as surety, he requested the plaintiff to sign the note, and that the plaintiff did sign the note at the request of the defendant, and not otherwise; and in the second count, as an additional ground, that at the time the plaintiff signed the note at the request of the defendant, the defendant assured him, the plaintiff, "that he would not, and should not, be subjected to any loss by reason of his signing said note."

A demurrer was sustained to the first two causes of action, and the case was tried upon the third and fourth causes of action.

The averments of the third and fourth causes of action are, in substance, that the money received from the note of ten thousand dollars was used by Burnett in reducing his indebtedness to one F. D. Wight, which indebtedness was secured by first mortgage on certain cattle and lands, and that the defendant held a second mortgage on the same property; and that the defendant had received from Burnett certain land in Colorado and New Mexico as an indemnity for the signing of the note as surety, and that the lands so conveyed have been sold, but the amount received from the sale thereof has not been accounted for.

The jury returned a verdict for the plaintiff in the sum of five hundred and ninety-three dollars and sixty cents. The plaintiff took the case by writ of error to the court of appeals.

The plaintiff assigns as error the sustaining of the demurrer to the first and second causes of action, and he claims that as he signed the note solely because he was requested to do so by the defendant, he is entitled to recover from the defendant any amount he may have been required to pay by reason of his suretyship.

[48] The principle on which one surety is regarded as liable as a principal to another surety is that a state of facts is shown to the court from which it appears positively or by fair inference that such surety intended to stand in the character of principal to the subsequent signers: Cutter v. Emery, 37 N. H. 567.

The cases are reviewed in Bagott v. Mullen, 32 Ind. 332, 2 Am. Rep. 351, and the court finds that in the cases considered there was something more than the mere request of one surety to another to execute the note or paper as security. There was either a promise, written or verbal, to indemnify, or a taking of security from the principal, and from either of these circumstances the courts hold such surety released from contribution.

In the case of McKee v. Campbell, 27 Mich. 497, the court has this to say: "The law implies from all joint obligations a prima facie liability to contribution, which may be overcome by showing that one is bound to protect the other. This may be either because he is a principal debtor on his own account, or because he has undertaken to save the other harmless. But the mere request to another to join him as cosurety would, upon all ordinary rules of construction, mean that he was to enter upon the same responsibilities and become bound on equal terms. Such we conceive to be the doctrine of the authorities, in spite of some careless expressions which do not, we think, fairly interpret the doctrine applied. We find in several cases, not only discussion, but conflicting decisions, upon the question whether a positive agreement for such a modified liability could be created by parol—which would have been an idle inquiry if a mere signing by request would operate as a claim to indemnification. The authorities which contain actual decisions upon the point before us [49] indicate that the change of responsibility must be founded on a plain understanding to that effect."

The decisive weight of authority is, that to relieve a party from liability to contribution there must be a contract expressed or implied for such immunity: Burnett v. Millsaps, 59 Miss. 333.

In the case of Bishop v. Smith, decided by the supreme court of New Jersey in 1904, and reported at page 874, volume 57, of the Atlantic Reporter, the court, speaking of the doctrine that he who becomes surety at the request of one who is already surety upon the same obligation or note is exonerated from any liability to the first surety because of such request, says: "But I think the doctrine contended for is not sound. The later and better doctrine is that 'the mere fact that the defendant became surety at the plaintiff's request is not sufficient to release him from liability, though such a request is a good consideration for a promise of indemnity.'"

Upon the authority of these cases the court properly sustained the demurrer to the first cause of action.

The second cause of action states that the plaintiff was "assured" by the defendant at the time he was requested to sign the note that "this plaintiff would not, and should not, be subjected to any loss by reason of signing the said note." But we cannot regard this as stating a contract of indemnity. It is nothing more than the expression of an opinion by the defendant that the sureties would not be called upon to pay the note. The demurrer to the second cause of action was properly sustained.

The plaintiff, when called as a witness, was asked to relate a conversation between the plaintiff and Burnett, the maker of the note. Objection to the question was sustained. Plaintiff then offered the [50] affidavit of Burnett, in which Burnett sets forth the history of the transaction concerning the note and the agreement and understanding with the defendant at the time when certain property in Trinidad was conveyed by Burnett to the defendant. The court, upon objection, refused to receive the affidavit. The plaintiff was then asked to relate a conversation between him and Mrs. Burnett, the wife of the maker of the note, concerning the property conveyed by her to her husband and by her husband to one S. J. Alexander as trustee. Upon objection this testimony was excluded. The plaintiff then offered in evidence a portion of the deposition of Mrs. Burnett, taken in the matter of the estate of her husband upon a claim presented by her against the estate. The offer was rejected. Four of the plaintiff's assignments of error are based upon the court's refusal to receive the foregoing offers. It is claimed that the declarations of Burnett were admissible as part of the res gestae, but we think the declarations made by Burnett ten days after he executed the deed cannot be regarded as so connected with the transaction as to entitle them to be received; and no error was committed by the court in rejecting them. We know of no rule of evidence that authorizes the admission of the affidavit of Burnett or of the deposition of Mrs. Burnett as evidence in this cause. Counsel have called our attention to no such rule, and while the statements made in affidavits and as witnesses in other proceedings are sometimes admissible as against the persons making them, they were, we think, inadmissible against the defendant in this proceeding. It is said that as a common purpose to defraud was shown, the admissions of Burnett and his wife were admissible as against the grantee, John,

and that as Burnett and his wife continued in the possession of the property inconsistently with the [51] deeds, their subsequent declarations are competent. There was no common purpose to defraud shown, nor were Burnett and his wife holding possession of the property they had conveyed inconsistently with their deed. They were not claiming to own the property after they had conveyed. The testimony shows that after they had conveyed it they paid rent to the grantee for its use. The rule invoked by the plaintiff that the declaration of one in collusion with another to defraud is binding on all the parties to the collusive agreement has no application to the case at bar. The plaintiff has not shown a collusive agreement. On the contrary, his contention is, as shown by the offer of proof, that there was no collusion; that by the terms of the agreement between John and Burnett the property was conveyed to John as indemnity for the note in question, and that Burnett had stated to John, "That unless Mr. Chappell was to share in the indemnity, that he would tear up the papers and throw them in the fire."

We find no error in the refusal to admit the testimony offered by the plaintiff.

The fourth cause of action is based upon the liability of the defendant to account to the plaintiff for the value of certain lands in the territory of New Mexico on which the defendant held a second deed of trust, given to indemnify him from loss by reason of his becoming surety with Chappell on the note. After the signing of the note by John and Chappell, Burnett executed a deed of trust to secure John from loss by reason of his suretyship. John had taken a deed of trust on a large tract of land owned by Burnett to secure the payment of about eight thousand dollars. The deed of trust given by Burnett to indemnify John from loss as surety was subsequent to the deed of trust given to secure the eight thousand dollars, but it did include about two hundred and [52] eighty acres of grazing land not included in the prior deed of trust. At the foreclosure of the second deed of trust John bought the property for a nominal consideration, and subsequently he sold it for the sum of two thousand three hundred dollars. John admitted that he should account to Chappell for one-half the value of the land conveyed by the deed of trust to indemnify him as surety and not included in the prior deed of trust, and the jury was instructed to render a verdict in favor of Chappell for one-half the value of such land, and interest. The plaintiff requested an instruction, the substance of which is that

the jury should render a verdict in plaintiff's favor for one-half the sum of two thousand three hundred dollars, being the amount John had received from the sale of all the lands mentioned. This request was properly refused. The testimony clearly shows that the defendant sold the land for very much less than the amount secured by his first deed of trust, and as the plaintiff was only entitled to indemnity after the satisfaction of the first deed of trust, and for one-half of the value of the land included in the second and not in the first deed of trust, the plaintiff was not entitled to have the instruction requested given.

Other instructions offered by plaintiff and refused were fairly included in the instructions given.

The plaintiff was entitled to recover judgment for one-half the reasonable value of the land not included in the first deed of trust bought by the defendant at the foreclosure sale. The judgment for five hundred and ninety-three dollars and sixty cents in favor of the plaintiff is the amount the jury fixed as one-half the value of this land.

We find no error prejudicial to the plaintiff in the record, and the judgment is affirmed.

Mr. Justice Gabbert and Mr. Justice Helm concur.

The Subject of Contribution as Between Cosureties will be found discussed in the notes to Gross v. Davis, 10 Am. St. Rep. 639; Culliford v. Walser, 70 Am. St. Rep. 443. As a general rule a surety who has been compelled to pay the debt may enforce contribution from his cosurety: Sanders v. Herndon, 122 Ky. 760, 121 Am. St. Rep. 493; Fanning v. Murphy, 126 Wis. 538, 110 Am. St. Rep. 946; Carter v. Fidelity etc. Co. of Maryland, 134 Ala. 369, 92 Am. St. Rep. 41; Connolly v. Dolan, 22 R. I. 60, 84 Am. St. Rep. 816; Williams v. Riehl, 127 Cal. 365, 78 Am. St. Rep. 60. A person who is about to become a surety with others may stipulate with the principal, without the knowledge of other sureties, for a separate indemnity for his benefit alone. But if one surety, after becoming such, obtains from the principal a separate indemnity, it inures to the benefit of all: Commrs. of McDowell County v. Nichols, 131 N. C. 501, 92 Am. St. Rep. 785.

The Right of Subrogation is the subject of a note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 474.

MANITOU AND PIKE'S PEAK RAILWAY COMPANY v. HARRIS.

[45 Colo. 185, 101 Pac. 61.]

HOMESTEAD IN PUBLIC LAND—Action by Entryman for Trespass.—When a patent is issued to a homestead claimant his title relates to the date of the homestead entry, and he has an action of trespass for intermediate injuries done the property. (p. 141.)

DAMAGES—Measure of for Destruction of Trees by Fire.—A land owner whose trees have been killed by fire is not necessarily limited in his recovery to their value for lumber or other such uses; hence evidence is not admissible to show that the trees not consumed were as valuable for the purposes of timber immediately after the fire as they were before. (pp. 141, 142.)

Lunt, Brooks & Willcox, for the appellant.

J. F. Sanford, for the appellee.

186 STEELE, C. J. The plaintiff, alleging that she was the owner and in possession of certain land in El Paso county, and that sparks from one of the defendant's locomotives started a fire on defendant's right of way which spread to her land, and consumed, burned, killed and destroyed a large amount of timber growing on said land, claimed damages in her complaint in the sum of five hundred dollars. The trial resulted in a verdict and judgment against the defendant in the sum of one hundred and fifty dollars, from which judgment an appeal was taken to the court of appeals.

The assignments mainly relied on are:

1. That no title was shown in plaintiff at the time of the fire.

2. The plaintiff proved no title at the date of the fire to the land burned over, entitling her to recover damages for the destruction of any timber thereon.

3. That the court erred in refusing to allow the defendant to show that the trees killed, but not consumed by fire, were as valuable for the purposes of timber, and for any purpose for which they might have been cut and removed from the land, immediately after the fire as they were before.

4. That the court erred in refusing to instruct the jury that they should determine the value of the timber just before the fire, and the value, if any, just after the fire, and that the difference would be the amount of their verdict.

5. That the court erred in refusing to instruct the jury that at the time of the fire the plaintiff had not purchased the property from the government of the United States;

that the only damages she could recover were the damages to her possession.

[187] 6. That the court erred in not instructing the jury as to the measure of damages.

No assignment of error based upon the insufficiency of the evidence, or upon the ground of excessive damages, is presented in the brief.

The plaintiff offered in evidence a patent of the United States dated August 29, 1902, conveying to the plaintiff the land described in the complaint. It recites that the claim of Lisle Harris to the land has been established and duly consummated, in conformity with the "Act to secure homesteads to actual settlers on the public domain." The statute requires five years' residence upon the land to entitle settlers to patent. It therefore follows that during a period of five years before August, 1902, the plaintiff had a claim to the land under the land laws. She says she settled upon the land in 1896, and that she had resided there since that time. The fire occurred in 1899, and we are of opinion that the patent itself is sufficient proof that at the time of the fire she had duly entered the land as a homestead, and her statement that she entered it in 1896 is sufficient proof that she had been a settler upon the land since that time. The title related back to the date of the homestead entry, and she had her action of trespass for any injury done in the meantime: St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

No claim is made that the damages awarded are excessive. The plaintiff claimed no damages except for the trees consumed, burned, killed and destroyed, and the court limited the recovery to such damages. The defendant claimed that there was no value to the timber before the fire because of its inaccessible location, and the court, at the request of the defendant, confined the jury to a consideration of the value of the trees before the fire, and directed it to not consider the value, if any, at any other time or place, [188] or after the timber was cut, or in any other condition than as it stood before the fire. Whether this instruction is or is not correct, we do not determine, as it was given at the request of the defendant, and the plaintiff does not complain. We perceive no prejudicial error, therefore, in the refusal of the court to permit the defendant to show by plaintiff's witnesses that the trees killed, but not consumed, were as valuable for the purposes of timber, and for any purpose for which they might have been cut and removed from the land, immediately after the fire, as they were before. Counsel was not entitled

to have the question submitted to the jury. It does not follow that because trees are burned no other damage accrues to the owner of the land than that of the lumber value of the trees. If such were the rule, then no damage would accrue to the owner of land if his young trees were wantonly destroyed, or if trees that were not suitable for use as lumber were destroyed. But such cannot be the law. Trees have other value than that of their value as lumber, and we perceive no prejudicial error in the ruling of the court.

The judgment will be affirmed.

Mr. Justice Campbell and Mr. Justice Musser concur.

An Entryman Under the Federal Homestead Laws may bring an action for injury to his land, although he has not yet made final proof: Wendel v. Spokane County, 27 Wash. 121, 91 Am. St. Rep. 825; McLeod v. Spencer, 21 Okl. 165, 129 Am. St. Rep. 774. See, also, Thompson v. Basler, 148 Cal. 646, 113 Am. St. Rep. 321; Waisner v. Waisner, 15 Wyo. 420, 123 Am. St. Rep. 1081.

When a Patent Issues to One Who has Previously Made a Homestead Entry upon government land, it relates back, for all purposes, to the time of the original entry: Northern Pac. Ry. Co. v. Townsend, 84 Minn. 152, 87 Am. St. Rep. 342; note to Schneider v. Hutchinson, 76 Am. St. Rep. 480.

TOBLER v. NEVITT.

[45 Colo. 231, 100 Pac. 416.]

ATTORNEY—Implied Authority to Take Appeal.—An attorney employed only to try a litigated issue in a nisi prius court has no implied authority to prosecute an appeal or writ of error from an adverse decision and bind his client for the cost of a transcript to be used for that purpose. (p. 148.)

J. W. Davidson, for the plaintiff in error.

George T. Sumner and John H. Nevitt, for the defendants in error.

232 CAMPBELL, J. Emil Tobler and Frances Tobler were plaintiffs in an action which was tried in the district court Saguache county. Its object was to obtain an injunction against threatened acts of defendants therein. The judgment went against plaintiffs, and the action was dismissed. John Nevitt was the official stenographer of that court, and took notes of the proceedings at the trial. After the trial was finished and the case was submitted to, and

taken under advisement by, the court, the plaintiff says that Ira J. Bloomfield, who was one of the attorneys retained by the Toblers in, and who helped try, the action, ordered Nevitt to write out in long-hand a copy of the evidence, which he did. The defendants refusing to pay for the same, Nevitt brought this action against them and recovered judgment, from which they appealed.

There is a direct conflict between Nevitt and Bloomfield, the former asserting, the latter denying, the employment. As the law, applicable to the facts as testified to by plaintiff, is not what the court gave to the jury, we assume, for our present purpose, that his version of the controversy is correct. The plaintiff does not claim that the evidence was used in the trial of the case for the convenience of counsel, or for the benefit of the trial judge in making findings, or that it was ordered for either purpose; but he says that there was no restriction made by him as to the use defendants were to make of it, though he was not employed to write it out until after the trial was over and the court had taken the case under advisement. Bloomfield was not the general attorney [233] for the Toblers. He was retained by them for a special purpose, which was to conduct the trial in the district court to a final determination therein, and at its conclusion his fee was paid and his connection with the case ceased. He was not retained, or authorized, to appeal the case or sue out a writ of error to the final judgment in case it went against his clients, unless the special retainer above mentioned, in law, gave him such authority. While the plaintiff says that no restriction or limit was placed upon the use to be made of the transcript when prepared, he must have known, as the evidence conclusively shows, that it was not, and could not be, used by Bloomfield or his clients in the trial of the case, for that had theretofore terminated, and that it was not to be read by the judge preparatory to his findings, since plaintiff did not have it prepared until after the entry of judgment. At the time plaintiff says he was employed to transcribe the evidence, the cause had been, as we have seen, submitted to the trial court. In a letter written by him to Bloomfield several weeks later, and after entry of judgment against Bloomfield's clients, plaintiff referred to that judgment, and in that connection said, in substance, that he supposed an appeal would be taken and his transcript, though not then, soon would be, completed. This shows that plaintiff himself supposed that the transcript was to be used, if at all, by plaintiffs in connection with a review in the

supreme court, and not by the trial judge in reaching his conclusion. The case, then, is one where the action is against the client, and where an attorney, retained specially to try a litigated issue in the district court, and without special authority from his client, employs the official stenographer in advance of judgment, and before it can be known what that judgment will be, to write out, from his notes, the evidence [234] introduced at the trial for use on a review of the judgment in the supreme court. The court specifically instructed the jury that if Bloomfield was attorney for defendants in the case in the district court, and ordered plaintiff to write out the evidence produced in the trial of that case, or to make a transcript thereof, even though they should find that Bloomfield had no special authority from his clients to give the order, plaintiff was entitled to recover, unless he then knew of the termination of the relation of attorney and client. In this we think the court was wrong as applied to the facts of this case. At common law, the general rule is, that the authority of an attorney to represent his client in an action ceases upon its final determination and the entry of judgment. Especially was this true as to the defendant's attorney—or, more accurately speaking, the attorney for the defeated party. The attorney for the prevailing party was empowered, under his employment as attorney, to enforce collection of that judgment by suing out a writ of execution. A distinction is also made by some of the authorities between the power of an attorney who is retained to try a litigated issue and one employed to collect a debt. In the former case, his authority is usually regarded as ending with the trial of the case. In the latter he may, it seems, appeal from the judgment, if it is against his client, or sue out a writ of error to reverse it without a new retainer. If Bloomfield had ordered plaintiff to write out a transcript of the evidence for use in the trial of the case in the district court, or for the benefit of the judge as an aid to him in making findings, defendants would have been bound thereby. It does not follow, however, that Bloomfield, merely by virtue of his retainer to try the litigated issue in the district court, had authority to appeal, or bind his client by a [235] direction to the stenographer to transcribe the evidence for use in the reviewing court. The testimony is uncontradicted that Bloomfield was employed by defendants as one of several attorneys to try the litigated issues in, and his employment ceased when the case was submitted to, the district court. He was not specifically authorized by defendants to take any

steps looking to a review or reversal of such judgment as the court might thereafter pronounce against his clients. The plaintiff is a lawyer, as well as official stenographer of the court, and is presumed to know what authority an attorney possesses by virtue of his retainer to try a litigated issue.

A review of some of the leading authorities will show the extent and duration of the authority of an attorney. Plaintiff says that an attorney has implied power, without special authority, to bind his client by an order to an official stenographer to transcribe evidence to be used in the trial of his client's cause. Miller v. Palmer, 25 Ind. App. 357, 81 Am. St. Rep. 107, 58 N. E. 213, so holds. The decision was right in that case, for the evidence was ordered to be, and in fact was, used in the progress of trial of the cause in the trial court. Harry v. Hilton, 64 How. Pr. 199, is to the same effect. There also the evidence was transcribed for use at the trial. In Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72, Gray, Chief Justice, thus expressed the rule which has often been quoted with judicial approval: "An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action." The principle was applied to the case then before the court, and it was held that an attorney had power to release an attachment, at least before [236] judgment. In Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252, it was held that an attorney for a foreign client, or one residing at a distance, who was intrusted with the collection of a debt, had an implied authority to indemnify the officer in making a levy. In Jenney v. Delesdernier, 20 Me. 183, it was said that the attorney for plaintiff, without any special authority, may approve of the receipt taken by the sheriff for personal property attached by him, and thereby relieve the officer of his obligation to retain and produce the property. This, upon the principle that the attorney has the power to elect and control the remedy, and all proceedings arising out of, and connected with, it. Thornton v. Tuttle, 20 Abb. N. C. 308, ruled that the attorney could bind his client by the employment of a stenographer to take and write out the testimony of witnesses upon a reference of a special issue. In Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125, it was held that the retainer of an attorney to conduct an action confers upon him authority to stipulate with opposing counsel, after the rendition of judgment in favor of

his client and after the expiration of the term of court, but within the time for procuring of a writ of error, that the case shall abide the final decision of another action which involves the same question, and is conducted by the same attorneys. In that case, the court said that the stipulation was manifestly for the benefit of the clients, and was acted upon by the opposing party. The court said the case came within the exceptions to the general rule, and that, by virtue of his general retainer, an attorney for the prevailing party has the power to collect or enforce the judgment, to admit service of a citation issued upon a writ of error or appeal to review it, and authority to oppose any steps that may be taken within a reasonable time [237] by the defeated parties to reverse it. The court held that the action of the attorney in this case tended to an enforcement of the judgment which he had secured for his clients.

It will be observed that, in all of these cases relied upon by plaintiff, as deciding that an attorney has implied authority to bind his client, such acts related to the proceedings in the trial court and which tended to enforce the judgment therein rendered. In none of them is it held that an attorney, merely by virtue of his retainer to try a litigated issue, has power to take an appeal, or sue out a writ of error, to reverse a judgment and to bind his clients to pay for transcribing the evidence to be used upon such review. Two cases from Massachusetts, and possibly others may be found, are said to go to the full length claimed by plaintiff. In Grosvenor v. Danforth, 16 Mass. 74, it was held that an attorney of record in an action in which an erroneous judgment has been rendered against his client, may sue out a writ of error for its reversal without special authority. This apparently was based upon a previous decision of the same court in the case of Dearborn v. Dearborn, 15 Mass. 316. In that case the attorney was employed to undertake the collection of a debt. After obtaining his judgment he sued out process against the bail. It was claimed that that was a new suit and that he had no authority to bring it without a fresh direction from his client. It was held however that the scire facias against the bail is not to be considered a new suit. There are decisions to the contrary. The court, however, said further that, when an attorney undertakes to collect a debt, he is bound to sue out all process necessary to that object, and that the prosecuting of a scire facias is but a regular step in collection of the original demand. The Dearborn case seems not to go [238] to the length reached by the

decision in Grosvenor v. Danforth, 16 Mass. 74. Dearborn v. Dearborn, 15 Mass. 316, we think, is clearly distinguished from the one at bar by the supreme court of Iowa in Hopkins v. Mallard, 1 G. Greene, 117. The court, speaking by Greene, Justice, said there was nothing in the Dearborn case conflicting with the decision announced in the case then under consideration, for it was said that the attorney there was employed and undertook to collect a debt, and that it was justly held therein that he was bound to sue out all process necessary to that object, whereas, in the case in hand, the retainer to try a cause in a trial court did not authorize the attorney to prosecute an appeal. In Weeks on Attorneys, second edition, 248, the rule is stated to be that an attorney once appointed continues in that character until judgment or other termination of the suit, and that "where a scire facias is necessary to revive a judgment, a fresh authority is necessary"; and also it is necessary to justify bringing a writ of error. At section 249a, the author says that "the employment of an attorney to defend an action pending in a trial court does not, under ordinary circumstances, authorize him to take an appeal to a higher court from the judgment rendered against his client." To this is cited Hooker v. Village of Brandon, 75 Wis. 8, 43 N. W. 741, where the court, speaking by Taylor, Justice, announced the rule and gives clearly the reasons for it. Connett v. City of Chicago, 114 Ill. 233, 29 N. E. 280, held that a city attorney whose duty it is to look after and protect the interests of the city in all legal controversies has the power on behalf of the city to pray for an appeal from a judgment against the city and prepare the necessary steps for taking the same; but the court recognized the general rule that the retainer of an attorney by a private party to prosecute or defend in a trial court does not authorize him to prosecute [239] an appeal or writ of error in the same case; adding that a city attorney occupies a different position, the general scope of his powers and duties being much larger than that of an attorney for a private litigant especially retained for a single case. In 2 Clark & Skyles on the Law of Agency, section 650, the authors say that the general rule is that an attorney cannot begin proceedings for an appeal from a judgment against his client without further authority from the latter. In Delaney v. Husband, 64 N. J. L. 275, 45 Atl. 265, it was held that the retainer in the original suit did not, of itself, constitute a retainer to bring a writ of error. To the same effect is Richardson v. Talbot,

2 Bibb, 382. Ring v. Vogel Paint & Glass Co., 46 Mo. App. 374, is not authority for plaintiff's contention. The court there held that, under conflicting evidence, the legal presumption that an attorney appearing in a case has proper authority of his client was not overcome by the proofs.

Our conclusion, therefore, is that an attorney at law, employed only to try a litigated issue in a nisi prius court, has not thereby the implied authority to appeal from, or sue out a writ of error to, a judgment rendered against his client, or to bind the client to the payment of stenographer's fees for services rendered at the instance of the attorney in transcribing the evidence to be used in prosecuting a review in the supreme court. There is no evidence in this case of ratification of, or acquiescence in, such employment of plaintiff by defendants in this action. The cause having been tried by plaintiff's counsel upon the theory, which the trial court adopted by so instructing the jury, that the special retainer of Bloomfield to try the case in the district court necessarily carried with it the implied power, without any special authority from his clients, to perfect an appeal and represent his clients therein and to bind [240] them to pay all the costs and expenses necessarily incurred in the prosecution of such review, its judgment cannot stand. It therefore is reversed and the cause remanded.

Chief Justice Steele and Mr. Justice Gabbert concur.

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I. Commencement and Conduct of Action in General.

a. Commencement of Action.—An appearance by an attorney in court carries with it the presumption of authority to appear: Brown v. French, 159 Ala. 645, 49 South. 255; Dalbkermeyer v. Scholtes, 3 S. D. 183, 52 N. W. 871; Bonnifield v. Thorp, 71 Fed. 924. But of course the authority may be questioned, and if it is found wanting the party, whether plaintiff or defendant, whom the attorney assumes to represent is not bound by his acts: McNamara v. Carr, 84 Me. 299, 24 Atl. 856; Allen v. Stone, 10 Barb. 547; Yoakley v. Hawley, 73 Tenn. (5 Lea) 670; although it has been affirmed that one defendant may employ an attorney for his codefendant, and that the appearance of the attorney, so employed, for all will bind all: Abbott v. Dutton, 44 Vt. 546, 8 Am. Rep. 394.

"An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced or

before he has been retained to commence one. Before the commencement of a suit, or the giving of authority to commence one, there is nothing upon which the authority of an attorney to act for his client can be based. If before the commencement of any suit an attorney assumes to act for his principal, it must be as agent, and his actual authority must appear, and if it be not shown, it cannot be inferred by comparison with what his authority to act would have been if a suit were actually pending and he had in fact been retained as attorney by one of the parties. The authority of an attorney commences with his retainer": Stone v. Bank of Commerce, 174 U. S. 412, 19 Sup. Ct. Rep. 747, 43 L. ed. 1028.

An attorney is authorized to appear and act for his client only in the proceedings which constitute a part of the action; employment in the principal case does not authorize him to appear in other proceedings, such as a suit for contempt, not forming essentially a part of the principal action: Pitt v. Davison, 37 Barb. 97. And authority given an attorney to bring an action of attachment is not authority for him to appear for the plaintiff in attachment in a suit against him to recover damages for unlawfully bringing the attachment: Barnes v. Profilet, 5 La. Ann. 117. An attorney, by virtue of his authority to defend a suit removed from a justice's court to the common pleas by certiorari, has no authority to bring suit, in the client's name, against the obligors in the bond given upon obtaining the certiorari: Waldrat v. Maynard, 3 Barb. 584. And authority to institute legal proceedings to collect a debt is not authority to institute a criminal prosecution: Thompson v. Beacon Val. Rubber Co., 56 Conn. 493, 16 Atl. 554.

Ordinarily, however, when a demand is placed in the hands of an attorney for enforcement, he has authority to determine what proceedings he will institute: Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185; Poucher v. Blanchard, 86 N. Y. 256. When employed to bring a suit, an attorney, in the absence of special instructions as to what court he will sue in, may exercise a sound discretion as to whether he will resort to a state or a federal court: McGeorge v. Bigstone Gap Imp. Co., 88 Fed. 599. An attorney employed to foreclose a mortgage may adopt any proper method of foreclosure: Burgess v. Stevens, 76 Me. 559. The underlying reason of these decisions is, that when one puts his case in the hands of an attorney for suit, it is a reasonable presumption that he intends to confer authority upon the attorney to adopt such a course and take such steps as the latter, in his superior knowledge of the law, may decide to be proper and necessary to accomplishment of the purpose for which he has been employed: Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.

Since an attorney employed to collect a claim has authority to do all necessary acts for the furtherance of that end, he may bring an action to enforce the demand. This rule has been applied where a note has been intrusted to an attorney for collection: Alden v. W. J. Dyer & Bro., 92 Minn. 134, 99 N. W. 784. It has been held that an attorney who receives a note for collection has authority

by his general retainer, to bring a second suit on the note, if nonsuited in the first suit for lack of proof of the execution of the note: Scott v. Elmendorf, 12 Johns. 315.

An attorney intrusted with a note or other claim to collect may sue out an attachment, for an authority includes all the necessary or usual means of executing it with effect; the general authority given him is sufficient to warrant him to sue out an attachment whenever facts exist which warrant such a course: Kirksey v. Jones, 7 Ala. 622; Pierce v. Strickland, 2 Story, 292, Fed. Cas. No. 11,147. A general authority to commence suits warrants an attorney in commencing a suit and attaching property, so as to render the client responsible for damages thereby occasioned: Fairbanks v. Stanley, 18 Me. 296.

b. **Conduct of Action.**—A layman who acts as an attorney cannot consent to any action which will bind his principal unless expressly empowered for that very purpose: Durfee v. Abbott, 50 Mich. 278, 15 N. W. 454. But an attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, which affect the remedy as distinguished from the cause of action. A general retainer is sufficient to authorize an attorney, in his honest judgment, to control all matters of procedure in the action. And his authority is not limited to the mere prosecution or defense of the suit, as the case may be; it extends to all matters necessary to the protection and promotion of the interests committed to his care, so far as they may be affected by the proceedings in court where he represents the client: Kirksey v. Jones, 7 Ala. 622; Cronkhite v. Evans-Snider-Buel Co., 6 Kan. App. 173, 51 Pac. 295; Paxton v. Cobb, 2 La. 137; Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Eickman v. Troll, 29 Minn. 124, 12 N. W. 347; Fowler v. Iowa Land Co., 18 S. D. 131, 99 N. W. 1095; Livesley v. Pier, 11 Wash. 268, 39 Pac. 660; Illinois Steel Co. v. Warris (Wis.), 123 N. W. 656; Halliday v. Stuart, 151 U. S. 229, 14 Sup. Ct. Rep. 302, 38 L. ed. 141.

"When one puts his case against another into the hands of an attorney for suit," said Justice Cooley, in Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185, "it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand, and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law." In this connection the court in Luce v. Foster, 42 Neb. 818, 60 N. W. 1027, uses this language: "The general authority of an attorney by virtue of his employment has been well stated as including the doing on behalf of his client of all acts in or out of court necessary or incidental to the prosecution or management of the suit, which affect

the remedy only and not the cause of action. The authority is usually plenary on all matters affecting the remedy, but does not at all exist in regard to matters affecting the substantial rights of the client to enforce which the attorney is employed. This distinction may readily be illustrated. An attorney employed to make collections has no authority to release a surety on a note (Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201), nor to compromise a valid judgment (Hamrick v. Combs, 14 Neb. 381, 15 N. W. 731), nor may he compromise his client's cause of action, even under the cloak of an award which was prearranged: Holker v. Parker, 7 Cranch, 436, 3 L. ed. 396. The foregoing acts affect the cause of action; but with respect to procedure and matters affecting the remedy alone, the client is presumed to confer on the attorney authority to do all things which the latter, by virtue of his superior legal knowledge, deems necessary or proper. Thus the attorney may consent to selling attached property of a perishable nature: Nelson v. Cook, 19 Ill. 440. He may agree that if a foreclosure sale is had pending an appeal, the proceeds shall be deposited in court subject to the final determination of the case: Halliday v. Stuart, 151 U. S. 229, 14 Sup. Ct. Rep. 302, 38 L. ed. 141. So it has been held that he may release an attachment: Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Jenney v. Delesdernier, 20 Me. 183. It must be remembered, however, that the rule is but general, and does not supply an absolute test": Luce v. Foster, 42 Neb. 818, 60 N. W. 1027.

Ordinarily, then, whatever is done in the progress of a cause by the attorney of record is regarded as done by the party, and is binding upon him. Whether or not the attorney is faithful to his trust is a matter between him and his client, to whom he is responsible for the faithful discharge of his duty. Otherwise judicial proceedings would be greatly embarrassed: Rosenbaum v. State, 33 Ala. 354; Jamison v. May, 13 Ark. 600; Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940; Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238; Smith's Heirs v. Dixon, 3 Met. 438; Hill's Admr. v. Penn Mut. Life Ins. Co., 120 Ky. 190, 85 S. W. 759; White v. Johnson, 67 Me. 287; Henck v. Todhunter, 7 Har. & J. 275, 16 Am. Dec. 300; Bethel Church v. Carmack, 2 Md. Ch. 143; Peteler Portable Ry. Mfg. Co. v. Northwestern Adamant Mfg. Co., 60 Minn. 127, 61 N. W. 1024; Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130; McDowell v. Perrine, 36 N. J. Eq. 632; Deen v. Milne, 4 N. Y. St. Rep. 129; Devlin v. City of New York, 15 Abb. Pr., N. S., 31; Greenlee v. McDowell, 39 N. C. 481; Putnam v. Day, 89 U. S. (22 Wall.) 60, 22 L. ed. 764.

c. **Exclusiveness of Attorney's Control.**—Not only has an attorney authority, by virtue of his retainer and general employment in a case, to control all matters of procedure in the action, but he has control of such matters to the exclusion of his client. It is necessary to the decorum of the court and the due and orderly conduct of the cause that the attorney should have the control and management of the action. Moreover, the client is thereby protected from the intrigues of his adversary. All the proceedings in court to enforce the remedy

and bring the subject matter of the suit to trial, judgment and execution are ordinarily within the exclusive control of the attorney. But, on the other hand, the attorney cannot compromise, settle, surrender or impair the cause of action or the subject matter of the litigation without the consent of his client, this being within the exclusive control of the latter: See the note to Cameron v. Boeger, 93 Am. St. Rep. 170; Mott v. Foster, 45 Cal. 72; Boca & L. R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718; Miedreich v. Rank, 40 Ind. App. 393, 82 N. E. 117; Clark v. Kingsland, 1 Smedes & M. 248; Edgerton v. Brackett, 11 N. H. 218; Pilger v. Gou, 21 How. Pr. 155; Read v. French, 28 N. Y. 285; Ulster County Supervisors v. Brodhead, 44 How. Pr. 426; Webb v. Dill, 18 Abb. Pr. 264; Nightingale v. Oregon Cent. Ry. Co., 2 Saw. 338, Fed. Cas. No. 10,264. The general right of a client to settle or compromise his claim and dismiss his action, without the knowledge or consent of his attorney, at least when acting in good faith, is undoubted: See the note to Cameron v. Boeger, 93 Am. St. Rep. 172; Boorgren v. St. Paul City R. R. Co., 97 Minn. 51, 114 Am. St. Rep. 691, 106 N. W. 104, 3 L. R. A., N. S., 379; O'Connor v. St. Louis Transit Co., 198 Mo. 222, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703; Wagner v. Goldschmidt, 51 Or. 63, 93 Pac. 689; Tompkins v. Nashville etc. R. R., 110 Tenn. 157, 100 Am. St. Rep. 795, 72 S. W. 116. In many cases attorneys have attempted to restrict the right of their clients in this respect by inserting a clause in the contract of retainer prohibiting the client from making a settlement of the litigation without the consent of the attorney; but such contracts have usually been held void as against public policy, for the law encourages amicable adjustments of disputes rather than a resort to or a continuation of litigation: Matter of Snyder, 190 N. Y. 66, 123 Am. St. Rep. 533, 82 N. E. 742, 14 L. R. A., N. S., 110, 13 Ann. Cas. 441; Davy v. Fidelity etc. Ins. Co., 78 Ohio St. 256, 125 Am. St. Rep. 694, 85 N. E. 504, 17 L. R. A., N. S., 443. Compare, however, Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500, 91 S. W. 1046.

d. **Distinction in Case of Special Retainer.**—When an attorney is called upon to perform specific services, and does not identify himself with the record of the cause, and performs only the particular services which he has been retained to perform, his implied authority to bind his client seems limited to the proper conduct of the specific work intrusted to him: Cameron v. Stratton, 14 Ill. App. 270. To quote from the opinion of this case: "The law certainly recognizes a distinction between the powers implied from a general retainer, to commence, prosecute and control a cause until judgment is rendered, and for special employment for a special purpose, and upon the full consideration of all the authorities that we can find, bearing upon the question, as well as the reasons upon which they are based, we think the line must be drawn between them as attorneys of record in the cause and those not of record; that with the former the defendant may safely treat upon all matters within the scope of his apparent authority, until notice to the contrary; with the latter, out-

side of the particular service in which he is engaged, he deals at the peril of being able to show express authority for the act done by him. This conclusion is believed to be fully sustained by the following cases: Succession of Barr, 8 La. Ann. 458; State v. Hawkins, 28 Mo. 366; McCarver v. Nealey, 1 G. Greene (Iowa), 360; Seymour v. Haines, 104 Ill. 557; Weist v. Lee, 3 Yeates (Pa.), 47; Hill v. Mendenhall, 21 Wall. 453, 22 L. ed. 616."

II. Control Over Process, Writs, and Notices.

a. Acknowledgment or Waiver of Service.—As a general rule, an attorney at law has no authority, by virtue of his general retainer, to waive or admit service for his client of original process by which the court for the first time acquires jurisdiction of the client. Exercise of such power is rather the act of an attorney in fact, and can be conferred only by special authority: Whitly v. Barker, 1 Root, 406; Masterson v. Le Claire, 4 Minn. 163; Bradley v. Welch, 100 Mo. 258, 12 S. W. 911; Warlic v. Reynolds (N. C.), 66 S. E. 657; Reed v. Reed, 19 S. C. 548. To quote from Starr v. Hall, 87 N. C. 381: "The principles upon which these authorities rest is, that it is no part of the duty of an attorney, nor within the scope of his authority, to admit of service for his client of the original process by which the jurisdiction of the court over the person of the client is first established; for, until that be done, the relation of client and attorney cannot begin; nor can it be created by the act of the attorney alone. To exercise such a power would be to act rather as an agent, or attorney in fact, than as an attorney of the court, and to give effect to it, therefore, there must needs be a special authority for it; and as the law is plain, that the summons must be personally served upon the defendant, if a party will take upon himself the responsibility of discarding the mode prescribed by law, and admit of a waiver of such service by an attorney, he is bound to see to it that the latter has the authority to act, or else the inconvenience must be on himself."

The rule that an attorney, under a general retainer, has no authority to waive or admit service of original process, has been modified by statute in some states: Multnomah L. & B. Co. v. Weston B. & B. Co. (Or.), 99 Pac. 1046; and perhaps has never obtained to its fullest extent in some jurisdictions: Ingram v. Richardson, 2 La. Ann. 839. Of course, a client may expressly confer authority on his attorney to admit service of process: Sullivan v. Susong, 40 S. C. 154, 18 S. E. 268; and, where an attorney has accepted service, it will be presumed, at least in collateral proceedings, that he was clothed with authority to do so: Hendrix v. Fuller, 7 Kan. 331; Conrey v. Brenham, 1 La. Ann. 397; Taylor v. Sutton, 6 La. Ann. 709; Northern Cent. Ry. Co. v. Rider, 45 Md. 24; Backus v. Burke, 63 Minn. 272, 65 N. W. 459; Marling v. Robrecht, 13 W. Va. 440.

It has been said that an attorney employed in anticipation of a suit has as much power to bind the client before as after the commencement of the action, and hence that he may bind him by waiver

of service: Hefferman v. Burt, 7 Iowa, 320, 71 Am. Dec. 445. But this would hold true only where the attorney has been actually employed for the purposes of that suit: Dentzel v. City etc. Ry. Co., 90 Md. 434, 45 Atl. 201.

A letter which authorizes a person to acknowledge service of the complaint on behalf of a defendant does not invest him with authority to waive process: Clark v. Morrison, 85 Ga. 229, 11 S. E. 614.

After an action has been commenced and the court has acquired jurisdiction, an attorney has authority to accept service of the usual papers and notices: Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922; Connor v. Hodges (Ga. App.), 66 S. E. 546; Manufacturers' Paper Co. v. Lindblom, 80 Ill. App. 267; McDonough v. Daly, 3 Mo. App. 606; Alton v. Gilmanton, 2 N. H. 520; and, on the other hand, he may give any notice affecting the rights of his client which the client himself might give: Nolan v. St. Louis etc. R. R. Co., 19 Okl. 51, 91 Pac. 1128.

b. **Indorsement of Writ.**—Under the Massachusetts statute which requires an original writ to be indorsed by the plaintiff or his attorney, it has been decided that an attorney authorized to commence an action is thereby authorized to indorse the name of his client on the writ: Chadwick v. Upton, 3 Pick. 442. But in other jurisdictions it has been decided that authorizing an attorney to commence an action does not clothe him with authority to indorse the writ with his client's name: Harmon v. Watson, 8 Me. 286; Miner v. Smith, 6 N. H. 219. In Weathers v. Ray, 4 Dana, 474, it is affirmed that the general authority of an attorney at law does not embrace the right to indorse a writ, that the action is for the benefit of a third party.

c. **Directing Service of Writs and Notices.**—By employing an attorney to bring and prosecute an action, the plaintiff thereby authorizes him to give directions for the service of the writ: Morgan v. Joyce, 66 N. H. 538, 27 Atl. 225. And generally an attorney employed in a cause has implied authority to direct the service of notices and writs: Gray's Admr. v. Patton's Admr., 13 Bush, 625; Cady v. Fair Plain Literary Assn., 135 Mich. 295, 97 N. W. 680.

III. Making Stipulations and Admissions.

a. **Stipulations in General.**—An attorney has implied authority, when employed to conduct or defend a cause of action, to make stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus entered into, which are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself and the essential rights of the client, are binding on the client: Hart v. Spaulding, 1 Cal. 213; Teich v. San Jose Safe Deposit Bank, 8 Cal. App. 397, 97 Pac. 167; Garrigan v. Dickey, 1 Ind. App. 421, 27 N. E. 713; Cline v. Wrightson, 7 Ky. Law Rep. 230; Calmes v. Stone, 7 La. Ann. 133; Lacoste v. Robert, 11 La. Ann. 33; Kent v. Richards, 3 Md. Ch. 392; Rogers v. Greenwood, 14

Minn. 333; Franklin v. National Ins. Co., 43 Mo. 491; Cox v. New York Cent. & H. R. R. Co., 63 N. Y. 414; Gorham v. Gale, 7 Cow. 739, 17 Am. Dec. 549; Wilcox v. Woodhall, 2 Caines, 250; People v. Board of Supervisors Westchester County, 60 Hun, 585, 15 N. Y. Supp. 580; Village of Suspension Bridge v. Bedford, 10 N. Y. St. Rep. 850; Ives v. Ives, 80 Hun, 136, 29 N. Y. Supp. 1053, modifying judgment, 7 Misc. Rep. 328, 28 N. Y. Supp. 170; Pierce v. Perkins, 17 N. C. 250; Henry v. Hilliard, 120 N. C. 479, 27 S. E. 130; Galbreath v. Colt, 4 Yeates, 551; Ex parte Jones, 47 S. C. 393, 25 S. E. 285; Holmes v. Johnston, 12 Heisk. 155; Ward v. Wilson, 17 Tex. Civ. App. 28, 43 S. W. 833, affirmed in 92 Tex. 22, 45 S. W. 8; Thompson v. Ft. Worth & R. G. Ry. Co., 31 Tex. Civ. App. 583, 73 S. W. 29. In fact, the attorney has authority to make stipulations of this character to the exclusion of the client: See the note to Cameron v. Boeger, 93 Am. St. Rep. 170.

Where an attorney has been employed in anticipation of a suit to be brought, his client will be bound by his stipulations in regard to the same as though he had stipulated after the institution of the suit: Hefferman v. Burt, 7 Iowa, 320, 71 Am. Dec. 445. But the general employment of an attorney, without reference to a particular suit not yet instituted, does not authorize him to stipulate that such suit shall abide the event of another suit to which the client is a party: Stone v. Bank of Commerce, 174 U. S. 412, 19 Sup. Ct. Rep. 747, 43 L. ed. 1028.

The rule that a stipulation made by an attorney in respect to a pending cause binds his client applies to stipulation entered into by the attorney of a county on behalf of the county, and such stipulation cannot be repudiated by the successors in employment of the attorney who made the agreement while acting in behalf of the county: Lockwood v. Blackhawk County, 34 Iowa, 235.

In some states the statutes provide that an attorney has authority to bind his client in any of the steps of an action or proceeding by agreement filed with the clerk or entered upon the minutes of the court, and not otherwise: Wadsworth v. First Nat. Bank, 124 Ala. 440, 27 South. 460; Daneri v. Gazzola, 2 Cal. App. 351, 83 Pac. 455; Garrigan v. Dickey, 1 Ind. App. 421, 27 N. E. 713; Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594. Statutes thus providing that an attorney can bind his client only by stipulation in writing filed have been held not to apply to consent to a motion to amend the complaint during the trial: Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940.

The implied authority of an attorney to make stipulations is ordinarily limited to matters of procedure in the management or prosecution of the action. He cannot, without special authority, dispose of or adjust the substantial rights of his client by compromise or otherwise: Wabash etc. R. Co. v. McDougall, 126 Ill. 111, 9 Am. St. Rep. 539, 18 N. E. 291, 1 L. R. A. 207; Chicago Gen. Ry. Co. v. Murray, 174 Ill. 259, 51 N. E. 245; DuPont v. Sanitary Dist. of Chicago, 203 Ill. 170, 67 N. E. 815; Howe v. Lawrence, 22 N. J. L. 99; Hast

v. Piedmont & C. R. Co., 52 W. Va. 396, 44 S. E. 155; note to Cameron v. Boeger, 93 Am. St. Rep. 170. Of course a client may, by waiver or estoppel, be bound by a stipulation made by his attorneys in excess of their authority: Patterson v. Read, 43 N. J. Eq. 18, 10 Atl. 807; Ducker v. Rapp, 67 N. Y. 464.

b. **Continuances and Extensions of Time.**—It is within the implied authority of an attorney to consent to a continuance: Stinnard v. New York Fire Ins. Co., 1 How. Pr. 169; Strong v. District of Columbia, 3 McAr. 499; Nightingale v. Oregon Cent. Ry. Co., 2 Saw. 338, Fed. Cas. No. 10.264; or to consent to an extension of time to plead: Brooks v. Cavanaugh, 11 La. Ann. 183; Bonnifield v. Thorp, 71 Fed. 924. A plaintiff's attorney may stipulate that the defendant shall have the same time in which to answer or demur to the complaint when served as the plaintiff had in which to serve the complaint, as a condition to granting a stipulation extending the plaintiff's time to serve the complaint: Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673, 15 Ann. Cas. 343. But an attorney has no implied authority to bind his client by a general agreement with other attorneys not to try causes during a particular period: Robert v. Commercial Bank, 13 La. 528, 33 Am. Dec. 570. And when a judgment in ejectment is entered by agreement to be released on payment of a designated sum on or before a certain date, the attorney for the plaintiff has no implied authority to bind him by an agreement for an extension of time: Beatty v. Hamilton, 127 Pa. 71, 17 Atl. 755. Attorneys, after they have submitted a case to a judge of a municipal court, have authority to enter into a stipulation giving the judge additional time to decide the case: Litt v. Stewart, 62 N. Y. Supp. 1114.

c. **Admission of Evidence.**—Under the rule that an attorney of record has implied power to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution, defense or management of the action, which affect the remedy and not the right, an attorney may waive objections to evidence and stipulate for the admission of facts on the trial: Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321. Counsel may bind their clients by admissions and agreements of facts made for the purposes of the trial: Starke v. Kenan, 11 Ala. 818; Wilson v. Spring, 64 Ill. 14; Farmers' Bank of Maryland v. Spring, 11 Md. 389; Alton v. Gilmanton, 2 N. H. 520; J. L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N. C. 431, 49 S. E. 946; Daniel v. Ray, 1 Hill, 32; Tomeny v. German Nat. Bank, 9 Heisk. 493; they can enter into agreements or stipulations which will be competent or conclusive evidence of the facts agreed to: Westheimer v. State Loan Co., 195 Mass. 510, 81 N. E. 289; Page v. Brewster, 54 N. H. 184. The attorney for the defendant in a personal injury case may stipulate that the deposition of the plaintiff may be taken in advance of the trial, and, in the event of his death before trial, that it may be read on the trial of another action brought against the defendant by the personal representative: Ludeman v. Third Ave. R. R. Co., 72 App. Div. 26, 76 N. Y. Supp. 128.

d. Agreement to Abide by Decision in Another Case.—An attorney employed in two or more suits, by or against different parties, the suits involving the same issues and the interests of the clients being of the same character in each, may, without special authorization, stipulate that the trial and decision in one shall determine the other: Commercial Union Assur. Co. v. Chattahoochee Lumber Co., 130 Ga. 191, 60 S. E. 554; Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277; Southern Kansas Ry. Co. v. Pavey, 57 Kan. 521, 46 Pac. 969; Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507; North Missouri R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138; Schaeffer v. Siegel, 9 Mo. App. 594; Galbreath v. Rogers, 30 Mo. App. 401. A stipulation of this kind, however, can be made only when the cases involve the same questions of law and fact: Louisville Trust Co. v. Stone, 88 Fed. 407; and ordinarily only in cases pending as distinguished from those merely contemplated: Stone v. Bank of Commerce, 174 U. S. 412, 19 Sup. Ct. Rep. 747, 43 L. ed. 1028.

"It is undoubtedly true that an attorney cannot consent to a judgment against his client, or waive any cause of action or defense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It cannot be doubted that under them counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulation that the trial of one shall determine the others. This pertains to the remedy pursued—to the manner of trial—and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases": Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277.

It seems that an attorney has implied authority to stipulate that the action in which he appears shall abide the result of another action in which he is not engaged and to which his client is not a party: Scarritt Furniture Co. v. Moser, 48 Mo. App. 543.

The retainer of an attorney to conduct an action confers upon him authority to stipulate with the opposing counsel after the judgment in favor of his client and after the term, but within the time for procuring a writ of error, that the case shall abide the final decision of another action involving the same question, conducted by the same attorney: Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125.

e. Other Stipulations.—Attorneys have been held authorized to make the following stipulations: That another defendant joined with the client may be stricken out: Fling v. Trafton, 13 Me. 295; that the defendant in ejectment may amend his answer without costs: Illinois Steel Co. v. Warras (Wis.), 123 N. W. 656; that the case

may be tried on the merits without pleadings, the pleadings having been lost: Cook v. Allen, 67 N. Y. 578; that a jury may be waived: Whitestown Milling Co. v. Zahn, 9 Ind. App. 270, 36 N. E. 653; that a case set for trial by jury shall be tried before a referee, and that neither party shall appeal or move for a stay: Smith v. Barnes, 9 Misc. Rep. 368, 29 N. Y. Supp. 692; that judgment may be taken against his client without further notice, on a verdict already rendered: Barlow v. Steel, 65 Mo. 611; that an order of the county court appointing an administrator may be affirmed by the circuit court: Estate of Skelly, 21 S. D. 424, 113 N. W. 91. An attorney may stipulate to the fees of a referee: Mark v. Buffalo, 87 N. Y. 184.

f. **Admissions by Attorneys.**—The admissions of an attorney made during the pendency of the cause are ordinarily binding upon his client to the same extent as stipulations. The court is warranted in acting upon the admissions of counsel, and their admissions are binding upon their clients: Godwin v. State (Del.), 74 Atl. 1101; Dorrance v. McAlester, 1 Ind. Ter. 473, 45 S. W. 141; Central Branch Union Pac. Ry. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163; Talbot v. McGee, 4 T. B. Mon. 375; Lewis v. Sumner, 13 Met. 269; Wenans v. Lindsey, 2 Miss. (1 How.) 577; Pratt v. Conway, 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028; State v. Parkinson, 5 Nev. 15; Oliver v. Bennett, 65 N. Y. 559; Heywood v. Doernbecher Mfg. Co., 48 Or. 359, 86 Pac. 357, 87 Pac. 530; Bollman v. Bollman, 6 S. C. 29; Cooke v. Pennington, 7 S. C. 385; Daniel v. Ray, 1 Hill, 32; Harniska v. Dolph, 133 Fed. 158, 66 C. C. A. 224; unless made through mistake or inadvertence: Harvey v. Thorpe, 28 Ala. 250, 65 Am. Dec. 344; St. Louis etc. Ry. Co. v. Epperson, 97 Mo. 300, 10 S. W. 478; Gates v. Brinkley, 4 Lea, 710. This rule, it seems, applies in case of an attorney employed by a municipal corporation as well as to an attorney employed by an individual: Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624.

While attorneys engaged in the actual management of a cause may bind their clients by admissions when so engaged, or by statements and correspondence in relation thereto, yet they have no authority, under a general retainer, to compromise an action or to bind a client by statements that he has no cause of action or that he has surrendered whatever rights he possessed. When employed under a general retainer to prosecute a claim an attorney cannot, in the absence of a reference by his client of the defendant to him for information, bind his client by admissions or advice prejudicial to the client's cause of action: Lytle v. Crawford, 69 App. Div. 273, 74 N. Y. Supp. 660.

An attorney for two plaintiffs in separate actions is without authority to make a statement in one which will bind his client in the other: State v. Easterling, 1 Rich. 310.

g. **As to Matters of Law.**—A stipulation or admission by counsel as to a matter of law is of no effect: Mitchell v. Cotten, 3 Fla. 134; Holms v. Johnston, 12 Heisk. 155.

IV. Delegation of Power and Employment of Counsel.

a. Employment of Assistant or Associate Counsel.—An attorney ordinarily has no implied authority, under his general employment to prosecute or defend a case, to employ assistant or associate counsel at the expense of his client; his general retainer in the case, without any special authorization, confers on him no such power: Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899; Emblen v. Bicksler, McLean & Bennett, 34 Colo. 496, 83 Pac. 636; McCarthy v. Crump, 17 Colo. App. 110, 67 Pac. 343; Lathrop v. Hallett, 20 Colo. App. 207, 77 Pac. 1095; Chicago & S. Traction Co. v. Flaherty, 222 Ill. 67, 78 N. E. 29; Continental Adjustment Co. v. Hoffman, 123 Ill. App. 69; Gilliland v. Brantner (Iowa), 121 N. W. 1047; Cross v. Atchison etc. Ry. Co., 141 Mo. 132, 42 S. W. 675; Kingsbury v. Joseph, 94 Mo. App. 298, 68 S. W. 93; Dillon v. Watson, 3 Neb. (Unof.) 530, 92 N. W. 156; In re Borkstrom, 63 App. Div. 7, 71 N. Y. Supp. 451, order affirmed in 168 N. Y. 639, 61 N. E. 1127; Meaney v. Rosenberg, 32 Misc. Rep. 96, 65 N. Y. Supp. 497; Briggs v. Georgia, 10 Vt. 68. It has been held, however, that an attorney has authority to empower another attorney to appear for him, so that the appearance will bind the client: Reich v. Cochran, 102 App. Div. 615, 105 App. Div. 542, 94 N. Y. Supp. 404. And an attorney retained to conduct a case pending in another county may properly employ local counsel to attend to the formal matters in the cause and charge the fees to pay such counsel as expenses, if they are no more than the expenses would have been had the attorney gone in person: Dillon v. Watson, 3 Neb. (Unof.) 530, 92 N. W. 156. An attorney, at his own expense and risk, may employ an assistant to aid him in his professional work for a client, and charge such client with the reasonable value of the entire labor; and that does not militate against the rule that the relation of attorney and client does not imply authority to the former to employ another attorney at the client's expense: Vilas v. Bundy, 106 Wis. 168, 81 N. W. 812.

b. Delegation of Authority.—An attorney employed to prosecute or defend a suit, or to perform other legal services, cannot, without special authorization, transfer or delegate his authority so as to confer his rights, duties and obligations upon another attorney; his employment involves a personal trust, which cannot be delegated without the special consent of his client: Johnson v. Cunningham, 1 Ala. 249; Wright v. Evans, 53 Ala. 103; Hitchcock v. McGehee, 7 Port. 556; Kellogg v. Norris, 10 Ark. 18; Danley v. Crawl, 28 Ark. 95; Morgan v. Roberts, 38 Ill. 65; Sloan v. Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496; O'Conner v. Arnold, 53 Ind. 203; Clegg v. Baumberger, 110 Ind. 536, 9 N. E. 700; Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677; Hilton v. Crooker, 30 Neb. 707, 47 N. W. 3; Johnston v. Baca, 13 N. M. 338, 85 Pac. 237; Buckley v. Buckley, 64 Hun, 632, 18 N. Y. Supp. 607; Lacher v. Gordon, 127 App. Div. 140, 111 N. Y. Supp. 283; Kingston Bank v. Roosa, 2 How. Pr. 8; Planters' Bank v. Massey, 2 Heisk. 360; Ratcliff v. Baird, 14 Tex. 43; Missouri

etc. Ry. Co. v. Wright, 47 Tex. Civ. 458, 107 S. W. 77; Crotty v. Eagle's Admr., 35 W. Va. 143, 13 S. E. 59.

V. Incurring Expenses Incidental to Case.

There appears to be no doubt of the authority of an attorney, in prosecuting or defending his client's case, to make such proper and necessary disbursements and incur such expenditures as the case may require. This authority is implied merely from the relation of attorney and client: Packard v. Stephani, 85 Hun, 197, 32 N. Y. Supp. 1016; Brown v. Travelers' Life & Accident Ins. Co., 21 App. Div. 42, 47 N. Y. Supp. 253. He has implied authority to employ a stenographer to take and transcribe evidence, and bind his client for the expense thereof: Miller v. Palmer, 25 Ind. App. 357, 81 Am. St. Rep. 107, 58 N. E. 213; Bottome v. Neely, 54 Misc. Rep. 258, 104 N. Y. Supp. 429; Harry v. Hilton, 64 How. Pr. 199, 11 Abb. (N. C.) 448; Thornton v. Tuttle, 20 Abb. N. C. 308. He may bind his client for the fees of an expert witness: Mulligan v. Cannon, 41 N. Y. Supp. 279, 25 Civ. Proc. Rep. 348, affirmed in 153 N. Y. 663, 48 N. E. 1105. He has implied authority to bind his client for the reasonable cost of printing briefs: Weisse v. City of New Orleans, 10 La. Ann. 46; Williamson Stuart Paper Co. v. Bosbyshell, 14 Mo. App. 534. An attorney employed to bring replevin may bind his client to pay the expense of removing the property taken from the defendant to a place of safety: Fox v. William Deering & Co., 7 S. D. 443, 64 N. W. 520; and where he is retained by a nonresident to recover personalty, he has authority to receive it for his client and incur the expense necessary for its care and custody thereafter: W. W. Kimball Co. v. Payne, 9 Wyo. 441, 64 Pac. 673.

VI. Dismissal, Discontinuance and Retraxit.

a. **Dismissal or Discontinuance.**—In Rhutasel v. Rule, 97 Iowa, 20, 65 N. W. 1013, it is held that the general employment of an attorney to prosecute an action does not clothe him with authority to dismiss it. "His employment," said the court, "is to prosecute, and, in an important sense, it is inconsistent with a power to dismiss the suit. It is reasonable to say that such a power should be specially delegated. An attorney so employed should not deprive his client of a trial. His implied powers are such as are necessary or incidental to the prosecution or defense which he is employed to conduct." In Brown v. Mead, 68 Vt. 215, 34 Atl. 950, an attorney in an action of trespass, accepting tender of amendment for the wrong, is held to have no authority, as incidental to his employment, to discontinue the action. That an attorney, employed to bring an action, has no authority to dismiss it over the objection of his client, see Steinkamp v. Gaebel, 1 Neb. (Unof.) 480, 95 N. W. 684.

The authorities generally hold, however, that an attorney, under his general authority, may discontinue or dismiss the action, because that relates to the conduct of the suit and does not affect the cause

of action, but only the remedy: McLeran v. McNamara, 55 Cal. 508; Gillett v. Booth, 6 Ill. App. 423; Paxton v. Cobb, 2 La. 137; Davis v. Hall, 90 Mo. 659, 3 S. W. 382; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L. R. A., N. S., 244; Seeligson v. Gifford, 46 Tex. Civ. App. 566, 103 S. W. 416. "Where an attorney is retained," said the court in Gaillard v. Smart, 6 Cow. 385, "we will not look for a special authority to do so ordinary an act of practice as the discontinuance of the cause." To quote from Simpson v. Brown, 1 Wash. Ter. 247, "this is but a step in the ordinary course of practice, and of frequent occurrence, and clearly within the scope of the general power of an attorney and essential to the judicial management of causes in courts."

b. **Retraxit or Renunciation.**—But a retraxit is quite different from a discontinuance or mere dismissal, for by it the plaintiff renounces his right of action and his renunciation is irrevocable. It is a perpetual bar, and equivalent to a release. Hence an attorney has no implied power to enter a retraxit for his client; it is improper to enter a retraxit without the personal consent of the plaintiff: Hallack v. Loft, 19 Colo. 74, 34 Pac. 568; Lambert v. Sandford, 2 Blackf. 137, 18 Am. Dec. 149; Gorham v. Gale, 7 Cow. 739, 17 Am. Dec. 549; Sheffer v. Perkins (Vt.), 75 Atl. 6; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238. This rule appears to have been relaxed under the Indiana statute: Barnard v. Daggett, 68 Ind. 305.

VII. Confession of or Consent to Judgment.

Some authorities take the view that, without express authority, an attorney cannot bind his client by the confession of or consent to judgment: Pfister v. Wade, 69 Cal. 133, 10 Pac. 369; People v. Lamborn, 2 Ill. 123; Wadhams v. Gay, 73 Ill. 415; Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277; Edwards v. Edwards, 29 La. Ann. 597; Dilley v. Van Wie, 6 Wis. 209. The weight of judicial opinion, however, is to the effect that an attorney, by virtue of his general power to conduct a suit, has implied authority to consent to or confess judgment, the client's remedy, in case of an abuse of authority, being against the attorney: Beverly v Stephens, 17 Ala. 701; Lyon v. Williams, 42 Ga. 168; Williams v. Simmons, 79 Ga. 649, 7 S. E. 133; Webster v. Dundee Mortgage & Trust Co., 93 Ga. 278, 20 S. E. 310; Taylor v. American Freehold Land-Mortgage Co. of London, 106 Ga. 238, 32 S. E. 153; Hollenbeck v. Glover, 128 Ga. 52, 57 S. E. 108; Town of Chalmers v. Tandy, 111 Ill. App. 252; Meriden Hydro-Carbon Arc Light Co. v. Anderson, 111 Ill. App. 449; Hudson v. Allison, 54 Ind. 215; Thompson v. Pershing, 86 Ind. 303; Garrigan v. Dickey, 1 Ind. App. 421, 27 N. E. 713; Wilkie v. Reynolds, 34 Ind. App. 527, 72 N. E. 179; Holbert v. Montgomery's Admr., 5 Dana, 11; Dangerfield's Exr. v. Thruston's Heirs, 8 Mart., N. S., 232; Farmers' Bank v. Spring, 11 Md. 389; Denton v. Noyes, 6 Johns. 296, 5 Am. Dec. 237; In re Maxwell, 66 Hun, 151, 21 N. Y. Supp. 209; Hairston v. Garwood, 123 N. C. 345, 31 S. E. 653; Cyphert v. McClune, 22 Pa.

195; Wilson v. Wilson, 25 R. I. 446, 56 Atl. 773; Jones v. Williamson, 5 Cold. 371; Denny v. Brown, Fed. Cas. No. 3805.

The record of the judgment so entered is certainly prima facie evidence that the attorney who confessed judgment was authorized to do so: Lowellville Coal Min. Co. v. Zappio, 80 Ohio St. 458, 89 N. E. 97. Other cases to the same effect are: Hill v. Lambert, Minor, 91; Dobbins v. Dupree, 39 Ga. 394; Martin v. Judd, 60 Ill. 78; Wilson v. Spring, 64 Ill. 14; Anderson v. Sutton, 2 Duvall, 480; Arnold v. Nye, 23 Mich. 286; Gifford v. Thorn, 9 N. J. Eq. 702; Ward v. Price, 25 N. J. L. 225; Merritt v. Clow, 2 Tex. 582; Dunman v. Hartwell, 9 Tex. 495, 60 Am. Dec. 176.

VIII. Waiver or Surrender of Client's Rights.

An attorney has implied authority to waive informalities, irregularities and technical advantages in the cause which he is conducting: State v. Tuller, 34 Conn. 280; Hanson v. Hoitt, 14 N. H. 56; Gorham v. Gale, 7 Cow. 739, 17 Am. Dec. 549. But he cannot waive any substantial right of his client and thus perhaps make nugatory the very duty which he has been employed to perform: State Bank of Nebraska v. Green, 8 Neb. 297, 1 N. W. 210; Warwick v. Marlatt, 25 N. J. Eq. 188; Dickerson v. Hodges, 43 N. J. Eq. 45, 10 Atl. 111; Lewis v. Duane, 141 N. Y. 302, 36 N. E. 322, affirming 69 Hun, 28, 23 N. Y. Supp. 433; Gable v. Hain, 1 Penr. & W. 264; Hickey v. Stringer, 3 Tex. Civ. 45, 21 S. W. 716. An attorney intrusted with the foreclosure of a mortgage cannot bind his clients by a declaration that they will not consider the mortgage as foreclosed: Lewis v. Duane, 141 N. Y. 302, 36 N. E. 322, affirming 69 Hun, 28, 23 N. Y. Supp. 433; and an attorney retained to sue on a note secured by chattel mortgage is not thereby empowered to give possession of the property to an indorser of the note and authorize him to sell it: Beard v. Westerman, 32 Ohio St. 29. An attorney has no power, without actual payment or special authority, to surrender or waive the security or lien of his client: Doub v. Barnes, 1 Md. Ch. 127; Terhune v. Colton, 10 N. J. Eq. 21; Tankersly v. Anderson, 4 Desaus. Eq. 44; Engelbach v. Simpson, 12 Tex. Civ. 188, 33 S. W. 596. In an action concerning land the attorney is without authority to bind his client by an agreement to relinquish all claims and convey part of the land for a certain consideration: Rayburn v. Kuhl, 10 Iowa. 92. An attorney ad litem for a defendant summoned constructively does not possess authority to waive any of the defendant's rights: Bush v. Visant, 40 Ark. 124.

An attorney may stipulate to such facts as in effect waive all but one of the several separate defenses of his client: Bingham v. Winona County Supervisors, 6 Minn. 136.

IX. Compromise, Settlement and Release.

a. **Compromise, Settlement and Discharge.**—The generally accepted rule is that an attorney employed in a case cannot, without express authorization, bind his client by a compromise or agreement to settle

the question at issue. Here it is that the line of demarkation between the authority of the attorney and the authority of the client becomes quite definitely drawn. The attorney has, by implication arising from his general employment, exclusive control over all matters of procedure in the action, for, because of his superior legal knowledge, it must be presumed that the client has consented to confide all matters affecting the remedy to his skill and judgment. But a settlement or compromise goes to the very right being litigated and destroys the cause of action; while the implied authority of the attorney does not, under ordinary circumstances, extend so far as to empower him to do this, but only to conduct and manage the case and control those matters affecting the remedy only as distinguished from the right: Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Ambrose v. McDonald, 53 Cal. 28; Trope v. Kerns, 83 Cal. 553, 23 Pac. 691; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568; Derwort v. Loomer, 21 Conn. 245; Nolan v. Jackson, 16 Ill. 272; Wadhams v. Gay, 73 Ill. 415; Danziger v. Pittsfield Shoe Co., 107 Ill. App. 47, affirmed in 204 Ill. 145, 68 N. E. 534; Wakeman v. Jones 1 Ind. 517; Repp v. Wiles, 3 Ind. App. 167, 29 N. E. 441; Martin v. Capital Ins. Co., 85 Iowa, 643, 52 N. W. 534; Marbourg v. Smith, 11 Kan. 554; Jones v. Inness, 32 Kan. 177, 4 Pac. 95; Smith's Heirs v. Dixon, 3 Met. 438; Brown v. Bunger, 19 Ky. Law Rep. 1527, 43 S. W. 714; Cox v. Adelsdorf, 21 Ky. Law Rep. 421, 51 S. W. 616; Sebree v. Sebree, 30 Ky. Law Rep. 670, 99 S. W. 282; Woodrow v. Hennen, 6 Mart., N. S., 156; Dupre v. Splane, 16 La. 51; Phelps v. Preston, 9 La. Ann. 488; Hamburger v. Paul, 51 Md. 219; Fritchey v. Bosley, 56 Md. 94; Levy v. Brown, 56 Miss. 83; Davidson v. Rozier, 23 Mo. 387; Grumley v. Webb, 48 Mo. 562; Walden v. Bolton, 55 Mo. 405; Spears v. Ledergerber, 56 Mo. 465; Semple v. Atkinson, 64 Mo. 504; Davis v. Hall, 90 Mo. 659, 3 S. W. 382; State v. Hoeffner, 124 Mo. 488, 28 S. W. 1; Vanderline v. Smith, 18 Mo. App. 55; Roberts v. Nelson, 22 Md. App. 682; Willard v. A. Siegel Gas-Fixture Co., 47 Mo. App. 1; Bay v. Trusdell, 92 Mo. App. 377; Kelly v. Chicago & A. Ry. Co., 113 Mo. App. 468, 87 S. W. 583; Smith v. Jones, 47 Neb. 108, 53 Am. St. Rep. 519, 66 N. W. 19; Mandeville v. Reynolds, 68 N. Y. 528; Smith v. Bradhurst, 18 Misc. Rep. 546, 41 N. Y. Supp. 1002; Shaw v. Kidder, 2 How. Pr. 244; De Witt v. Greener, 11 Civ. Proc. Rep. 327; Moye v. Cogdell, 69 N. C. 93; Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209; Stokely v. Robinson, 34 Pa. 315; Township of North Whitehall v. Keller, 100 Pa. 105, 45 Am. Rep. 361; Isaacs v. Zugsmith, 103 Pa. 77; Brockley v. Brockley, 122 Pa. 1, 15 Atl. 646; Chambers v. Miller, 7 Watts, 63; Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42; Gilliland v. Gasque, 6 S. C. 406; Treasurers v. McDowell, 1 Hill, 184, 26 Am. Dec. 166; Matthews v. Massey, 4 Baxt. 450; Adams v. Roller, 35 Tex. 711; Taylor v. Evans (Tex. Civ. App.), 29 S. W. 172; Cook v. Greenberg (Tex. Civ. App.), 34 S. W. 687; Vail v. Conant, 15 Vt. 314; Haynes v. Tacoma etc. R. Co., 7 Wash. 211, 34 Pac. 922; Timm v. Timm, 34 Wash. 228, 75 Pac. 879; Crotty v. Eagle's Admr., 35 W. Va. 143, 13 S. E. 59. The same rule applies

to a proctor in admiralty: Bates v. Seabury, 1 Sprague, 433, Fed. Cas. No. 1104.

Without special authority, an attorney cannot bind his client by compromising his claim and accepting a less sum, or security for a less sum, than the amount due; he cannot discharge a demand on part payment: Hall Safe & Lock Co. v. Harwell, 88 Ala. 441, 6 South. 750; Wood v. Bangs, 2 Penne. (Del.) 435, 48 Atl. 189; Kaiser v. Hancock, 106 Ga. 217, 32 S. E. 123; Bigler v. Toy, 68 Iowa, 687, 28 N. W. 17; Cox v. Adelsdorf, 21 Ky. Law Rep. 421, 51 S. W. 616; Maddux v. Bevan, 39 Md. 485; Hamburger v. Paul, 51 Md. 219; Watts v. Frenche, 19 N. J. Eq. 407; Kelly v. Wright, 65 Wis. 236, 26 N. W. 610.

He cannot compromise an action on payment of his costs: Mandeville v. Reynolds, 5 Hun, 338. An attorney employed to recover possession of real estate cannot bind his client by an agreement to pay a sum of money for the surrender of possession: Stuck v. Reese, 15 Iowa, 122. An attorney who is conducting an action of ejectment cannot fix upon a boundary by way of compromise: Mackey's Heirs v. Adair, 99 Pa. 143. The general attorney of a railroad company cannot bind his principal by an agreement that the company will employ a certain person for life in partial satisfaction of his claim for damages: Nephew v. Michigan Cent. Ry. Co., 128 Mich. 599, 87 N. W. 753. Counsel employed by an executrix to prosecute a case has no implied authority to compromise the suit: McIntyre v. Meldrim, 63 Ga. 58; Succession of Landry, 117 La. 193, 41 South. 490. Under a general employment an attorney has no authority to consent to a compromise judgment: Senn v. Joseph, 106 Ala. 454, 17 South. 543; Kilmer v. Gallaher, 112 Iowa, 583, 84 Am. St. Rep. 358, 84 N. W. 697; Miocene Ditch Co. v. Moore, 150 Fed. 483, 80 C. C. A. 301. Certainly an attorney at law has no power, merely by his retainer as such, to compromise an action and consent to the entry of judgment in accordance with a stipulation, if his client, with the knowledge of the adverse attorney, objects to it, and such objection is brought home to the attention of the court before the judgment is entered: Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647. Attorneys employed to foreclose a mortgage are without implied authority to compromise by agreeing that their client will hold the premises as a mortgagee in possession and account for the rents and profits: McKechnie v. McKechnie, 3 App. Div. 91, 39 N. Y. Supp. 402. An attorney who receives a debt secured by chattel mortgage for collection cannot release the lien without express authority: Ludden & Bates Southern Music House v. Sumter, 45 S. C. 186, 55 Am. St. Rep. 761, 22 S. E. 738. An attorney has no implied power to release the lien of his client's mortgage or make an arrangement for the sale of the property free from the lien: Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678.

Under a general retainer an attorney has no authority to bind his client by an attempted accord and satisfaction. Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924.

While, strictly speaking, an attorney has no right, without special authority, to bind his client by a compromise, yet courts have shown a disinclination to disturb such a compromise, once it is made, if it is fair and reasonable in its terms: Potter v. Parsons, 14 Iowa, 286; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42; Roller v. Wooldridge, 46 Tex. 485; Holker v. Parker, 11 U. S. (7 Cranch) 436, 3 L. ed. 396. But courts have power, even when such compromise agreements are entered of record, to refuse to enforce them and grant relief to the clients: New York etc. R. R. Co. v. Martin, 158 Mass. 313, 33 N. E. 578; Dalton v. West End St. Ry. Co., 159 Mass. 221, 38 Am. St. Rep. 410, 34 N. E. 261; Township of North Whitehall v. Keller, 100 Pa. 105, 45 Am. Rep. 361.

The court, in Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42, in holding that a fair and judicious compromise, made by the attorney with the assent of the party in interest, will not be disturbed, although without the knowledge of the plaintiff of record, said: "The decisions on the power of an attorney to compromise are contradictory. In England, however, the doctrine established by the later cases, after some vacillation, is that the attorney has power, by virtue of his retainer, to compromise the action in which he is retained, provided he acts bona fide and reasonably, and does not violate the positive instructions of his client, and that the compromise will bind the client, even if he does violate instructions, unless the violation is known to the adverse party: Swinfen v. Swinfen, 18 Com. B. 485; Swinfen v. Lord Chelmsford, 5 Hurl. & N. 890; Chambers v. Mason, 5 Com. B., N. S., 59; Chown v. Parrott, 14 Com. B., N. S., 74; Prestwich v. Poley, 18 Com. B., N. S., 806; Fray v. Voules, 1 El. & El. 839; Butler v. Knight, L. R. 2 Ex. 109; Thomas v. Harris, 27 L. J. Ex., N. S., 353; In re Wood; Ex parte Wenham, 21 Week. Rep. 104. The reason is the attorney, within the scope of his retainer, is considered the general agent of the client. And it is strongly argued in support of the power that it ought to be upheld both as a matter of public policy and for the good of the client, inasmuch as the attorney generally knows vastly better than the client whether it is better to risk the trial of the suit or to compromise it, and is often called upon to do the one or the other suddenly in the absence of the client: See Wharton on Agency, sec. 590. The English doctrine finds support in a few American cases: Holmes v. Rogers, 13 Cal. 191; Wadhams v. Gay, 73 Ill. 415; Potter v. Parsons, 14 Iowa, 286; Wieland v. White, 109 Mass. 392; North Missouri R. R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138; Reinhold v. Alberti, 1 Binn. 469. The American courts, however, show a leaning in favor of such compromises, when fairly made, and readily uphold them if they can find grounds on which to do so. 'Although,' says Chief Justice Marshall, in Holker v. Parker, 7 Cranch, 436, 452, 'an attorney at law merely as such has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on

or not fairly exercised': See, also, Roller v. Wooldridge, 46 Tex. 485; Potter v. Parsons, 14 Iowa, 286."

In case of an emergency, when there is no time or opportunity for the attorney to consult with his client, it has been held that an attorney has implied authority to take such steps, even to compromising the claim, as will secure the greatest benefits to the client: Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63. But the mere fact that the client is at a distance, perhaps out of the state, does not of itself create such an emergency: Repp v. Wiles, 3 Ind. App. 167, 29 N. E. 441; Benedict v. Wilhoite, 26 Ky. Law Rep. 178, 80 S. W. 1155. Although the client resides in another state, his attorney has no implied authority to accept a satisfaction of judgment for less than the full amount: Housenick v. Miller, 93 Pa. 514; Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846.

According to Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 73 Am. St. Rep. 577, 40 Atl. 734, 44 L. R. A. 167, an attorney of record may bind his client to a final disposition of an action by oral or written agreement entered on the record, made an order of court, and executed by the adversary in good faith, without knowledge of any limitation upon the attorney's authority; and the fact that the agreement and order of court thereon effect a compromise of the client's cause of action is an immaterial circumstance.

According to Bonney v. Morrill, 57 Me. 368, the employment of an attorney to prosecute an action for land of which the party alleges that he has been disseized carries authority to compromise the claim against the disseizor for mesne profits during the pendency of the suit, if he deems such action best for the interest of his client.

And according to Grand Lodge Independent Order of Free Sons of Israel v. Ohnstein, 110 Ill. App. 312, an attorney has authority to bind his client by a promise to the opposite party to pay her the amount of her claim in consideration of her dismissal of her suit.

In Dixon v. Floyd, 73 S. C. 202, 53 S. E. 167, where it is decided that an attorney may compromise a case during its progress before the master, it is pointed out that attorneys are allowed greater latitude during the progress of cases in open court than at other times. Said the court: "The agreement was made during the progress of the case upon the hearing before the master. It must, therefore, be regarded as having been made in open court. The distinction between the powers of an attorney during the progress of a case in open court, and at other times, is clearly pointed out by the authorities: Ex parte Jones, 47 S. C. 393, 25 S. E. 285, and cases cited therein. In the former, far greater latitude is allowed than in the latter. One of the principal reasons is because the trial frequently develops a state of facts quite different from that anticipated, and the attorney is compelled to act for the best interests of his client, without the opportunity for consultation which would be afforded him on other occasions. A failure to act promptly might materially prejudice the rights of his client. In the case under consideration, mutual concessions were made as to certain rights of the respective parties which the

pleadings showed were strenuously contested; and in adjusting those rights under the circumstances, the attorneys did not act without authority."

The statutes of some states appear to modify the strict rule that an attorney cannot compromise his client's cause of action: B. F. Roden Grocery Co. v. MacAfee (Ala.), 49 South. 402; McLaine v. Bachelor, 8 Me. 324; Fogg v. Sanborn, 48 Me. 432.

While an attorney may have no implied authority to effect a compromise, still there is no objection to the client giving him special authority to compromise, in which case his agreement to compromise binds the client: Turner v. Campbell, 59 Ind. 279; Freeman v. Brehm (Ind. App.), 31 N. E. 545, affirming 30 N. E. 712; Albee v. Hayden, 25 Minn. 267; Kelly v. Chicago & A. Ry. Co., 113 Mo. App. 468, 87 S. W. 583; Trenton St. Ry. Co. v. Lawlor (N. J.), 71 Atl. 234; Phillips v. Pullen, 50 N. J. L. 439, 14 Atl. 222; Diamond Soda Water Mfg. Co. v. Hegeman, 74 App. Div. 430, 77 N. Y. Supp. 417; Livesley v. Pier, 11 Wash. 268, 39 Pac. 660; High v. Emerson, 23 Wash. 103, 62 Pac. 455. And where an attorney has effected a compromise it will be presumed, especially after judgment has been rendered therein, that he was authorized: Trope v. Kerns, 83 Cal. 553, 23 Pac. 691; Strattner v. Wilmington City Electric Co., 3 Penne. (Del.) 453, 53 Atl. 436; People v. Quick, 92 Ill. 580; Williams v. Nolan, 58 Tex. 708. Yet it has been held that proof of the fact that an attorney has accepted less than the amount of his client's claim raises no presumption that he had special authority to make such a settlement: Sonnebom v. Moore, 105 Ga. 497, 30 S. E. 947.

b. **Release of Claim or Cause of Action.**—An attorney has no implied authority, as a rule, to release his client's claim or cause of action: Richardson Drug Co. v. Dunagan, 8 Colo. App. 308, 46 Pac. 227; Millaudon v. McMicken, 7 Mart., N. S., 34; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Tompkins v. Woodford, 1 Pa. 156; Gilliland v. Gasque, 6 S. C. 406; Armstrong v. Hurst, 39 S. C. 498, 18 S. E. 150; Harper v. National Life Ins. Co., 56 Fed. 281, 5 C. C. A. 505. He cannot, by virtue merely of his retainer to prosecute or defend a suit, execute a release to one who is liable to his client for the purpose of making him a competent witness: Ball v. Bank of Alabama, 8 Ala. 590, 42 Am. Dec. 649; McCurdy v. Terry, 33 Ga. 49; Succession of Stocking, 6 La. Ann. 229; Succession of Weigel, 18 La. Ann. 49; York Bank v. Appleton, 17 Me. 55; Springer v. Whipple, 17 Me. 351; Shores v. Caswell, 13 Met. 413; Murray v. House, 11 Johns, 464; Bowne v. Hyde, 6 Barb. 392; Marshall v. Nagel, 1 Bail. 308. An attorney who receives a note for collection has no authority to make any agreement, without special instructions from his principal, to release an indorser or surety: Roberts v. Smith, 3 La. Ann. 205; East River Bank v. Kennedy, 22 N. Y. Sup. Ct. (9 Bosw.) 543; Varnum v. Bellamy, 4 McLean, 87, Fed. Cas. No. 16,886. This is in accordance with the general rule that an attorney employed to collect a debt is not authorized to release sureties upon the claim of his

client: Givens v. Briscoe, 3 J. J. Marsh. 529; Harrodsburg Sav. Inst. v. Chinn's Admr., 7 Bush, 539.

X. Submission to Arbitration or Amicable Action.

a. Submission to Arbitration in General.—It is within the general authority of an attorney employed in a pending suit to submit the controversy to arbitration or reference; his power to do so is implied from his retainer in the case, and no special authorization is requisite: Beverly v. Stephens, 17 Ala. 701; Lee v. Grimes, 4 Colo. 185; Wade v. Powell, 31 Ga. 1; McElreath v. Middleton, 89 Ga. 83, 14 S. E. 906; Talbot v. McGee, 4 T. B. Mon. 375; Smith's Heirs v. Dixon, 3 Met. 438; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Buckland v. Conway, 16 Mass. 396; Everett v. Charlestown, 12 Allen, 93; Pike v. Emerson, 5 N. H. 393, 22 Am. Dec. 468; Brooks v. New Durham, 55 N. H. 559; Paret v. Bayonne, 39 N. J. L. 559; Gorham v. Gale, 7 Cow. 739, 17 Am. Dec. 549; Tilton v. United States Life Ins. Co., 8 Daly, 84; Tiffany v. Lord, 40 How. Pr. 481; Morris v. Grier, 76 N. C. 410; Treasurer of Champaign Co. v. Norton, 1 Ohio, 270; Wilson v. Young, 9 Pa. 101; Babb v. Stromberg, 14 Pa. 397; Bingham's Trustee v. Guthrie, 19 Pa. 418; Stokely v. Robinson, 34 Pa. 315; Evars v. Kamphaus, 59 Pa. 379; Williams v. Danziger, 91 Pa. 232; Williams v. Tracey, 95 Pa. 308; Sargeant v. Clark, 108 Pa. 588; Smith v. Bossard, 2 McCord Eq. 406; Holker v. Parker, 11 U. S. (7 Cranch) 436, 3 L. ed. 396; Alexandria Canal Co. v. Swann, 46 U. S. (5 How.) 83, 12 L. ed. 60; Abbe v. Rood, Fed. Cas. No. 6, 6 McLean, 106; Denny v. Brown, Fed. Cas. No. 3805. King v. King, 104 La. 420, 29 South. 205, seems to announce a different rule. And in Wright v. Evans, 53 Ala. 103, it is affirmed that an attorney cannot delegate his authority to submit a controversy to arbitration.

b. Limitation on Right of Submission.—The language of many of the decisions is broad enough to justify the conclusion that an attorney has implied authority to submit his client's cause to arbitration, whether or not an action is pending, and whether or not the agreement for submission is in pais or by rule or under the direction of the court. Some courts take the position, however, that an attorney cannot, without special authority from his client, submit a controversy to arbitration unless the cause is actually pending and the submission is made under the authority and direction of the court: Jenkins v. Gillespie, 10 Smedes & M. 31, 48 Am. Dec. 732; Markley v. Amos, 8 Rich. 468; McGinnis v. Curry, 13 W. Va. 29. A leading case on this point is Daniels v. City of New London, 58 Conn. 156, 19 Atl. 573, 7 L. R. A. 563, where the court uses this language: "The cases establishing an attorney's authority to submit to arbitration a pending cause, under the authority and direction of the court, are somewhat numerous; and, as is well said in Markley v. Amos, 8 Rich. 468, this of itself 'affords a fair inference that he cannot submit in any other way.' We have been referred to no well-considered case, nor do we know of any, which supports this claim of the defendant. On the other hand, some of the authorities cited on the plaintiff's brief are directly against such a position: See the cases of Jenkins

v. Gillespie, 10 Smedes & M. 31, 48 Am. Dec. 732; Markley v. Amos, 8 Rich. 468; Scarborough v. Reynolds, 12 Ala. 252; Morse, Arb. 16. In addition to the cases cited, there is the case of McGinnis v. Curry, 13 W. Va. 29 (decided in 1878), where the court holds that an attorney has no authority, before or after suit brought, to make an agreement in pais to submit his client's cause to arbitration, without special authority of his client. So far as the reasoning and conclusions of the court in that case on the point in question here are applicable to the case at bar, we adopt them, and feel justified in quoting from the opinion at some length. The court says: 'The authority of an attorney at common law, by a consent order made in the court, to submit a pending suit to arbitration, is universally admitted; and the courts, in cases where such a consent order has been made at the instance of counsel, have frequently spoken of the authority of counsel to submit a controversy of his client to arbitration in general language, which would be broad enough to include, not only a case of a submission of a controversy, in a pending suit by an agreement of counsel in pais, but even a controversy about which no suit was pending. But all the cases in which such loose and general language was used were cases where the authority of the counsel was exercised not only in a pending suit, but by a consent order agreeing to the submission made in open court: See Wilson v. Young, 9 Pa. 101; Holker v. Parker, 7 Cranch, 436, 3 L. ed. 396; Somers v. Balabrega, 1 Dall. 164, 1 L. ed. 183; Bingham's Trustees v. Guthrie, 19 Pa. 418. In England, though, so far as I know, it has never been decided that an attorney had a right to submit his client's controversy to arbitration, when no suit was pending, or by an agreement in pais, and not by an order in court when a suit was pending; yet there are English cases from which it may be inferred that the courts may there consider the power of the attorney to submit his client's cause to arbitration in general, and not confined to pending suits, or to orders of reference made in court: See Banfill v. Leigh, 8 Term Rep. 571; In re Jamieson, 4 Ad. & E. 945. But, in considering how much weight should be attached to these dicta of English judges, it should be remembered that an attorney in England occupies toward his client a very different relation from what he does in this country. There he is very frequently the general agent of the client, and transacts a great deal of his general business. But here an attorney is generally employed to attend to his client's interest in reference to some single controversy. In Pennsylvania, too, there are decisions which might seem to imply that the power of an attorney to submit to arbitration was not confined to the making of a consent order in a pending cause to refer it to arbitration: See Bingham's Trustees v. Guthrie, 19 Pa. 418. But, in considering what weight should be attached to the dicta of Pennsylvania judges, it should also be borne in mind that in Pennsylvania the authority of attorneys is more extensive than elsewhere: See Lynch v. Commonwealth, 16 Serg. & R. 368, 16 Am. Dec. 582; Wilson v. Young, 9 Pa. 101. While I have found no case deciding that an attorney has a general authority to

submit his client's controversies to arbitration, there are cases in which it has been decided that he does not possess such general authority: See Jenkins v. Gillespie, 10 Smedes & M. 31, 48 Am. Dec. 732; Scarborough v. Reynolds, 12 Ala. 252. It is true that these were cases in which there was no lis pendens. But it seems to me that, as it is held that an attorney, by reason of his being employed to institute a suit or defend a threatened suit, has no authority to submit by an agreement in pais signed by the attorney, the case to arbitration, that it must follow that he has no such authority, though the suit be pending. An authority to act in pais could only be inferred if it existed from his employment, before the institution of the suit, as an attorney; and such employment, as we have seen, confers no such authority. This conclusion is not at all inconsistent with the numerous cases deciding that an attorney has authority in a pending suit, by an order of court, to submit the cause to arbitration. When the courts have assigned any reason for their decisions, they have been based not merely, if at all, on the employment of the counsel by the client, but on the fact that he is an officer of the court, acting in the presence and under the control of the court, and, as such, has a right to take any legal steps he may deem proper in prosecuting or defending the suit. But this reasoning has no application to any action of the attorney in pais, such as agreeing to submit the case to arbitrators by an agreement signed by him without any special authority from his client.' If an attorney cannot, without special authority from his client, submit a controversy to arbitration by an act in pais, it would seem to follow that he cannot by any like act, without such authority, materially change a submission already made or adopted by his client." Even if an attorney has general authority to submit to arbitration, whether the cause is pending or not, his assent to a change in the terms of an arbitration agreed to by his client will not bind the latter, where it does not appear whether the attorney was employed before or after the submission or to what extent his authority went: Jenkins v. Gillespie, 18 Miss. (10 Smedes & M.) 31, 48 Am. Dec. 732.

c. **Consent to Amicable Action.**—In Pennsylvania it seems that an attorney has authority to bind his client by stating a case for the judgment of the court, or by agreeing to an amicable action: Whitcomb v. Kephart, 50 Pa. 85; Cook v. Gilbert, 8 Serg. & R. 567.

XI. Control Over Attachments.

An attorney has, by virtue of his right to control the remedy and matters of procedure, implied authority to control attachments. Hence intrusting an attorney with a note for collection, or giving him general authority to commence a suit, warrants him in attaching property: Kirksey v. Jones, 7 Ala. 622; Brown v. Spiegel, 156 Mich. 138, 120 N. W. 579; Pierce v. Strickland, 2 Story, 292, Fed. Cas. No. 11,147. And the attorney of an attaching creditor has power, without any special authority from his client, to release the attachment, whether it is on personal or real property: Monson v. Hawley, 30

Conn. 51, 79 Am. Dec. 233; Benson v. Carr, 73 Me. 76; Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Moulton v. Whitman, 115 Mass. 37; Marble v. Jamesville Mfg. Co., 163 Mass. 171, 39 N. E. 998; Brown v. Spiegel, 156 Mich. 138, 120 N. W. 579; Muir v. Orear, 87 Mo. App. 38; although the view seems to be taken in Quarles v. Porter, 12 Mo. 76, that an attorney is without authority to release a garnishee from his attachment, unless the client has given special authority. The consent of an attorney to the appointment of a bailee to receive attached goods, in accordance with local practice, binds his client: Pierce v. Strickland, 2 Story, 292, Fed. Cas. No. 11,147; and he may approve the receipt taken for attached property by the officer, so as to relieve the latter from liability: Jenney v. Delesdernier, 20 Me. 183; Farnham v. Gilman, 24 Me. 250. By virtue of his general employment the attorney for the plaintiff in attachment may make a motion for an order to sell the attached property, so as to make the plaintiff answerable to a third person who owns it: Vaughn v. Fisher, 32 Mo. App. 29; but where the property attached is a restaurant, he has no authority to direct the sheriff to conduct the business and bind his client for the expenses incurred: Alexander v. Denaveaux, 53 Cal. 663, 59 Cal. 476.

XII. Control Over Judgment.

a. Revivor of Judgment.—The authority of an attorney under his general employment does not cease upon the entry of judgment. Hence where the plaintiff, in an action of foreclosure, dies after the decree, but before the sale, the defendant's attorney, under his general authority, may waive notice of a motion for revivor: Smith v. Cunningham, 59 Kan. 552, 53 Pac. 760. But it has been affirmed that an attorney has no authority, on his own motion, to institute affirmative proceedings to keep alive a judgment which he has for collection: Cullison v. Lindsay, 108 Iowa, 124, 78 N. W. 847.

b. Vacation of Judgment or Opening of Default.—Under the New York practice it seems that an attorney may open a default which he has taken, and allow the defendant to answer or be heard on the merits: Read v. French, 28 N. Y. 285; Clussman v. Merkel, 16 N. Y. Sup. Ct. (3 Bosw.) 402; Schelly v. Zink, 13 Hun, 538. But in Holbert v. Montgomery's Admrs., 5 Dana, 11, it is said that after the rendition of a final judgment the attorneys of the parties have no authority resulting from their original employment to consent to set it aside or agree to a new trial. And in Quinn v. Lloyd, 30 N. Y. Sup. Ct. (7 Rob.) 538, 36 How. Pr. 378, 5 Abb. Pr., N. S., 281, it is said that an attorney has no power, without the consent of his client, to agree to the vacation of a judgment which is pending and secured on appeal. If, when a judgment is taken contrary to a former agreement, the attorney for the plaintiff agrees with the opposing attorney that the judgment shall be stricken out if the defendant objects to it, the agreement is binding: Kent v. Ricards, 3 Md. Ch. 392. That an attorney has authority to protect a judgment in proceedings for its vacation instituted during the period in which he has by law

authority to enforce the judgment, see Sheldon v. Risedorph, 23 Minn. 518.

c. **Enforcement of Judgment.**—The authority of an attorney does not cease with the entry of judgment, but continues for the purpose of directing proceedings for the enforcement of the judgment: Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380. Hence he has authority, under his general employment in the case, to issue execution on the judgment recovered by him for his client: Rowlett v. Shepherd, 7 Mart., N. S., 518; Simpson v. Lombas, 14 La. Ann. 103; Farmers' Bank v. Mackall, 3 Gill, 447; Russell v. Geyer, 4 Mo. 384; Simpkins v. Page, 1 Code Rep. 107; Union Bank v. Geary, 30 U. S. (5 Pet.) 99, 8 L. ed. 60; Erwin v. Blake, 33 U. S. (8 Pet.) 18, 8 L. ed. 852; Wills v. Chandler, 1 McCrary, 276, 2 Fed. 273. He has authority, by virtue of his original retainer, after he obtains judgment, to institute supplementary proceedings and procure the appointment of a receiver, for these may properly be regarded as proceedings in the suit: Ward v. Roy, 69 N. Y. 96; Shaunessy v. Traphagen, 13 N. Y. St. Rep. 754. He may sue out execution and cause the arrest of the defendant, where the statute permits such a course: Hyams v. Michel, 3 Rich. 303. Having recovered judgment on his client's claim an attorney may, under his general retainer, demand an assignment of the debtor's choses in action, and institute proceedings under the fraudulent debtor's act in the event of a refusal: Steward v. Biddlecum, 2 N. Y. 103. The court is justified in assuming that an attorney who has recovered a judgment for his client against an insolvent corporation has authority to present a petition for the allowance of the judgment out of the assets of the corporation in proceedings to wind up its affairs: Nelson v. Jenks, 51 Minn. 108, 52 N. W. 1081.

d. **Assignment of Judgment.**—An attorney who has recovered a judgment for his client, or who has been retained to collect a judgment, cannot, in the absence of express authority, sell or assign the judgment: Boren v. McGehee, 6 Port. 432, 31 Am. Dec. 695; Schroeder v. Wolf, 227 Ill. 133, 81 N. E. 13; Mayer v. Sparks, 3 Kan. App. 602, 45 Pac. 249; Walden v. Grant, 8 Mart., N. S., 565; Wilson v. Wadleigh, 36 Me. 496; Head v. Gervais, Walk. 431, 12 Am. Dec. 577; Rice v. Troup, 62 Miss. 186; Wyatt v. Fromme, 70 Mo. App. 613; Henry & Coatsworth Co. v. Halter, 58 Neb. 685, 79 N. W. 616; Appeal of Campbell, 29 Pa. 401, 72 Am. Dec. 641; Fassitt v. Middleton, 47 Pa. 214, 86 Am. Dec. 535; Rowland v. Slate, 58 Pa. 196; Bosler v. Searight, 149 Pa. 241, 24 Atl. 303; Mayer v. Blease, 4 S. C. 10; Noonan v. Gray's Exrs., 1 Bail. 437; Baldwin v. Merrill, 8 Humph. 132; Maxwell v. Owen, 7 Cold. 630.

e. **Release or Discharge of Judgment.**—An attorney who has prosecuted his client's suit to judgment cannot, without special authority, release the judgment or discharge the lien thereof, unless the judgment is paid or satisfied: Phillips v. Dobbins, 56 Ga. 617; Rounsaville v. Hazen, 33 Kan. 71, 5 Pac. 422; Harrow v. Farrow's Heirs, 7 B. Mon. 126, 45 Am. Dec. 60; Morgan v. His Creditors, 19 La. 84; Wilson v. Wadleigh, 36 Me. 496; Wilson v. Jennings, 3 Ohio St. 528; Appeal

of Kirk, 87 Pa. 243, 30 Am. Rep. 357; Dollar Sav. Bank v. Robb, 4 Brewst. 106. He cannot file the judgment as a claim in equity proceedings and thus waive its lien: Horsey v. Chew, 65 Md. 555, 5 Atl. 466. It is said that payment to the attorney of a state does not satisfy a judgment in its favor, and that he has no power to release the judgment: Peacock v. Pembroke, 8 Md. 348. Obviously an attorney may be given special authority to release the lien of a judgment: Wishard v. Biddle, 64 Iowa, 526, 21 N. W. 15.

f. **Payment and Satisfaction of Judgment.**—An attorney may, by virtue of his general authority in a case, receive payment of the judgment and satisfy the same; no special authorization is requisite to empower him to do this. When employed to prosecute a suit to judgment, his implied authority is not terminated upon the rendition of judgment, and is sufficient to empower him to receive the amount of the judgment and acknowledge satisfaction: Frazier v. Park's Admrs., 56 Ala. 363; Miller v. Scott, 21 Ark. 396; Conway County v. Little Rock etc. Ry. Co., 39 Ark. 50; Black v. Drake, 2 Colo. 330; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Smyth v. Harvie, 31 Ill. 62, 83 Am. Dec. 202; McCarver v. Nealey, 1 G. Greene, 360; Canterberry v. Commonwealth, 1 Dana, 415; Langdon v. Potter, 13 Mass. 319; Lewis v. Gamage, 1 Pick. 347; State v. Hawkins, 28 Mo. 366; Carroll County v. Cheatham, 48 Mo. 385; Rhinehart v. New Madrid Banking Co., 99 Mo. 381, 73 S. W. 315; Wycoff v. Bergen, 1 N. J. L. 214; Weist v. Lee, 3 Yeates, 47; Commrs. of Public Accounts v. Rose, 1 Desaus. 461; Mordecai v. Charleston County, 8 S. C. 100; Maxwell v. Owen, 7 Cold. 630; Branch v. Burnley, 1 Call, 147; Wilson v. Stokes, 4 Munf. 455; Hayes v. Koepfli, 46 Wash. 43, 89 Pac. 151; Harper v. Harvey, 4 W. Va. 539; Wills v. Chandler, 1 McCrary, 276, 2 Fed. 273.

This rule applies to the attorney for a minor in an action by his guardian ad litem or prochein ami: Baltimore & O. R. Co. v. Fitzpatrick, 36 Md. 619; Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 73 Am. St. Rep. 577, 40 Atl. 734, 44 L. R. A. 167; State v. Ballinger, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A., N. S., 72.

The time within which an attorney may receive payment and acknowledge satisfaction of a judgment is in some jurisdictions limited to two years: Chautauqua County Bank v. Risley, 4 Denio, 480; Flanders v. Sherman, 18 Wis. 575.

If an attorney at law agrees with a surety on a delivery bond that if he will procure and deliver to the sheriff the property specified in the bond, the surety shall be released from the judgment and from all claim for damages assessed for the value of the use of the property, the agreement is within the limits of the attorney's authority, and evidence that it was authorized or ratified by his client is unnecessary, if the property was in fact delivered to the sheriff by the surety: Willis v. Chowning, 90 Tex. 617, 59 Am. St. Rep. 842, 40 S. W. 395.

An attorney who is retained for some specific purpose, and is not an attorney of record, has been held to have no authority to collect the amount of the judgment: Cameron v. Stratton, 14 Ill. App. 270.

While an attorney of record may, by virtue of his general authority, receive payment of the judgment recovered, and enter satisfaction thereof, he cannot, without special authority, satisfy the judgment without payment, and this in full; his implied authority does not empower him to compromise the amount of the judgment, or accept less than the full amount thereof in satisfaction: Robinson v. Murphy, 69 Ala. 543; McMurray v. Marsh, 12 Colo. App. 95, 54 Pac. 852; People v. Cole, 84 Ill. 327; Miller v. Lane, 13 Ill. App. 648; Stocking v. Knight, 19 Ill. App. 501; Rohr v. Anderson, 51 Md. 205; Fetz v. Leyendecker, 157 Mich. 355, 122 N. W. 100; Johnson v. Dun, 75 Minn. 533, 78 N. W. 98; Burgraf v. Byrnes, 94 Minn. 418, 103 N. W. 215; State v. Hoeffner, 124 Mo. 492, 28 S. W. 5; Hamrich v. Combs, 14 Neb. 381, 15 N. W. 731; Faughnan v. City of Elizabeth, 58 N. J. L. 309, 33 Atl. 212; Beers v. Hendrickson, 45 N. Y. 665; Tito v. Seabury, 18 Misc. Rep. 283, 41 N. Y. Supp. 1041; Wood v. City of New York, 44 App. Div. 299, 60 N. Y. Supp. 759; Woodford v. Rasbach, 6 Civ. Proc. Rep. 315; Philadelphia & R. R. Co. v. Christman, 4 Penny. 271; Peters v. Lawson, 66 Tex. 336, 17 S. W. 734; Watt v. Brookover, 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007; Pierce v. Brown, 8 Biss. 534, Fed. Cas. No. 11,143.

The rule that an attorney cannot, except when expressly authorized, compromise a judgment for less than the amount thereof, is applied to decrees for alimony in Sebastian v. Rose (Ky.), 122 S. W. 120; Schlemmer v. Schlemmer, 107 Mo. App. 487, 81 S. W. 636.

It seems that an attorney has power to enter a remittitur for the damages awarded by the jury in excess of the amount claimed or really due: Mead v. Buckner, 2 La. 286; Pickett's Exrs. v. Ford, 4 How. (Miss.) 246.

Not only is an attorney without implied authority to accept any sum less than the full amount of a judgment in satisfaction thereof, but he is without implied authority to accept anything different than that sued for: D. C. Heath & Co. v. Commonwealth, 129 Ky. 835, 113 S. W. 69. He cannot, where a money judgment has been recovered, take notes or other securities in satisfaction: Holliday v. Thomas, 90 Ind. 398; Roberts v. Rumley, 58 Iowa, 301, 12 N. W. 323; Greenwell v. Roberts, 7 La. 63; nor an assignment of another judgment: Clark v. Kingsland, 1 Smedes & M. 248. Perhaps an attorney would be warranted in receiving a certified check in payment of a judgment, but not in accepting as part payment outstanding notes of his client held by the defendant: Lesher v. Radel, 170 Fed. 723. He has no implied authority to accept an acknowledgment of indebtedness of the garnishee of the judgment debtor is satisfaction of a judgment in favor of his client: Barr v. Rader, 31 Or. 225, 49 Pac. 962.

It is not within the implied authority of an attorney to accept land instead of money in satisfaction of a judgment: Walden v. Bolton, 55 Mo. 405; Gray v. Howell, 205 Pa. 211, 54 Atl. 774. On the other hand, he cannot receive money or any other thing in satisfaction of a judgment for land: Harrow v. Farrow's Heirs, 7 B. Mon. 126, 45 Am. Dec. 60.

Clearly, an attorney may be expressly authorized to receive a less amount or anything but money in satisfaction of a judgment: Vickery v. McClellan, 61 Ill. 311; Jeffries v. Union Mut. Life Ins. Co., 1 McCrary, 114, 1 Fed. 450. And where a judgment has been satisfied by an attorney, it will be presumed that he was authorized to execute the satisfaction: Miller v. Preston, 154 Pa. 63, 25 Atl. 1041; Wheeler v. Alderman, 34 S. C. 533, 27 Am. St. Rep. 842, 13 S. E. 673; Cartwright's Admr. v. Jones' Admr., 13 Tex. 1.

XIII. Control Over Execution.

a. **In General.**—The general powers of an attorney do not terminate when he has prosecuted the suit in which he has been retained to judgment, but continue for the purpose of directing the proceedings under the process of the court for enforcing the judgment. He may issue execution, and take other steps necessary to enforce payment of the judgment: See "Enforcement of Judgment," ante; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Jenney v. Delesdernier, 20 Me. 183; Union Bank v. Geary, 30 U. S. (5 Pet.) 99, 8 L. ed. 60; Erwin v. Blake, 33 U. S. (8 Pet.) 18, 8 L. ed. 852. It is said that an attorney has authority to receive seisin for the creditor on a levy of execution on the debtor's land: Pratt v. Putnam, 13 Mass. 361; that he has authority to permit the sheriff to renew an execution in the name of the client: Cheever v. Mirrick, 2 N. H. 376; but in Dodge v. Prince, 4 Vt. 191, it is stated that he has no power to appoint an appraiser on execution, without special authority.

b. **Directing Enforcement of Execution.**—By virtue of his general retainer it is said that an attorney has power to direct the sheriff as to the time and manner of enforcing the execution: Gorham v. Gale, 7 Cow. 739, 17 Am. Dec. 549; Lynch v. Commonwealth, 16 Serg. & R. 368, 16 Am. Dec. 582; Willard v. Goodrich, 31 Vt. 597; Erwin v. Blake, 33 U. S. (8 Pet.) 18, 8 L. ed. 852; giving such instructions to the officer as the client might lawfully give if he were present (Smith v. Gayle, 58 Ala. 600; Stevens v. Colby, 46 N. H. 163; Kimball v. Perry, 15 Vt. 414), perhaps directing him to depart from the regular course relative thereto (State v. Boyd, 63 Ind. 428; Corning v. Southland, 3 Hill, 552), but not amounting to an abuse of process: Walters v. Sykes, 22 Wend. 566. Yet it has been affirmed that the levying of execution is not within the authority of an attorney; that in the absence of special authority the acts and directions of an attorney in directing the levy upon or the taking of goods upon process are in excess of his general powers as attorney and do not affect or subject his client to liability: Welsh v. Cochran, 63 N. Y. 181, 20 Am. Rep. 519; Fischer v. Hetherington, 11 Misc. Rep. 575, 32 N. Y. Supp. 795. According to Averill v. Williams, 4 Denio, 295, 47 Am. Dec. 252, he has no authority to direct what shall be sold under his client's execution.

c. **Return of Execution.**—The implied authority of an attorney to control the execution extends to matters connected with the return. Hence returning an execution to the creditor's attorney, at the re-

quest of the latter, protects the officer against suit for not returning it to the clerk's office: White v. Johnson, 67 Me. 287. And where the sheriff delivers an execution, which is unsatisfied, to the attorney of the creditor on or before the return day, and he accepts it without objection, the creditor cannot maintain an action against the officer for not returning the execution: Howard v. Whittemore, 9 N. H. 133. And where the plaintiff's attorney induces the sheriff to omit returning the execution three days before the proper term, by advising him that it will be sufficient if returned on the first day of court, this constitutes a good defense to the plaintiff's rule against the officer for neglect to make a return: McClure v. Colclough, 5 Ala. 65. If the attorney, in undertaking to direct the acts of the officer, writes a defective return, which the officer signs, the mistake is the client's: Stevens v. Colby, 46 N. H. 163.

d. **Stay of Execution.**—An attorney may stay execution for a moderate time in order to obtain or collect judgment with greater facility, where he acts honestly and with reasonable discretion: Millandon v. McMicken, 7 Mart., N. S., 34; Kent v. Ricards, 3 Md. Ch. 392; Wieland v. White, 109 Mass. 392; Silvis v. Ely, 3 Watts & S. 420. But there are limitations on his general powers in this respect: Pendexter v. Vernon, 9 Humph. 84. The attorney for a judgment creditor cannot, without special authority, stay execution so as to postpone the lien to subsequent claims: Reynolds v. Ingersoll, 11 Smedes & M. 249, 49 Am. Dec. 57; nor so as to discharge a surety: Union Bank of Tennessee v. Govan, 10 Smedes & M. 333. He has no implied authority to bind his client by an agreement whereby execution is stayed and the debtor's property conveyed in trust to pay other creditors before his client: Housenick v. Miller, 93 Pa. 514. But where attorneys have fraudulently issued an execution which, in respect to delivery to the sheriff, is prior to another execution issued by them in favor of another party, they may stipulate that the prior execution shall be postponed to the one subsequently issued: Read v. French, 28 N. Y. 285.

e. **Institution of Supplementary Proceedings.**—By virtue of his original retainer an attorney may, after he obtains judgment, institute supplementary proceedings and procure the appointment of a receiver, when such a course is proper: Ward v. Roy, 69 N. Y. 96; Shaunessy v. Traphagen, 13 N. Y. St. Rep. 754. When an attorney has an execution in his hands for collection, although he is not the attorney of record, he has prima facie authority to act for the judgment creditor and apply for a subpoena commanding the debtor to appear and disclose: West Cove Grain Co. v. Bartley (Me.), 74 Atl. 730.

f. **Satisfaction of Execution.**—An attorney who prosecutes an action and obtains judgment is authorized to receive the money realized on execution and enter satisfaction thereof if payment of the full amount is made: Williams v. State, 65 Ark. 159, 46 S. W. 186; Gray v. Wass, 1 Me. 257; White v. Johnson, 67 Me. 287; Butler v. Jones,

8 Miss. (7 How.) 587, 40 Am. Dec. 82; Milliken v. McBroom, 38 Mo. 342; Appeal of Henderson, 4 Penny. 229; Mayer v. Blease, 4 S. C. 10; Wilson v. Stokes, 4 Munf. 455. But he has no power, unless specially authorized, to discharge an execution on payment of a sum less than the amount of the judgment: Jewett v. Wadleigh, 32 Me. 110; Wilson v. Wadleigh, 36 Me. 496; Lewis v. Gamage, 1 Pick. 347; Barr v. Rader, 31 Or. 225, 49 Pac. 962. See "Payment and Satisfaction of Judgment," ante. It has been decided that an attorney cannot bind his client by agreeing that the proceeds of an execution shall be by the sheriff paid to the surety on the indemnity bond, to be held as security against liability thereon: Luce v. Foster, 42 Neb. 818, 60 N. W. 1027. And it has also been decided that an attorney is without power to authorize a clerk of the circuit court, in his official capacity, to accept money on a judgment: Hendry v. Benlisa, 37 Fla. 609, 20 South. 800, 34 L. R. A. 283.

XIV. Control Over Judicial Sale.

a. **Right to Direct and Manage.**—It would seem that the attorney of record, by virtue of his implied authority to take the necessary steps to realize upon a judgment and execution, may, within proper bounds, control the execution sale. It has been affirmed that he may give directions to the sheriff as to the mode and time of sale: Lynch v. Commonwealth, 16 Serg. & R. 368, 16 Am. Dec. 582; that he may order or agree to the adjournment of the sale: Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380; Ward v. Hollins, 14 Md. 158; and that he may enter into other reasonable stipulations in regard to the conduct of the sale: Nelson v. Cook, 19 Ill. 440; Story v. Hawkins, 8 Dana, 12; Appeal of Reamer, 18 Pa. 510; Rice v. O'Keefe, 6 Heisk. 638; Farmers' Trust & Canal Bank v. Ketchum, 4 McLean, 120, Fed. Cas. No. 4670. On the other hand, it has been held that he has no power to agree that the property levied upon shall be sold at private sale, and by a person other than the sheriff: Kronschnable v. Knoblauch, 21 Minn. 56; and that he has no authority to bind his client by an agreement that the purchaser shall pay the amount of his bid to a third person instead of to the officer making the sale: Fire Assn. of Philadelphia v. Ruby, 58 Neb. 730, 79 N. W. 723. It has also been held that an attorney employed to try an action for debt and enforce a lien securing it has no authority after judgment to contract with a third person to sell the property for a certain sum for a specified commission: National Bank of Commerce v. Bowman, 30 Ky. Law Rep. 1236, 100 S. W. 831. When the purchaser at execution holds the certificate of sale, his attorney has no authority to accept from a lienholder the amount due thereon and bind his client by an agreement to have the certificate assigned to the lienholder: Howard v. Kelly, 137 Iowa, 76, 126 Am. St. Rep. 274, 114 N. W. 544.

Limitations on the authority of an attorney in controlling a judicial sale are pointed out in Person v. Leathers, 67 Miss. 548, 7 South. 391, where it is held that an attorney retained to defend an action to sell real estate under a deed of trust has no power, after a decree of sale is rendered, to bind the defendant by consenting to a

sale of the lands in solido. "The authority of an attorney of record, for all general purposes, ends with the termination of the litigation which has been committed to his charge. In the conduct of the litigation, he may take such action as may appear to him advisable to bring the controversy to a favorable conclusion; but when once the litigation has been ended the attorney can do nothing further, in which his discretion is to be exercised, without re-employment, or without express instructions. The rendition of judgment puts an end to the authority of a plaintiff's attorney, except as to receiving the fruits of the judgment. The rendition of final judgment must be held, likewise, to put an end to the authority of defendant's attorney, without fresh employment or without express instructions. The decisions of this court are all in harmony with this general rule. If, then, we concede that the gentleman who consented to the sale of the lands in solido was the attorney of record of Person, still the case is in no way relieved of this ineradicable taint of illegality. No attorney of record, months after the rendition of a final decree, can be held to possess authority to waive the substantial right of the judgment debtor to have her lands sold in tracts not exceeding one hundred and sixty acres."

In Smith v. Cunningham, 59 Kan. 552, 53 Pac. 760, it is held that where the plaintiff in an action of foreclosure dies after the decree but before the sale, the defendant's attorney may, under his general authority, waive notice of a motion for revivor. Said the court: "In regard to the relation of attorney and client, it may be said that the attorney's authority to act for his client continues until the end of the litigation, or until the discharge of the particular purpose for which he was employed, unless his authority is sooner revoked. In a large number of cases the entry of judgment ends the litigation, but in foreclosure proceedings it would seem that the end of the litigation is not reached until the lien is enforced by the sale and confirmation of sale of the mortgaged property. The understanding of the profession is that the duties and powers of an attorney continue until the final conclusion of the foreclosure proceedings. Such proceedings are not concluded by a decree directing a sale of the property, nor has an additional retainer or new contract with an attorney to represent his client in the proceedings subsequent to the decree ever been deemed necessary. In such a case, the attorney originally employed would be deemed derelict in his duty if he failed to protect the interests of his client by examining the circumstances of the sale and every step taken in enforcing the lien. If there were any departures from the directions in the decree or substantial noncompliance with the requirements of the law, it would be his duty to resist the confirmation of the sale, and to move to set the sale aside."

b. **Right to Purchase for Client.**—The authorities generally take the view that it is not within the implied authority of an attorney to purchase for his client under the latter's execution: Lasley v. Lackey, 4 Ky. Law Rep. 896; Beardsley v. Root, 11 Johns. 464, 6 Am. Dec. 386; Washington v. Johnson, 7 Humph. 468; Savery v. Sypher, 73 U. S. (6

Wall.) 157, 18 L. ed. 822. This doctrine is approved in Fisher v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68, 69 Pac. 622, 907, where it is decided that an attorney has no authority, as such, to purchase for his client the latter's property sold under execution in proceedings in which the attorney is retained. Under the Alabama practice, there is no impropriety in an attorney attending, on behalf of his client, an execution sale, and buying in the property for his client: Fabel v. Boykin, 55 Ala. 383. That an attorney having the control of an execution in favor of two or more plaintiffs cannot purchase the property for the benefit of some of his clients against the interest and without the consent of the others, see Hawley v. Craimer, 4 Cow. 717; Leisinring v. Black, 5 Watts, 303, 30 Am. Dec. 322. In Stilley v. McNeal, 219 Pa. 533, 69 Atl. 58, it is affirmed that an attorney who buys in property on foreclosure for his client is not authorized to sell the same to a third person not present at the sale or bidding thereat.

XV. Control Over Appeal.

a. **Right to Prosecute Appeal.**—It appears to be generally conceded that an attorney retained to prosecute or defend an action has no implied authority, in the event of a judgment adverse to his client, to prosecute an appeal or writ of error and bind his client for the costs and expenses incidental thereto: Tobler v. Nevitt, 45 Colo. 231, ante, p. 142, 100 Pac. 416, 23 L. R. A., N. S., 702; Hopkins v. Mallard, 1 G. Greene, 117; National Park Bank v. Lanahan, 60 Md. 477; Delaney v. Husband, 64 N. J. L. 275, 45 Atl. 265; Livingston Middleditch Co. v. New York College of Dentistry, 30 Misc. Rep. 831, 61 N. Y. Supp. 918, affirmed in 31 Misc. Rep. 259, 64 N. Y. Supp. 140, 7 Ann. Cas. 398; Coles v. Anderson, 8 Humph. 489. To quote from Hooker v. Village of Brandon, 75 Wis. 8, 43 N. W. 741: "We think, upon authority and principle, an employment to defend an action pending in a trial court does not, under ordinary circumstances, authorize such attorney to take an appeal to a higher court from the judgment rendered against his client. Public policy and the rights of litigants require that their attorneys in such case, especially where they have easy access to their clients, should first consult their wishes upon the question of taking an appeal from the judgment rendered against them in the trial court before incurring further expenses in such litigation. Any other rule would authorize an over-confident attorney to inflict unnecessary costs upon his client in a case when the client was entirely satisfied to abide the judgment of the trial court. The following authorities cited by the learned counsel for the respondent tend to establish this view as to the authority of the attorney under such circumstances: Covill v. Phy, 24 Ill. 37; Richardson v. Talbot, 2 Bibb, 382; Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55 (Gil. 44); Jackson v. Bartlett, 8 Johns. 361; Walradt v. Maynard, 3 Barb. 584, 586."

When an appeal has been taken by an attorney, however, it will be presumed that he had authority to do so: Ricketson v. Torres, 23 Cal. 636; Ring v. Charles Vogel Paint & Glass Co., 46 Mo. App. 374. And

an agreement by an attorney to withdraw an appeal will be presumed to have been made by the client's authority: Ward v. Hollins, 14 Md. 158.

b. **Right to Control Procedure.**—By his general authority an attorney may, after judgment has been entered, stipulate for an extension of time in which to perfect an appeal: Hoffenberth v. Muller, 12 Abb. Pr., N. S., 221. And in New Jersey it has been decided that an agreement by attorneys to postpone an appeal case in the common pleas for the term is valid: State v. Kitchen, 41 N. J. L. 229.

It is competent for attorneys conducting an appeal to make stipulations in matters relating to the procedure: American Emigrant Co. v. Long, 105 Iowa, 194, 74 N. W. 940; Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010; Rogan v. Walker, 1 Wis. 597.

c. **Right to Execute Undertaking.**—While some authorities may incline to the contrary (Nisbet v. Lawson, 1 Ga. 275; Bach v. Ballard, 13 La. Ann. 487; Adams v. Robinson, 1 Pick. 462), the general rule is that an attorney, by virtue of his general powers, has no authority to execute an appeal bond for his client: Gordon v. Camp, 2 Fla. 23; Love v. Sheffelin, 7 Fla. 40; Clark v. Courser, 29 N. H. 170; Murray v. Peckham, 15 R. I. 297, 3 Atl. 662; In re Holbrook, 5 Cow. 35; Coles v. Anderson, 8 Humph. 489. In Georgia the attorney of a plaintiff in certiorari has statutory authority to execute the usual certiorari bond in behalf of his client: Foley v. Bell, 4 Ga. App. 447, 61 S. E. 856.

d. **Right to Waive Appeal.**—Many authorities hold that an attorney has power to waive the right of appeal: Mackey v. Daniel, 59 Md. 484; Pike v. Emerson, 5 N. H. 393, 22 Am. Dec. 468; Jones v. Spokane Valley L. & W. Co., 44 Wash. 146, 87 Pac. 65. But it is doubtful whether he can do so gratuitously: S. H. Keoughan & Co. v. Equitable Oil Co., 116 La. 773, 41 South. 88. In Leahy v. Stone, 115 Ill. App. 138, it is decided that the attorney in a case has implied authority to stipulate in advance of the trial that the judgment which may be entered therein shall be final, and that no appeal or writ of error shall be prosecuted therefrom.

MILLIMAN v. MILLIMAN.

[45 Colo. 291, 101 Pac. 58.]

DIVORCE—Right to Withdraw Demand for Decree.—A party to an action for divorce may withdraw her demand for a decree at any time before it is entered, and after such withdrawal the court has no authority to grant a divorce in her favor. (p. 183.)

Morrow, Skelton & Morrow, for the plaintiff in error.

W. T. Rogers, for the defendant in error.

[292] STEELE, C. J. Edward Milliman filed a complaint in divorce against Cora Milliman, in the county court of the city and county of Denver. An answer and cross-complaint was filed by the defendant, denying the material allegations of the complaint, and, in her cross-complaint, charging the plaintiff with the violation of his marriage obligation; but she did not pray for a divorce.

The case came on for trial, and the jury returned a verdict finding the defendant guilty of extreme cruelty, as charged in the complaint, and finding the plaintiff guilty of extreme cruelty as charged in the cross-complaint. At this time, a colloquy occurred between counsel for the parties, whereupon one of the attorneys made the statement: "You have secured a verdict in this case which prevents the granting of a divorce, and you ought to be satisfied, without asking the plaintiff to pay attorneys' fees in addition to the costs in the case." Thereupon, one of the jurors arose and said: "Do I understand that this verdict prevents the granting of a divorce?" The court responded: "It does prevent the granting of a divorce." The juror said that it was not his understanding, when he agreed to the verdict, that it prevented the granting of a divorce, but that he understood that the plaintiff would be granted a divorce on his complaint, and the defendant would be granted alimony on her cross-complaint. The [293] jury was thereupon polled, and announced that the verdict returned was not their verdict, and the court permitted the jury to retire. Counsel for defendant then stated that if the court was going to permit the jury to decide whether the parties to said action should be divorced, he would ask leave to amend the cross-complaint, so as to ask for a divorce. The defendant was absent at this time from the courtroom. The court then granted defendant leave to amend her cross-complaint, which order was entered of record by the clerk of the court; but no amendment was made at said time, or at any subsequent time, pursuant to said request and order.

The jury, when it returned after its retirement for the second time, returned a verdict finding the defendant not guilty of extreme cruelty as charged in the complaint, and finding the plaintiff guilty of extreme cruelty as charged in the cross-complaint. The defendant objected to the acceptance and recording of the verdict, and, upon the same day, she filed her written motion, in words and figures following:

"In the County Court.

"EDWARD MILLIMAN, Plaintiff,
vs.
"CORA MILLIMAN, Defendant.

"MOTION.

"Comes now the above-named defendant, Cora Milliman, and refuses to amend the prayer of her cross-complaint in accordance with the permission heretofore granted by the court, and moves the court that no decree of divorce be granted herein, but that a decree be entered herein requiring the plaintiff to pay such reasonable sum for the support and maintenance of the defendant as the court may deem just and equitable."

The court, after consideration, and on the 5th of January, 1906, overruled the motion, and ordered that a decree of divorce be entered in favor of the defendant; to the entering of which decree counsel for defendant thereupon excepted.

294 The judgment of the court, in refusing the defendant permission to withdraw her request for amendment, is the equivalent of requiring her to procure a divorce over her objection, and is the equivalent of granting to the plaintiff a divorce to which he was not entitled.

We shall ignore a discussion of the assignments of error which relate to the irregularity of the proceedings by the jury, and shall decide the case wholly upon the proposition that either party in a divorce proceeding, at any time prior to the entering of the decree, has the right to withdraw a demand for a divorce; and that the court cannot compel one to take a divorce when he does not desire to have one. It would be contrary to public policy in a case such as this to permit the decree for divorce to stand. If the defendant did not desire a divorce, we know of no power or authority of a court to grant her one over her protest.

The judgment will be reversed, and the cause remanded to the county court for further proceedings in accordance with this opinion.

Mr. Justice Gabbert and Mr. Justice Hill concur.

As to the Right of a Party to a Divorce to dismiss the action, see Petersen v. Petersen, 76 Neb. 282, 124 Am. St. Rep. 812; Hillman v. Hillman, 42 Wash. 595, 114 Am. St. Rep. 135.

LOVELL v. GOSS.

[45 Colo. 304, 101 Pac. 72.]

STATUTE OF LIMITATIONS—Accrual of Action on Default in Interest.—Where the payee of notes secured by a deed of trust elects to declare the principal due and to begin foreclosure proceedings because of a default in the payment of interest, the statute of limitations runs from the date of the default rather than from the date of the election. (p. 189.)

CONTRACTS—Practical Interpretation by Parties.—The practical interpretation given to their contracts by the parties thereto while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent. (p. 189.)

MORTGAGE—Default in Interest.—Sixty-four Days is not an Unreasonable Time within which the cestui que trust may elect to declare the debt secured by trust deed due for default in the payment of interest. (p. 190.)

STATUTE OF LIMITATIONS.—The Indorsement by the Trustee on notes secured by a trust deed, of the proceeds of the sale of the property, does not take the debt out of the statute of limitations. (p. 191.)

W. W. Dale, for the plaintiff in error.

R. H. Gilmore, for the defendant in error.

[305] HILL, J. This suit was instituted April 6, 1899, by the filing of plaintiff's complaint alleging, in substance, that on August 15, 1890, one De Sollar made and delivered to plaintiff four promissory notes for four thousand one hundred and ninety-one dollars each, payable April 26, 1893, with interest at seven per cent per annum, payable semi-annually, and, to secure their payment, executed and delivered to plaintiff a deed of trust bearing the same date, wherein he conveyed to Thomas J. Anders, as trustee with successors, certain property in the then county of Arapahoe, being a part of what is known as Cotton Mills Addition.

That on December 10, 1890, De Sollar conveyed to John W. Goss the undivided five-sixteenths interest in said property, which deed contained a clause, in substance, that, as part of the consideration, the said grantee assumed and agreed to pay five-sixteenths of said indebtedness and interest, by reason whereof the said Goss became liable for the payment of that amount of said indebtedness to plaintiff.

That said Goss, by warranty deed dated May 4, 1891, in consideration of two thousand dollars, to him in hand paid by defendants in error, sold and conveyed to them, their heirs and assigns, the undivided five-sixteenths [306] interest

in said property, and it was provided in said deed, and expressly understood and agreed between the said John W. Goss and defendants in error, that as part of the above consideration, the grantees therein assumed and agreed to pay five-sixteenths of said indebtedness and interest.

That said defendants and other owners of said property at various times thereafter paid the interest on said notes to August 15, 1892, but no part of the principal of said notes has been paid, except interest to August 15, 1892, and except the amount realized from the sale of said property under foreclosure of the deed of trust.

That said deed of trust was duly foreclosed, and the property sold on the twenty-sixth day of December, 1898, for five thousand dollars, which was applied to the payment of taxes due, interest then due and the balance on the principal of the notes.

Prayer for judgment for six thousand one hundred and thirty-four dollars and four cents, with interest from December 26, 1898.

Defendants in error filed separate answers, the same in substance containing two defenses, wherein they allege that the deed made by John W. Goss to them for said property was wholly voluntary and without any consideration whatever, and for the use and benefit of the said John W. Goss. They plead ignorance of the assumption clause therein, and want of knowledge of the execution to them and the recording of said deed until long after it had been done; they allege there was no consideration for it, and deny its being their contract, or that they were holding thereunder, etc.

For a separate defense defendants in error plead the statute of limitations.

The trial was to the court without a jury; a general finding was made in favor of the defendants in error, and judgment entered accordingly.

[307] In this action the plaintiff in error has assigned for our consideration two principal errors, which he claims were committed by the lower court in the trial of this cause, the first being that the court erred in holding that defendants in error were not liable upon the assumption clause contained in the deed, conveying the property to them, wherein it is stated they "assume and agree to pay" a certain portion of the indebtedness secured by the deed of trust; the second being that the court erred in holding that said action was barred by the statute of limitations.

No written opinion of the findings of the lower court having been made a part of the record, we are unable to say upon which of the defenses the court found in favor of the defendants, or whether upon both, and, so far as its findings are concerned, it is immaterial, so long as, in our opinion, it was proper to have entered the judgment upon one of them; and by reaching the conclusions to which we have come, it is unnecessary for this court to pass upon the first defense, and we have refrained from giving any opinion thereon, by rendering our decision solely upon the plea and proof offered in support of and against the action being barred by our statute of limitations, being section 2900, volume 2, Mills' Statutes, which reads in part as follows:

"The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterward:

"First, all actions of debt founded upon any contract or liability in action."

The undisputed evidence is, that each of the four notes, so executed by De Sollar, upon which suit was brought, contains this clause: [308] "And a failure to pay said interest, or any part thereof, when due, shall cause this whole note to become due, payable, and recoverable at once, and the said interest to be counted as principal and to bear interest at twelve per cent per annum; anything herein to the contrary notwithstanding."

The deed of trust, given to secure the payment of the notes, contains the following clause: "And it is stipulated and agreed that, in case of default in any of said payments of principal or interest as aforesaid, or of a breach of any of the covenants or agreements herein, then and in that case the whole of said principal sum hereby secured, and the interest to the time of sale, according to the tenor and effect of said indebtedness, shall and may at once become due and payable, anything in the said notes to the contrary notwithstanding, and the said premises be sold in like manner, and with the same effect as if the indebtedness had matured."

The four notes were dated August 15, 1890, and, by their terms, were absolutely due and payable on April 26, 1893, interest payable semi-annually; the deed of trust bearing the same date as the notes.

Some time after the execution of these papers by De Sollar he conveyed to John W. Goss a five-sixteenths interest in said property, in which deed there was a clause stating that

the grantee assumed and agreed to pay five-sixteenths of such indebtedness; thereafter, and before February 15, 1893, a similar deed with the same assumption clause was executed and recorded by the said John W. Goss to the defendants in error herein.

The semi-annual interest, due upon said notes February 15, 1893, was not paid by anyone, and the plaintiff in error, according to his own testimony, upon account of default in the payment of interest due upon February 15, 1893, requested the trustee to proceed with foreclosure proceedings under the [309] deed of trust, and thereupon the trustee, at the request of plaintiff in error, advertised said property to be sold thereunder on the twenty-fourth day of May, 1893, and had notice published accordingly. This notice of sale was dated April 22, 1893, and, among other things, contains the following recital:

"Whereas, said trust deed provides that, in case of default in the payment of said notes or any part thereof, or the interest thereon, ... then it shall and may be lawful for the said trustee to sell ; and

"Whereas, default has been made in the payment of interest due on said notes on February 15, 1893;

"Now, therefore, at the request of the legal holder of said notes I, Thomas J. Anders, as trustee, will sell," etc.

A printed copy of this notice of sale was, at about that time, mailed to Ellen A. Goss.

It appears that, after this sale was first advertised pursuant to such notice by the trustee, the sale was temporarily restrained in another suit against the plaintiff in error, and, in some stage of that action, he filed his affidavit, which states, among other things: "That default was made in the payment of interest on said note on February 15, 1893, and thereupon Thomas J. Anders, trustee, at the request of affiant, advertised the said property for sale on the twenty-fourth day of May, 1893, for the purpose of paying said note, and the interest due thereon, as well as the costs and expenses of executing the said trust."

The above is quoted for the purpose of showing the position taken by Mr. Lovell at the time of the commencement of the first foreclosure proceeding upon the notes. It appears, thereafter, the other [310] suit was in some manner disposed of, and foreclosure sale was ultimately made under the deed of trust and the property was sold by a successor in trust upon December 26, 1898, for the sum of five thou-

sand dollars, which, less expenses, was credited upon that date on these notes.

The first contention made by plaintiff in error is that the provision in the notes and deed of trust given to secure the same, wherein they provided that "upon default in the payment, or any part thereof, when due, shall cause the whole amount to become due, payable and recoverable at once," does not, of itself, in case of such default, cause the notes to mature so as to start the running of the statute of limitations; this clause being permissive only, and more in the way of a penalty, simply giving a privilege to the mortgagee, of which he can elect to take advantage if he desires. This position appears to be supported by numerous authorities: Belloc v. Davis, 38 Cal. 242; Mason v. Luce, 116 Cal. 232, 48 Pac. 72; Watts v. Hoffman, 77 Ill. App. 411; Lowenstein v. Phelan, 17 Neb. 429, 22 N. W. 561; Watts v. Creighton, 85 Iowa, 154, 52 N. W. 12; Richardson v. Warner, 28 Fed. 343; Nebraska City Nat. Bank v. Nebraska City etc. Co., 4 McCrary, 319, 14 Fed. 763.

The contrary doctrine appears to have been accepted in a large number of cases wherein it is held (where notes and deeds of trust contain similar clauses), upon default in the payment of interest, a cause of action accrues thereon at once, and the statute of limitations commences to run upon the entire debt from the date of such default: Reeves v. Butcher, 2 Q. B. 509; First Nat. Bank v. Peck, 8 Kan. 660; Harrison Machine Works v. Reigor, 64 Tex. 89; Ryan v. Caldwell, 106 Ky. 543, 50 S. W. 966; San Antonio etc. Assn. v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386; Snyder v. Miller, 71 Kan. 410, 114 Am. St. Rep. 489, 80 Pac. 970, 69 L. R. A. 250; Pierce v. Shaw, 51 Wis. 316, 8 N. W. 209; [311] Kelley v. Kershaw, 5 Utah, 295, 14 Pac. 804; Wheeler & Wilson Mfg. Co. v. Howard, 28 Fed. 741.

This court does not seem to have had occasion to pass upon the question upon which there appears to be such a decided conflict of authorities, and we do not deem it necessary to do so in this case, for the reason that the plaintiff in error, before the maturity of the principal of said notes, did elect to declare said entire amount due and payable, and requested the trustee to advertise and proceed with the foreclosure of the deed of trust upon account of default in the payment of interest due upon February 15, 1893. This suit was instituted upon April 6, 1899, so the question to be determined is whether or not the statute of limitations began to run on February 15, 1893, the date interest became in default, or

upon the date Mr. Lovell elected to take advantage of it and instructed the trustee to begin foreclosure upon account of default in the payment of interest due upon February 15, 1893. In other words, did the cause of action accrue upon the date Mr. Lovell decided to take advantage of the default, or did it accrue upon February 15, 1893, the date upon which the default occurred, and on account of which the plaintiff thereafter sought to take advantage of it? So far as we can learn, this question appears to be one of first impression in this court, and we have been unable to find any case passing directly upon the question; but, from the facts herein, without deciding which line of authorities above quoted, in our opinion, presents the sounder reasoning, we are of the opinion that, by the election of the plaintiff in error to start foreclosure proceedings, prior to the maturity of the principal of said notes upon account of default in the payment of interest due upon February 15, 1893, the cause of action accrued upon the date of such default and the statute of limitations [312] began to run from that date, which was more than six years prior to the bringing of this action.

This view is strengthened by the action of the plaintiff in error himself by the clauses contained in the published notice of the trustee's sale in the first instance, for which we assume he was responsible, as was held by our court of appeals.

In the case of Washburn v. Williams, 10 Colo. App. 153, 50 Pac. 223, in passing upon the question of the actions of a trustee as being authorized by the cestui que trust in foreclosure cases, it was stated: "It is the usual rule that it is sufficiently declared by the statement to that effect in the public notice of sale."

In the case of Manhattan Life Ins. Co. of New York v. Wright, 126 Fed. 82, 61 C. C. A. 138, it was held: "The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious error."

The fact appeals to us that when Mr. Lovell elected, prior to the maturity of the notes, to have foreclosure made of the deed of trust on account of default in the payment of interest due upon February 15, 1893, he himself elected to have his cause of action accrue upon that date and acted accordingly. It is true, he testified that this election by him to take advantage of the default, and his instruction to the

trustee to foreclose were not made until April 21, 1893, which was only five days prior to the final maturity of the notes; but in his affidavit in the other suit made some ten years before the trial of this cause, he stated: "That default was made in the [313] payment of interest February 15, 1893, and thereupon Anders, trustee, at the request of affiant, advertised the property for sale." A seeming conflict in his own statements as to the time he did elect to take advantage of the default, but, assuming his last statement is correct, which would make the election by him some sixty-four days after default in the payment of the interest, would still, in our opinion, be immaterial.

It was held, in the case of Washburn v. Williams, 10 Colo. App. 153, 50 Pac. 223, that what constitutes a reasonable time within which a cestui que trust may elect to declare the mortgage debt due for conditions broken by default in payment of interest depends upon the circumstances of each particular case. In that case it was held that four months was not unreasonable. In this case we do not think sixty-four days was an unreasonable time. Had he seen fit to make no election, then the rule might be otherwise. Upon this question we are giving no expression. It certainly cannot be said that the notes could be declared due at any date desired by the payee; their language will not permit of such a construction; besides, if such a rule is to prevail, it might be, as in this cause, very difficult to determine the exact time the payee did elect to take advantage of such default. According to the language of the notes, the cause of action accrued at the date they were finally due, or the date default was made in the payment of interest; in this case, the payee having acted upon account of the nonpayment of interest, after it became due, and before the final maturity of the notes, and, on account thereof, elected to declare all of them "due, payable and recoverable at once," as per the terms of the notes; this being the language in the notes. When—at once? Under the circumstances of this case, and in this connection, it certainly means at [314] once, and "upon default in the payment of interest thereon, when due," as stated in the notes; and we think this was the construction placed thereon by the parties at the time.

The evidence shows, although the notice of foreclosure sale was first advertised in April, 1893, to be held upon May 24, 1893, that a sale was not made at that time, upon account of the other suit; but thereafter the property was again advertised for sale, and eventually sold under said deed of trust,

upon December 26, 1898, for the sum of five thousand dollars, and this amount was, by the trustee, placed as a credit upon said notes, less the expenses of sale. It was contended by counsel for plaintiff in error that the indorsement by the trustee of the proceeds of the sale of the property upon the notes is such an acknowledgment of the indebtedness that a promise to pay the balance is inferred, and that the debt is thereby taken out of the bar of the statute of limitations.

In justice to counsel, it might be stated that his brief, in support of this position, was filed in this court long prior to the rendition of the decision in the case of Holmquist v. Gilbert, 41 Colo. 113, 92 Pac. 232, 14 L. R. A., N. S., 479, wherein this same question was directly passed upon adversely to the position taken by counsel for plaintiff in error.

For the reasons stated, it follows that the statute of limitations pleaded by the defendants in error and the proof offered in support thereof was a good defense, and the judgment of the lower court is affirmed.

Decision en banc.

Mr. Justice Campbell and Mr. Justice Gabbert dissent.

Rehearing denied.

The Question When the Statute of Limitations Begins to Run in case of a default in the payment of interest on a note secured by mortgage or deed of trust is considered in the recent cases of Snyder v. Miller, 71 Kan. 410, 114 Am. St. Rep. 489; San Antonio Real Estate etc. Assn. v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864; Moore v. Russell, 133 Cal. 297, 85 Am. St. Rep. 166.

O'HAIRE v. BURNS.

[45 Colo. 432, 101 Pac. 755.]

INJUNCTION Against Prosecuting an Action in Another State.—Equity will enjoin one citizen from prosecuting against another citizen of the state an action in a sister state which involves a matter already adjudicated in the courts of the first state. (p. 198.)

Scott Ashton and Dan B. Canby, for the plaintiff in error.

Charles S. Thomas, Richardson & Hawkins and Wm. T. Malburn, for the defendants in error.

433 HILL, J. This action was disposed of in the court below upon the pleadings. The plaintiff in error, defendant

in the court below, demurred to the complaint of the plaintiff, which demurrer was overruled, and the plaintiff in error having elected to stand by his demurrer, a permanent restraining order was issued, enjoining him from prosecuting a certain action against the defendant in error, in the district court of Pottawattamie county, Iowa, and from taking any additional steps in said cause, etc. It is alleged the suit in Iowa had grown out of certain dealings between them, in connection with the location of mining claims in the Cripple Creek district, in Colorado, in 1891 and 1892.

In order to convey an intelligent idea of the issues, it is necessary to set forth parts of the plaintiff's complaint in the court below, in which the defendant in error Burns, as plaintiff, alleges, in substance, that plaintiff and defendant, during all times therein mentioned, were citizens and residents of El Paso and Arapahoe counties, Colorado.

That on January 25, 1894, defendant filed his complaint in the district court of El Paso county against plaintiff, in which he alleged, in substance, that he, O'Haire, on or about November 15, 1891, entered into a prospective agreement with the plaintiff, Burns, and one O'Driscoll, to prospect and locate mining claims in the Cripple Creek mining district, by the terms of which Burns and O'Driscoll were to devote their time to prospecting, the said O'Haire to furnish provisions and supplies for them, but the mining properties discovered or developed should be owned by the three in equal shares; that he, O'Haire, performed his part of said agreement. [434] That on or about the 22d of January, 1892, Burns, without the knowledge of O'Haire or O'Driscoll, discovered the Portland Lode Mining Claim, caused the same to be surveyed and recorded in the name of himself and one Doyle; that at the time of its location the agreement was in force; that on October 10, 1892, Burns and O'Driscoll divided with O'Haire certain other claims owned by them, and located under the terms of this agreement; that Burns concealed from him and O'Driscoll the fact that said Portland claim had been located, with intent to defraud him out of his share; that he, O'Haire, was the owner of one-third of one-half of said Portland claim, by reason of the premises; that since the discovery of the Portland lode, Burns and his co-owners had mined and shipped valuable ore therefrom. Prayer that he be decreed an owner of one-sixth of said Portland claim, that Burns be decreed to convey one-sixth to him, an accounting be had, etc.; that later amended complaints were filed by

which the Portland Gold Mining Company and one Condon were impleaded as codefendants, same cause of action stated, with additional allegations that a corporation called the Portland Gold Mining Company claimed to be the owner of some interest in said claim, was then working it and extracting ore; that Condon claimed to have some interest in said property, the same prayers for relief, receiver, etc., summons issued, service made, etc.; to which pleadings answers were filed denying the material averments of the complaints as to the Portland claim, alleging other matters, etc., to which replications were filed, one Preston was appointed referee to take testimony, etc., which he did, reported same, etc.; that the court, on December 13, 1895, determined the issues against the said John D. O'Haire and in favor of the said Burns and his codefendants, a motion [435] for a new trial was overruled and final decree entered January 10, 1896; defendant O'Haire appealed to the supreme court of Colorado, which court, at the April term, 1899, duly affirmed said decree (26 Colo. 190), whereby said claim and cause of action was finally adjudged and determined, etc.; that afterward, on December 18, 1901, defendant brought a second action against plaintiff and the Portland company, in the district court of El Paso county, in which complaint he recited the previous proceedings in his first suit, and further alleged that this plaintiff procured Doyle to testify falsely in said first action against him, whereby Burns was enabled to prevail; that thereafter Doyle, in a suit in Pottawattamie county, Iowa, of Doyle v. Burns, testified his testimony in the former suit here was untrue, stated his inability to discover its untruth sooner, and brought this suit by reason of this newly discovered evidence, asked the decree in former case be annulled, he be permitted to relitigate it, etc.; that this plaintiff, having been served with process, appeared, moved to strike the complaint and to dismiss the action, etc., which motion was sustained April 25, 1903, whereupon said defendant prayed but never perfected an appeal to the supreme court; that thereafter, on February 1, 1904, this plaintiff, as president, director and a stockholder of the Portland company, which was organized under the laws of Iowa), was obliged to, and did, attend its annual stockholders' meeting at Council Bluffs, Pottawattamie county, Iowa, more than five hundred miles from the common residence of the parties in Colorado, and beyond the jurisdiction of the Colorado courts, and that, while attending said meeting in Council Bluffs, defendant began a suit against

him in Iowa, and caused original notice, the same being [436] a summons, to be served upon him by the sheriff of Pottawattamie county, reading as follows:

"JOHN D. O'HAIRE, Plaintiff,
vs.
JAMES F. BURNS, Defendant.

"In the District Court of the State of Iowa, in and for Pottawattamie County, March Term, A. D. 1904.

"To James F. Burns:

"You are hereby notified that, on or before the 3rd day of March, A. D. 1904, the petition of the plaintiff in the above-entitled cause will be filed in the office of the clerk of the district court of the state of Iowa, in and for Pottawattamie county, claiming of you the sum of three hundred thousand dollars, money as justly due from you, and interest thereon at —— per cent from the —— day of ————, A. D. 190—, as moneys in your possession and under your control belonging to him and growing out of certain dealings between you and plaintiff in connection with the location of certain mining claims in the Cripple Creek District, Colorado, in the years 1891 and 1892. (For more particular statement of cause of action, see petition when filed.)

"And that, unless you appear thereto and defend before noon of the second day of the next term, being the March, 1904, term of said court, which will commence at Council Bluffs, on the 15th day of March, 1904, default will be entered against you and judgment and decree rendered thereon as provided by law.

"Dated 1st day of February, A. D. 1904.

"N. A. CRAWFORD,
"Attorney for Plaintiff."

That he was informed by persons learned in the laws of Iowa, and believes, by said notice, unless he should appear as above cited, default judgment will be entered against him for three hundred thousand dollars, that no petition [437] was filed, or, under Iowa law, need be filed until March 3, 1904; that no such petition was served upon him, in consequence of which he was obliged to depend upon the notice for information as to the nature of said action; alleges, nevertheless, he is not indebted to defendant in any sum; the only transactions between him and defendant concerning the location of mining claims in the Cripple Creek mining district in 1891 and 1892, or at any other time or place, were those men-

tioned in the actions of defendant against him as hereinbefore set forth, which had been fully tried, finally and forever adjudicated against the defendant.

That said pretended cause of action set forth in the notice is groundless, has no existence in fact; that any and all alleged claims of the defendant against him concerning mining claims in the Cripple Creek district or elsewhere have been instituted and finally determined.

That the plaintiff, at about all times since 1891, has been present in and subject to the process of the courts of Colorado, which fact defendant well knew; that defendant, knowing the plaintiff intended to visit Council Bluffs at said time, caused said notice to be served, well knowing he had no just cause or action against him upon which any suit could be instituted or waged in Colorado; that the suit instituted in Iowa was for the purpose of annoying, harassing, vexing, and troubling plaintiff, subjecting him to needless expense in its defense, a long distance from the home of both parties, from the residence of witnesses assuming to know the facts, and to compel plaintiff, in order to escape annoyance and expense, to pay a large sum of money to withdraw said action.

That defendant was a witness in Iowa, in said cause of Doyle against plaintiff, and ever since his [438] first suit had been hostile to plaintiff, and in bringing his Iowa suit, was inspired by vindictive and malicious purposes; and in bringing said suit, defendant had entered into a conspiracy with persons in Iowa, to plaintiff unknown, whereby said suit was brought in that state with the expectation, through the aid and influence of such persons, of securing a judgment against plaintiff regardless of judgments rendered thereon in the Colorado courts; there is no witness for the defendant in or residing in Iowa, Doyle himself being a resident of Colorado.

That no contract, agreement, demand, claim, cause of action or pretended cause of action defendant has or imagines against the plaintiff arose or could have arisen in Iowa; all transactions between them having arisen and been adjudicated in Colorado; that if plaintiff be compelled to defend the action in Iowa, he will be put to great and unjust expense in employment of counsel in Iowa and Colorado, procuring attendance of witnesses, who may decline and cannot be compelled to attend, will be compelled to neglect business while away, etc.

That defendant is unable to respond to any judgment obtained against him; that defendant, under the laws of Iowa, cannot be required to give security for costs, except

for benefit of the officers of court; wherefore, plaintiff, if defendant be permitted to wage the action, will be annoyed, vexed, harassed, troubled and obliged to incur large and unjust outlays and disbursements of time and money, to his great and irreparable injury; that defendant, having fully litigated his alleged causes of action against this plaintiff in Colorado, should not be permitted to reopen the same or bring other actions concerning said controversies in the courts of other states against plaintiff—prayer for temporary and permanent injunctions, etc.

[439] The demurrer to the complaint challenged the jurisdiction and authority of the court to issue the writ, alleging the absence of equity in the plaintiff's bill, which was overruled, the defendant electing to stand thereon. A decree for plaintiff was entered, preliminary injunction made perpetual, and the defendant brings the action here upon error, and has assigned eleven errors, which present two propositions necessary to determine, the first being the contention that the complaint does not show the suit instituted in Iowa was upon any cause of action which had formerly been litigated and determined in this state, for the reason, it is claimed, there is nothing in the Iowa original notice served upon Mr. Burns showing that O'Haire claimed other than three hundred thousand dollars for moneys had and received by the defendant Burns, for and on account of certain mining claims located in the Cripple Creek district, Colorado, in the years 1891 and 1892, and in their brief counsel state: "There is nothing in the notice, which is a legal one under the laws of the state of Iowa, informing the court below as to what is the nature of the cause of action." To this we agree, and which fact was evidently in the mind of the drafter of the complaint in this action when he proceeded and followed this "Original Notice" set forth in the bill of complaint with the allegations of sufficient other facts, showing that the alleged action thus sought to be litigated in Iowa was the identical one, and could be none other than that which had theretofore been adjudicated by the courts of this state, and fully, finally and forever determined adversely to the contentions of Mr. O'Haire; and from a careful review of the entire complaint, we think it clearly states these facts, and being admitted by the demurrer, the only other question necessary for our determination is, whether a citizen of a state can, [440] and, under circumstances of this kind, should, be enjoined by the courts of his own state from prosecuting a personal action instituted by him in the courts

of another state against a citizen of his own state, both at all times residing therein, and where the matters attempted to be litigated have theretofore been adjudicated and settled in and by the courts of his own state, the alleged causes of action having arisen therein, the necessary witnesses all being there, and the action being instituted in the foreign state for the purposes of annoying, harassing, vexing and troubling the other citizen, the citizen bringing the action being insolvent. Under such circumstances, we unhesitatingly say that he can and should be enjoined from prosecuting the foreign action.

It is contended by plaintiff in error that such an action is in violation of the provisions of article 4, section 1 of the constitution of the United States, in that it fails to give the full faith and credit to the judicial proceedings of the state of Iowa, as contemplated by this section of the constitution.

It is also contended the result of such an injunction would be to bring about a conflict in the courts, and would be an effort by the courts of Colorado to restrain the courts of Iowa, which cannot be done, and the district court was without jurisdiction, power or right, under the complaint filed, to enjoin O'Haire from proceeding with his action in the Iowa courts. The jurisdiction of the subject matter and of the person of Burns having been obtained in Iowa by proper process, it is claimed it cannot be questioned elsewhere, and the district court of Iowa having first acquired jurisdiction of the subject matter, to wit, of the transitory action where service was made upon Burns personally in Iowa, that no other court would then have jurisdiction to control [441] the matter, and that O'Haire had an absolute right to institute and carry on his action at law in the form which he selected, and the district court of El Paso county was without jurisdiction to prevent him from thus conducting his litigation. The decree in this case does not attempt to enjoin or control the Iowa court in any manner, and is not a refusal to give that full faith and credit to its judicial proceedings as contemplated by the constitution of the United States, but is simply a decree restraining one of our own citizens from attempting to do that which is wrong, unlawful, against good conscience, stating when, and providing a method whereby there is, can, and should be, an end to litigation between citizens of our own state as to matters accruing therein.

In the case of Keyser v. Rice, 47 Md. (28 Am. Rep. 448) at page 213, it is stated: "The power of the state to compel its citizens to respect its laws, even beyond its own territorial

limits, is supported, we think, by a preponderance of precedent and authority."

Upon the same subject in Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 148, 51 Am. St. Rep. 165, 41 N. E. 380, 34 L. R. A. 363, it is stated in substance: "This right is not to be defeated because the party complaining has other legal defenses availing in the foreign jurisdiction."

We have no doubt but that Mr. Burns could have pleaded in the Iowa action the former litigation in this state, and the result thereof, as a complete defense, and, if established by proper evidence, it would have received the full faith and credit by the Iowa court to which it is entitled under the constitution of the United States; but why compel him to go over five hundred miles to a foreign jurisdiction from that from which both parties reside or from where the original cause of action, if any, accrued, from where the property over which the original [442] contention arose was situate, and from where all the witnesses reside, in order to present these facts to a foreign tribunal? We have been furnished with no principle of law or equity, nor process of sound reasoning, why this should be done, and are of the opinion none can be presented. Besides, if O'Haire is allowed to continue his Iowa suit, and is defeated, under this same rule he could, if aided by persons with means, bring another action in some other state wherever perchance he might secure personal service upon Mr. Burns, and thus compel him to again defend the same action, with at least the plea and proof of res judicata, and so continue without any redress. The fallacy of the statement is itself an answer to it. This method of equitable relief appears to have been approved by the great weight of authorities, and for answer to the able argument of counsel against it, we refer to the reasons assigned in support thereof in the following cases: Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 538; Cunningham v. Butler, 142 Mass. 47, 56 Am. Rep. 657, 6 N. E. 782; Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. Rep. 84, 36 L. ed. 981; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Dehon v. Foster, 4 Allen (Mass.), 545; Hawkins v. Ireland, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73; Field v. Holbrook, 3 Abb. Pr. (N. Y.) 377; Kittle v. Kittle, 8 N. Y. Com. Pl. 72; Vermont etc. R. R. Co. v. Vermont Cent. R. R. Co., 46 Vt. 792; Gage v. Riverside Trust Co., 86 Fed. 984; Kempson v. Kempson, 63 N. J. Eq. 783, 92 Am. St. Rep. 682, 52 Atl. 360, 685,

58 L. R. A. 484; Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 67 Am. Rep. 680, 41 Atl. 1046; Kendall v. McClure Coke Co., 182 Pa. 1, 61 Am. St. Rep. 688, 37 Atl. 823; Hager v. Adams, 70 Iowa, 746, 30 N. W. 36; Dinsmore v. Neresheimer, 32 Hun, 204.

The judgment is affirmed.

Chief Justice Steele and Mr. Justice Gabbert concur.

Injunctions Against the Prosecution of Actions in Another State are discussed in the note to Eingartner v. Illinois Steel Co., 59 Am. St. Rep. 879. The general rule is that a court of equity in one state has power, when justice and equity demand, to restrain its citizens from prosecuting an action in a sister state: Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 148, 51 Am. St. Rep. 165; Hawkins v. Ireland, 64 Minn. 339, 58 Am. St. Rep. 534; Miller v. Gittings, 85 Md. 601, 60 Am. St. Rep. 352; Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 67 Am. St. Rep. 680.

VAN BUREN v. POSTERARO.

[45 Colo. 588, 102 Pac. 1067.]

JUDGMENT—Effect of Misnomer of Defendant.—If summons is actually served on the person intended, although by mistake in the wrong name, a judgment by default binds him. (p. 202.)

JUDGMENT—Enjoining Because of Misnomer of Defendant.—A default judgment, rendered in a justice's court against the defendant by the wrong name, binds him if he was the person intended to be sued and was actually served with process; and its enforcement will not be enjoined, although the justice, in excess of his authority, has amended it by correcting the name. (pp. 201–203.)

Samuel N. Wheeler and Henry N. Rhone, for the appellant.

McMullin & Sternberg, for the appellee.

589 WHITE, J. Appellee was plaintiff below. The relief sought in the district court was in substance as follows: 1. To declare null and void, as to plaintiff, a certain judgment of a justice of the peace of Mesa county, which by transcript was made a lien upon the real estate of plaintiff; 2. To remove the cloud cast upon said real estate by reason of said judgment and transcript proceedings aforesaid; 3. To restrain defendant, appellant below, from asserting said judgment against plaintiff.

It appears from the record that on November 13, 1902, appellee, being indebted to appellant, was sued by the latter to

recover the amount of said indebtedness before a justice of the peace of Mesa county. That in said proceedings the defendant's name was written Elizabeth Postoria instead of Elizabeth Posteraro, her true name; the name as written in said proceedings was nevertheless supposed to be the name of appellee, and the summons was duly and personally served upon her as required by law. Appellee failed to appear in response to said summons, and judgment was entered by default against her under the name of Postoria. Execution on said judgment issued and was returned nulla bona. Thereupon appellant secured from said justice of the peace a transcript of the judgment, and discovering that defendant's name [590] was Posteraro instead of Postoria, returned the transcript to said justice, who, at appellant's request, caused the name to be correctly inserted therein, and by pencil interlineation inserted the name correctly spelled in the judgment itself. The transcript was then filed in the office of the district clerk of said county and proceedings taken with a view to making the judgment a lien upon appellee's real estate. This suit was thereupon instituted on the tenth day of February, 1903. Thereafter, on March 30, 1903, upon motion and notice to appellee, but over her objection by attorney then made, the justice of the peace entered an order amending said judgment relative to said name, and issued a new execution which was also returned nulla bona; and thereupon a new transcript was filed with the clerk of the district court and proceedings had as aforesaid. These subsequent proceedings were embodied in a supplemental complaint. After demurrer interposed on the ground of want of equities in plaintiff's pleadings, and the same was overruled, defendant answered. The answer was stricken out, except as to general denials. Objections were made to the introduction of any evidence under the complaint, on the ground of its insufficiency, but overruled. Judgment was rendered for the appellee as prayed. From said decree this appeal is prosecuted.

The gravamen of the complaint is that the judgment in the justice court had been fraudulently altered, after its rendition, by changing the name of the defendant in the particulars mentioned above. It was conceded, or, at least, plaintiff's evidence showed, that appellee was the identical person sued in the justice court, and upon whom summons was served; that she talked with the justice of the peace after the summons was served and before the trial, [591] relative to the case,

and the particular hour for trial; that she was indebted to appellant in the exact amount of the judgment; that such indebtedness was originally evidenced by a note given by appellee to appellant, but which when presented to the former for payment, before the institution of said suit in the justice court, was by appellant taken from the collector's hands and torn up or destroyed.

Neither by pleading nor evidence offered was it contended that appellee had a just or meritorious defense to the suit, nor if judgment was enjoined, and a new trial had, the result would be in anywise different from what it was. Appellee based her right for an injunction solely upon the technical ground that said change had been made without her consent.

The equity powers of a court will only be called into exercise to protect or enforce some substantial right, without which the result would be contrary to equity and good conscience.

Unquestionably, if a judgment has been fraudulently altered so as to increase the amount thereof, or to include some person other than the identical person sued, or changed in any manner so as to affect the substantial rights of a party, an injunction, if there be no remedy at law, will lie, but there is no reason for the equitable power of a court to interfere when no substantial rights have been invaded, and when to do so would be against equity and good conscience.

It is wholly unnecessary to determine whether the justice of the peace possessed the power to insert by interlineation the true name of the defendant in or to modify the judgment upon notice as was done. The judgment originally was a judgment against Elizabeth Posteraro, notwithstanding her name [502] therein was given as Elizabeth Postoria. This judgment could have been enforced by proper proceedings in aid of execution. If the justice exceeded his authority by the pencil interlineation in said judgment, or subsequently by its modification upon notice, such acts were of no force and effect and the judgment stood as it was originally entered. If he did not exceed his authority, the appellee cannot complain, for it in no wise affected her substantial rights. In either event the judgment could be enforced. It was therefore error in the trial court to decree that the judgment rendered on the nineteenth day of November, 1902, by such justice was null and void and of no effect.

The law announced in section 213, Black on Judgments, is that process served upon a man by wrong name is as truly served on him as if he had been served by his right name. It

is not the name that is sued, but the person to whom it is applied. If summons in an action is served upon the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, fails to plead the misnomer in abatement, a judgment is taken against him, he is concluded thereby.

In Burlington etc. R. R. Co. v. Burch, 17 Colo. App. 491, 69 Pac. 6, the right party, though a corporation, was sued by the wrong name; summons, however, was properly served upon the right party, and the judgment was held valid.

In Denver etc. R. R. Co. v. Loveland, 16 Colo. App. 146, 64 Pac. 381, it distinctly appears that service of summons was not made upon the corporation intended to be sued, but was made upon another corporation of similar name. To substitute the name of the party intended as defendant, who was not served with summons, for a defendant named and served, but not [593] intended to be sued, was properly held to be error. It is said, however, in that case that, "If the right party is sued by a wrong name, and service of process is had upon him, the true name may be substituted for the other by way of amendment."

We do not consider the language used in Solomonovich v. Denver etc. Co., 39 Colo. 282, 89 Pac. 57, relative to the two cases above referred to from the court of appeals, militates against the rule as hereinbefore stated from Black on Judgments.

Besides, section 146, Mills' Annotated Civil Code, expressly prohibits the granting of an injunction to stay judgment at law for a greater sum than the complainant shall show himself equitably not bound to pay. It also provides that an injunction granted to stay judgment at law shall operate as a release of all errors in the proceedings at law that are prayed to be enjoined.

In Fisher v. Greene, 5 Colo. 541, it is said: "To stay a judgment the complainant must allege facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident unmixed with any fault in himself or his agents."

Appellee, however, argues that the jurisdiction of a justice of the peace is purely statutory, and that the attempted action of the justice as shown in this was wholly void, and having occurred after judgment rendered, injunction was her only remedy. If the justice exceeded his authority and the mat-

ter could not have been taken to a higher court under section 2679 or section 2692, Mills' Annotated Statutes, appellee nevertheless had a clear and proper remedy under chapter 28, Mills' Annotated Code: Loloff v. Heath, 31 Colo. 170, 172, 71 Pac. 1112, 1113.

[594] We are clearly of the opinion that appellee failed to set forth and establish equities entitling her to an injunction, and the decree of the district court in the premises is erroneous. The judgment is therefore reversed.

Chief Justice Steele and Mr. Justice Bailey concur.

A Judgment is Binding on the Person Served With Process, although he may have been sued or served by a false or fictitious name. If so served, under a name not his own, he must appear and set up the misnomer and whatever defense he may have; failing to do this he is concluded by the judgment: Brum v. Ivins, 154 Cal. 17, 129 Am. St. Rep. 137; Haines v. West, 101 Tex. 226, 130 Am. St. Rep. 839; Stout v. Baltimore etc. R. R. Co., 64 W. Va. 502, 131 Am. St. Rep. 940.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

SEITH v. COMMONWEALTH ELECTRIC COMPANY.

[241 Ill. 252, 89 N. E. 425.]

NEGLIGENCE—Quantum of Evidence Necessary to Send Case to Jury.—In an action against an electric company for injury caused by shock from a broken wire, evidence that its "wrappings"—the insulation—were unraveled, the absence of any mechanical device to prevent wires from falling, the fact that kites were tangled in the wire, is sufficient to carry the case to the jury notwithstanding conflicting evidence on these points. Hence a motion to direct a verdict must be denied. (p. 208.)

NEGLIGENCE—Sole or Proximate Cause.—The negligent act must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause; it is sufficient if it concurs with some other cause acting at the same time, which in combination with it produces the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by any new or independent cause. (p. 208.)

NEGLIGENCE — Proximate Cause—Requisites.—To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act might have foreseen the precise form of the injury, but when it occurs it must appear that it was the natural and probable consequence. (pp. 208, 209.)

NEGLIGENCE — Proximate Cause — Requisites.—If the negligence creates a condition and the act of a third person in the plane of that condition causes injury, the existence of the condition is not the proximate cause, but if the original negligence operates with the intervening cause, then it becomes the proximate cause by the continuity of its action, and where the circumstances are such that the consequences might have been foreseen as a likely result, the act of a third person causing the injury will not excuse the first wrongdoer. (p. 209.)

NEGLIGENCE—Proximate Cause—Requisites.—When the act of a third person, causing injury, intervenes, is not consequential to the original act and could not reasonably have been foreseen, the first negligence is not the proximate cause of the injury. (p. 209.)

NEGLIGENCE—Proximate Cause.—The test is whether the party guilty of the first negligence might reasonably have anticipated the intervening cause as a natural and probable consequence from it, and, if so, the connection is not broken and the first act is the proximate cause. (p. 209.)

NEGLIGENCE—Proximate Cause—Application to Evidence.—If a live wire should fall upon a sidewalk, the electric company should reasonably anticipate that someone may attempt to remove it to prevent injury, and if in so doing some other person is injured, the electric company would be liable. (p. 212.)

NEGLIGENCE—Proximate Cause—Application to Evidence.—If a live wire should fall upon a sidewalk, the electric company cannot reasonably anticipate that a policeman in striking it with his club would cast it upon a person passing. The negligence of the company produced a condition which made the injury possible, but it occurred through the independent act of the policeman, for whose action the company was not responsible, and was therefore not liable. (p. 213.)

F. M. Fox, F. J. Canty, J. C. M. Clow and E. E. Gray, for the appellant.

Morse Ives, for the appellee.

255 CARTWRIGHT, C. J. The appellee, Albert Seith, brought this action on the case in the circuit court of Cook county against the appellant, Commonwealth Electric Company. The declaration in various counts charged the defendant with a failure to use ordinary care to guard, protect and maintain a wire used for the transmission of electricity over a public sidewalk in the city of Chicago, and using wire that was frail and weak, and allowing the insulation to become worn, and negligently allowing the wire to come in contact with another electric wire, causing it to break and one end to fall upon the sidewalk. It was alleged that the plaintiff, while walking on the sidewalk and exercising due care and caution, came in contact with the wire and was thereby injured. The defendant filed a plea of the general issue, and upon a trial there was a verdict and judgment for four thousand dollars damages, and the judgment has been affirmed by the appellate court for the first district.

The question raised by the brief and argument of counsel is whether the trial court erred in refusing to direct a verdict for the defendant.

The evidence was to the following effect: The city of Chicago granted a license to the defendant to suspend its wires over certain streets, and one condition was that the wires should be properly insulated, and all overhead conductors should be protected by guard-wires or other suitable mechanical device or devices. A line of the electric wires ran south on the west side of Noble street from a pole at the southwest corner of its intersection with Grant avenue, a street running east and west. The next pole south on Noble street was about one hundred feet distant. There were four cross-arms on the poles, and the wires of the defendant were on the top of

cross-arm. They had been up about eight or nine months, and the insulation was the same [256] kind ordinarily used and was good when the wires were strung. On August 19, 1903, two of the defendant's wires were burned off between these two poles, and the wire which caused the injury to plaintiff fell on the ground between the sidewalk and the roadway, near the middle of a space about five or six feet wide, about twenty feet north of the second pole and near the south end of a building at the corner in question. A policeman was getting off a Noble street car at the street intersection and saw the wire drop, and two little girls, who were thirteen years old at the time of the trial, in 1907, were coming out of an alley south of said corner building and saw the wire which had just fallen, while it was still in motion. Afterward it laid still on the ground. The first floor of the building on the corner was occupied by a saloon, and the plaintiff lived in a flat in the third story of that building. The two children went to the front door of the saloon on Grant avenue and told the saloon-keeper that a live wire was broken and had fallen to the ground. The children had come around to the side door near the rear, on Noble street, and two policemen who were in the saloon when they gave notice came out and one of the policemen went where the wire was lying. The policeman who had just got off the street-car went into the saloon and ordered a glass of beer. About the time that the policeman went where the wire was the plaintiff came down from his flat by the back stairs at the rear of the building, carrying a pail. The disputed question of fact was whether the plaintiff then picked up the wire or whether it was thrown on him by one of the policemen. The two children testified that as the plaintiff was walking south on the sidewalk, the policeman who stood by the wire struck it with his club and knocked it toward the sidewalk, and that the plaintiff caught it with his hand and brought it against his breast and fell down, with his head to the west and his feet to the east, on the space between the walk and the roadway. The plaintiff said that he did not notice any wire, but saw the [257] policeman strike at something and noticed something fly up and hit him, but did not know it was a wire until after the accident. Another witness said that he saw plaintiff come down the stairs with a pail in his hand and suddenly saw him throw up his hands, and the next instant he went to the ground. On the part of the defendant, the three policemen, a horseshoer whose shop was south of the rear stairway, and

the bar-tender, testified that the plaintiff picked up the wire himself and the policeman did not strike it. The first policeman, who ordered the glass of beer, testified that he was standing in front of a mirror in the saloon, in which he saw a man come along and pick up the end of the wire; that the witness made an exclamation and ran out of the side door across the street, where he pulled a plank off the sidewalk and ran back and tried to knock the wire out of plaintiff's hand; that he failed, and another person picked the plank up and knocked the wire out of his hand. The blacksmith testified that the plaintiff picked the wire up and pulled it through his hands until he came to the bare end, when he fell down, and that a policeman pulled a plank off the sidewalk on the other side of the street and with it knocked the wire out of plaintiff's hand. The bar-tender said that the plaintiff walked up to the wire and stooped down and took hold of it, and then straightened up and went down like a log, backward. The policeman who was charged with striking the wire testified that plaintiff said it was not a live wire, and the witness told him to get away from it, but he walked toward it and picked it up, and that he moved his hand toward the end of the wire where it was broken, and when he reached the end he fell down. The third policeman said that the one at the wire told the plaintiff to get away from there and the plaintiff said it was a dead wire; that the officer said to leave it alone, but the plaintiff stooped down and picked it up about eighteen inches from the end and drew it through his fingers until he got to the tip end, when he fell down. A kite, made of a newspaper [258] dated the previous day, which had been tangled on the wires and was partly burned, was taken off, and there was evidence for the plaintiff that there had been a pink kite hanging on the wires a week or two before. There were no guard-wires or other mechanical device to prevent wires from falling, and one of the girls testified that the wrappings were worn away and in threads and were loose and hanging. The evidence for the defendant was that the insulation was perfect and there were no strings or anything of the kind hanging down, and the ends of the wires showing the covering in perfect condition were cut off and made exhibits in the case. There was also evidence for the defendant that guard-wires are never used except where wires cross each other, but there was no other mechanical device to protect the wires.

It is argued that this evidence required a verdict for the defendant because it did not tend to prove negligence on the

part of the defendant, and because its negligence, if any, was not the proximate cause of the injury. There was no evidence tending to sustain the charge that the defendant was negligent in failing to discover and remedy the condition after the wire fell, for the reason that the accident occurred immediately. In view of the testimony of the child that the wrappings, as she called it, were loose and hanging in threads, the absence of any mechanical device to prevent wires from falling, and the evidence that there had been a pink kite on the wires for some time, it cannot be said that there was no evidence fairly tending to prove negligence. The court could not consider the evidence tending to defeat the cause of action, such as the kite made of the newspaper dated the day before, which may have caused a short circuit and fused the wire, nor the ends of the wires attached to the record to prove that the insulation was perfect. Whether the child was mistaken about the insulation, in view of the other testimony, was a question for the jury, now finally settled by the judgment of the appellate court.

259 The important question presented by the record and argued by counsel is whether the negligence alleged was the proximate cause of the injury to the plaintiff. No mention of that question is made in the opinion of the appellate court, but that court must have concluded that the negligence of the defendant was the proximate cause of the injury, since there could be no recovery on account of such negligence unless there was a causal connection between the negligence and the injury. The rules for determining whether a negligent act or omission is the proximate cause of an injury are well established, and have been applied by different courts in numerous cases to different conditions of fact. There has been practically no difference of opinion as to what the rules are, and they may be briefly stated as follows: The negligent act or omission must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which, in combination with it, causes the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by any new or independent cause. The question is not determined by the existence or nonexistence of intervening events, but by their character and the natural connection between the original act or omission and the injurious consequences. To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such

a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury, but when it occurs it must appear that it was a natural and probable consequence of his negligence. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two [200] are not concurrent and the existence of the condition is not the proximate cause of the injury. Where the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer. When the act of a third person intervenes which is not a consequence of the first wrongful act or omission and which could not have been foreseen by the exercise of reasonable diligence and without which the injurious consequence could not have happened, the first act or omission is not the proximate cause of the injury. The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and if so, the connection is not broken; but if the act of the third person which is the immediate cause of the injury is such as in the exercise of reasonable diligence would not be anticipated, and the third person is not under the control of the one guilty of the first act or omission the connection is broken and the first act or omission is not the proximate cause of the injury. One phase of the rule was stated in Chicago Hair etc. Co. v. Mueller, 203 Ill. 558, 68 N. E. 51, as follows: "If the negligent act and the injury are known, by common experience, to be usual in consequence, and the injury such as is liable, in the ordinary course of events, to follow the act of negligence, it is a question of fact for the jury whether the negligence was the proximate cause of the injury"; and there is a general review of the subject in Thompson on Negligence, chapter 5. In Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, the court said: "The principle is, damages which are recoverable for negligence must be such as are the natural and reasonable result of defendant's acts, and the consequences must be

such as in the ordinary course of things would flow from the acts and [261] could be reasonably anticipated as a result thereof." In Pollock on Torts, the author declares that the only rule tenable, on principle, where the liability is founded solely on negligence, is contained in the statement "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur": Webb's Pollock on Torts, p. 45. Judge Cooley states the rule as follows: "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote": Cooley on Torts, 3d ed., 99. In Wharton on Negligence (section 134) is found the following question and answer: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent, responsible human action." The supreme court of the United States, in the case of Milwaukee etc. R. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256, said: "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

The principles on which the question of proximate cause depends are illustrated by the facts of various cases in this court. In Village of Carterville v. Cook, 129 Ill. 152, 16 Am. St. Rep. 248, 22 N. E. 14, 4 L. R. A. 721, a much used sidewalk elevated six feet above the ground was [262] unprotected by railing or other guard, and by the inadvertent or negligent shoving by one boy of another boy against the plaintiff, the plaintiff was pushed from the sidewalk and injured. That was plainly a case where the village ought to have anticipated the consequences of its negligence. In American Express Co. v. Risley, 179 Ill. 295, 53 N. E. 558, the express company was held liable for the consequences of

placing a chute crosswise on an express car, because it could have been foreseen, by the exercise of ordinary care, that the injury which followed might result from the act. In Garibaldi & Cuneo v. O'Connor, 210 Ill. 284, 71 N. E. 379, 66 L. R. A. 73, where the plaintiff stepped upon a banana and fell, it was held that when the intervening cause of an injury could reasonably have been anticipated, the original negligent act, if it contributed to an injury, may be regarded as the proximate cause. In Elgin etc. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436, the declaration charged defendant with negligence in failing to have a switch lever locked and in failing to have the same guarded at an amusement park. There was no lock on the switch and the switchtender left his post for the attractions of a game of ball. It was held proper to submit to the jury the question whether the defendant had discharged its duty toward a passenger, although the mischievous act of a boy in changing the switch contributed to the injury. It was a case where the intervening cause of changing an unlocked and unguarded switch might reasonably have been anticipated. In Illinois Central R. R. Co. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A., N. S., 819, 11 Ann. Cas. 368, the defendant negligently set a fire, and the owner of a house, in an effort to extinguish the fire, received an injury from which she died. The defendant was bound to anticipate, when the fire started, that the decedent would try to put it out, and if in so doing, with reasonable care and caution, she was injured, the setting of the fire was the proximate cause of the injury, as a result which might be anticipated. Judge Thompson illustrates the rule by supposing a similar case: 1 Thompson on Negligence, sec. 263 64. In True & True Co. v. Woda, 201 Ill. 315, 66 N. E. 369, it was regarded as a question of fact whether the negligence of the defendant in piling lumber on the sidewalk in a public street where he knew the children of the neighborhood were in the habit of playing was the proximate cause of an injury, and this was upon the ground that the defendant should have known the children would be likely to climb on the lumber at play and be injured. In Siegel, Cooper & Co. v. Trcka, 218 Ill. 559, 109 Am. St. Rep. 302, 75 N. E. 1053, 2 L. R. A., N. S., 647, where the defendants were guilty of negligence in the construction of an elevator shaft and a boy fourteen years old was thrown down by another boy, it was considered that the two acts of negligence both contributed to the result, and clearly the

defendant might reasonably have anticipated what actually happened in the use of the elevator.

On the other hand, in Hullinger v. Worrell, 83 Ill. 220, in an action on the case against a sheriff for negligence in suffering a prisoner to escape, the sheriff was held not liable for damages resulting from an assault by the prisoner on the plaintiff, because the assault was not the natural and probable consequence of permitting the prisoner to escape from custody, and not being anticipated was not the proximate result. In City of Rockford v. Tripp, 83 Ill. 247, 25 Am. Rep. 381, where a horse with a cutter became frightened and ran away, and in passing where a team was hitched to a post set by the city for a hitching post, frightened the team and caused the team to break the post and run away, and they ran over a person in the street, it was held that a defect in the post was not the proximate cause of the injury. In Wolff Mfg. Co. v. Wilson, 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229, a barber's post insecurely fastened stood near the outer edge of a sidewalk, and the driver of a team in backing his wagon knocked the post over, injuring the plaintiff. The post, although not fastened as it should have been, would not have caused an injury but for the act of the driver in backing against it, and it was held the intervening cause [264] was the proximate cause of the injury. In Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, the court affirmed the judgment of the appellate court reversing the judgment of the trial court without remanding the cause, on the ground that the condition of the plaintiff could not have been reasonably anticipated as a result of the defendant's negligence.

Applying the rules of law to this case, it is clear that the defendant might reasonably anticipate, in case a wire should fall upon the sidewalk or where persons using the sidewalk or roadway would be likely to be injured, that a policeman or some other person might attempt to remove it to prevent injury, and if in so doing, or as a result of the policeman's act, some other person should be injured the defendant would be liable, since such effort to remove the cause of danger might naturally be anticipated. Of that character are the cases relied upon to sustain the judgment: Kansas City v. Gilbert, 65 Kan. 469, 70 Pac. 350; Smith v. Missouri etc. Tel. Co., 113 Mo. App. 429, 87 S. W. 71; Citizens' Telephone Co. v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879. The defendant would be liable although

there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground, but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk or the roadway. There is no evidence tending in the slightest degree to prove that the policeman struck the wire for the purpose of removing it as a source of danger. He testified that he did not touch it and told the plaintiff to get away from it; but assuming, as we are bound to do, that the testimony of the children was true and that he struck the wire and knocked it toward the sidewalk, that testimony did not even remotely tend to prove that he was attempting to remove the wire so as to prevent [265] injurious consequences. The injury to the plaintiff followed as a direct and immediate consequence of the independent act of the policeman, and but for such act any negligence of the defendant would have caused no injury to the plaintiff. In the case of Harton v. Forest City Telephone Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A., N. S. 956, 14 Ann. Cas. 390, the telephone company negligently maintained a pole in a dangerous condition until it fell across a highway. Three persons passing in a hack set the pole up again in the same hole and propped it with a stick six to eight feet long, procured from a wood-pile near by. The pole afterward fell and killed the plaintiff's daughter, who was in a buggy with the plaintiff in the road, and the court held that there was no liability, since the negligence of the telephone company was not the proximate cause of the injury. If it could have been argued in that case that the telephone company might reasonably have anticipated the removal of the pole from the highway and the resetting of it, no such argument can apply to the act of the policeman. The wire was lying between the sidewalk and the roadway, where it would injure no one, and the evidence most favorable to the plaintiff is, that the policeman struck it with his club and threw it upon the plaintiff as he was passing upon the sidewalk. The negligence of the defendant produced a condition which made the injury possible, but the injury would not have occurred but for the independent act of the policeman. That act was an independent cause of the injury by one for whose act the defendant was not responsible and by one over whom it

had no control. It follows that the defendant was not liable for such act, and the negligence alleged and which the evidence tended to prove was not the proximate cause of the injury. The court ought therefore to have given the instruction directing a verdict of not guilty.

The judgments of the appellate court and circuit court are reversed and the cause is remanded to the circuit court.

[266] VICKERS, J., Dissenting. I am not in accord with the conclusion reached by the majority opinion. The judgment is reversed because the trial court refused to direct a verdict for appellant. The conclusion is based on the assumption that there is no evidence fairly tending to show that the injury might reasonably have been anticipated from the negligence of appellant.

The majority opinion, after stating the facts and reviewing numerous authorities, proceeds as follows: "Applying the rules of law to this case, it is clear that the defendant might reasonably anticipate, in case a wire should fall upon the sidewalk or where persons using the sidewalk or roadway would be likely to be injured, that a policeman or some other person might attempt to remove it to prevent injury, and if in so doing, or as a result of the policeman's act, some other person should be injured the defendant would be liable, since such effort to remove the cause of danger might naturally be anticipated."

With the rule announced in the above quotation I have not the slightest quarrel. It is difficult to see how it is legally or logically possible to avoid a conclusion directly opposite to the one reached in the majority opinion consistent with the rule laid down in the quotation which I have made. The sentences immediately following the quotation show the manner in which the majority opinion seeks to avoid the logical conclusion which seems to me ought necessarily to follow from the premises previously laid down. Those sentences are as follows: "The defendant would be liable although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground, but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk or the roadway. The wire was lying between the [267] sidewalk and the roadway, where it would injure no one, and the evidence

most favorable to the plaintiff is, that the policeman struck it with his club and threw it upon the plaintiff as he was passing upon the sidewalk."

I am wholly unable to see how this language can be reconciled with the quotation first made from the majority opinion. In the first quotation it is said that the defendant ought to anticipate that the policeman might attempt to remove the wire and injure some one, and for an injury thus caused the defendant would be liable. In the second quotation it is said that if a policeman should strike the wire with his club while it was lying where it would do no injury to anyone on the sidewalk, it is inconceivable that the defendant could have anticipated an injury thus brought about. What is it that distinguishes the situation presented in the first quotation from that implied in the second? Certainly the fact that the policeman used his club instead of his hands or feet to remove the live wire is not sufficient to render the liability "inconceivable" in the last proposition and "clear" in the first. Does the fact mentioned in the second proposition, that the wire was lying where no injury would be done by it to a person on the sidewalk, make the liability inconceivable? While the majority opinion does not say so in so many words, yet there is an intimation that the wire was not immediately on the sidewalk, and for this reason the policeman should not have attempted to remove it. If this be conceded, it does not help the situation. Suppose the policeman did use poor judgment in deciding to remove the wire or in selecting the means to accomplish that purpose—or, to put it still stronger, suppose the policeman was guilty of negligence in attempting to remove the wire—then the utmost that can be claimed is that the policeman's negligence operated jointly with the negligence of appellant in producing the injury, and if this view be taken, under the authorities cited in the majority opinion appellant is liable. If the policeman, of his own malice or wantonness, threw the wire 208 on appellee and intentionally injured him, appellant would not be liable. There is, however, not a particle of evidence to sustain that theory, and I do not understand the majority opinion to proceed upon that hypothesis. The negligence of appellant is conclusively settled by the judgment of the appellate court. There is no pretense that appellee was guilty of contributory negligence. At least, if that question was ever in the case, it is likewise settled by the judgment of affirmance by the appellate court. The only

thing left, then, is the question of fact whether the injury resulted from causes which ought to have been reasonably anticipated by appellant. Under the rule first above quoted from the majority opinion there ought to be no doubt as to this question. The injury occurred by the attempt of a policeman in good faith to remove a danger from a public highway, placed there by the negligence of appellant. Applying the law to these facts, I think appellant is liable.

Mr. Justice Carter also dissenting.

The Doctrine of Proximate Cause is the subject of an extended note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 807.

The Duties and Liabilities of Electric Corporations are considered in the note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 516. Electricity being an exceedingly dangerous agency, it is the duty of those making use of it to exercise a high degree of care commensurate with the danger involved: Wilbert v. Sheboygan Light etc. Ry. Co., 129 Wis. 1, 116 Am. St. Rep. 931; Gilbert v. Duluth General Electric Co., 93 Minn. 99, 106 Am. St. Rep. 430; Barto v. Iowa Tel. Co., 126 Iowa, 241, 160 Am. St. Rep. 347; Conrad v. Springfield Ry. Co., 240 Ill. 12, 130 Am. St. Rep. 251. As to the liability to persons injured by fallen wires, see Mize v. Rocky Mt. Bell Tel. Co., 38 Mont. 521, 129 Am. St. Rep. 659; Eaton v. City of Weiser, 12 Idaho, 544, 118 Am. St. Rep. 225; Fisher v. New Bern, 140 N. C. 506, 111 Am. St. Rep. 857; Guinn v. Delaware etc. Tel. Co., 72 N. J. L. 276, 111 Am. St. Rep. 668; Hebert v. Lake Charles Ice etc. Co., 111 La. 522, 100 Am. St. Rep. 505, and note.

WULLER v. CHUSE GROCERY COMPANY.

[241 Ill. 398, 89 N. E. 796.]

INFANTS—Contracts—Voidable.—The contract of an infant is, in general, voidable by him, and gains no additional force from the fact that he is engaged in business for himself or is emancipated. (p. 217.)

INFANTS—Contracts—Voidable Notwithstanding Injury to Contractee.—The exercise of an infant's right to disaffirm his contract may operate injuriously and unjustly against the other party, but the right exists for protection against his own improvidence and is exercisable at his discretion. (pp. 217, 218.)

INFANTS—Contracts—Executed and Executory.—There is no distinction between executed and executory contracts so far as the right of disaffirmance by an infant is concerned. (p. 218.)

INFANTS—Contracts Disaffirmed.—Voluntary payments made by an infant may be recovered by him on his disaffirming a contract, but he must return such part of the consideration as he has, without obligation to make restitution of the remainder which he has expended or lost. (p. 218.)

INFANTS—Contracts—Time for Disaffirmance.—Contracts concerning personal property and executory agreements may be avoided by the infant either during or after his minority. (p. 218.)

INFANTS—Contracts—Voidable.—Stocks and Shares Being Personalty, an infant may avoid the purchase of them and recover the purchase money. (p. 219.)

INFANTS—Contracts Avoided—Mode of Restoring Stock.—Where an infant sued to have a contract for the purchase of stock set aside and the decree provided for the cancellation of the certificate, such cancellation is equivalent to a surrender of the stock by the infant and its restoration to the corporation. (p. 219.)

L. D. Turner and L. D. Turner, Jr., for the appellant.

Dill & Pfingsten and Schaefer, Farmer & Kruger, for the appellee.

399 DUNN, J. The appellee filed a bill for relief against the appellant, and the circuit court decreed the payment of fifteen hundred dollars by the appellant to the appellee and the cancellation of a certificate for fifteen shares of the capital stock of appellant held by the appellee. This decree having been affirmed by the appellate court, an appeal is prosecuted to reverse the judgment of the latter court.

The appellee was a minor when the bill was filed and when the cause was heard. In May, 1905, the appellant corporation was organized to carry on a mercantile business with a capital stock of four thousand five hundred dollars, of which the appellee subscribed and paid for fifteen shares of one hundred dollars each. He acted as secretary and treasurer of the corporation, and was a salesman and bookkeeper thereof at twelve dollars a week during the first year and at fifteen dollars a week thereafter until after he began this suit, in December 1908. Having become dissatisfied with the conduct of the business, appellee filed a bill charging mismanagement thereof, repudiating, on account of his minority, his contract for said stock and refusing to be bound thereby, offering to return the certificate 400 for said stock, and praying for an accounting, the appointment of a receiver and general relief.

The position of the appellant is, that an infant, having advanced money upon a contract voidable because of his infancy, cannot rescind the contract and recover the money, and that he cannot elect to avoid the contract during his infancy. The contract of an infant is, in general, voidable by him, and gains no additional force from the fact that he is engaged in business for himself or is emancipated. The exercise of his right to disaffirm his contract may oper-

ate injuriously and unjustly against the other party, but the right exists for the protection of the infant against his own improvidence, and may be exercised entirely in his discretion. The fact that the contract has been executed is immaterial. There is no distinction between executed and executory contracts, so far as the right of disaffirmance is concerned.

The appellant has cited the case of Chicago Mutual Life Indemnity Assn. v. Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549, in which the court, in determining the right of the association to admit minors to membership, used the following language (page 277): "If an infant performs the conditions prescribed in the certificate, he, the same as an adult, becomes entitled to the benefits thereby secured. If he fails to perform, his membership ceases, and that is all. We do not assent to the view that, as a further consequence of his disability, he may recover back the dues and assessments he may have already paid. 'If an infant advances money on a voidable contract which he afterward rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained by fraud': 1 Parsons on Contracts, 332."

This language of the court used in argument was not essential to the decision, and the quotation from Parsons is at variance with authority and the doctrine now accepted. [401] If the fact that the payment of money upon his contract was voluntary precluded its recovery, the right to avoid the contract would be no protection to an infant against his inexperience and the wiles of swindlers and cheats. Such voluntary payment may be recovered upon the avoidance of the contract: Shurtleff v. Millard, 12 R. I. 272, 34 Am. Rep. 640; Robinson v. Weeks, 56 Me. 102; Ruchisky v. De Haven, 97 Pa. 202. The consideration, or such part of it as remains in the possession or control of the minor, must be returned, but if he has lost or expended it, so that he cannot restore it, he is not obliged to make restitution: Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; Reynolds v. McCurry, 100 Ill. 356. Contracts concerning personal property and executory agreements may be avoided by the infant either during or after his minority: Childs v. Dobbins, 55 Iowa, 205, 7 N. W. 496; Chapin v. Shafer, 49 N. Y. 407; Robinson v. Weeks, 56 Me. 102. The shares of capital stock of a corporation are personal prop-

erty, the same as promissory notes or bonds: Cooper v. Corbin, 105 Ill. 224. An infant's purchase of such stock is voidable, and he may, at his election, avoid it and recover the purchase money: Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429; White v. New Bedford Cotton-Waste Corp., 178 Mass. 20, 59 N. E. 642. The appellee, having offered to return the stock which he had received under the contract, was entitled to the return of the purchase money he had paid.

The certificate of stock held by the appellee was merely the evidence of his rights as a stockholder. The contract by which he became a stockholder having been avoided, the decree properly provided for the cancellation of the certificate, which amounted, in effect, to the surrender of the stock by appellee and its restoration to appellant.

The judgment is affirmed.

Contracts of Infants are discussed at length in the note to Craig v. Van Bebber, 18 Am. St. Rep. 573. A minor is not required, as a condition to disaffirming his conveyance of land, to restore a consideration received for it which is not in his possession when he reaches majority but has been wasted or spent during his minority: Bullock v. Sprowls, 93 Tex. 188, 77 Am. St. Rep. 849; Ridgeway v. Herbert, 150 Mo. 606, 73 Am. St. Rep. 464. In White v. Sikes, 129 Ga. 508, 121 Am. St. Rep. 228, it was decided that where an infant makes an executory contract to convey land, and expends the money in obtaining a professional education, he is not required to make any tender as a condition to repudiating the contract on his arrival at majority. And, according to Gillis v. Goodwin, 180 Mass. 140, 91 Am. St. Rep. 265, a minor may disaffirm and avoid a contract by him made for the purchase of a bicycle of which he has had possession and use, and recover a sum which he paid on account of such purchase, without putting the other party in statu quo or allowing anything for the rent and use of the property while in his possession under the contract of purchase, though the reasonable value of the use of the bicycle was equal to the sum paid by him on account of its purchase: See, in this connection, Jenkins v. Jensen, 24 Utah. 108, 91 Am. St. Rep. 783; Rice v. Butler, 160 N. Y. 578, 73 Am. St. Rep. 703.

ALDRICH v. ILLINOIS CENTRAL RAILROAD COMPANY.

[241 Ill. 402, 89 N. E. 702.]

FELLOW-SERVANTS—Definition.—Fellow-servants, with respect to injuries caused to one of them, are those who are directly co-operating with one another in a particular work at the time of the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety. (p. 222.)

FELLOW-SERVANTS—More than Employment by Common Master, Necessity for.—It is not sufficient that fellow-servants are employed by the same master. In order to bring them within the rule freeing the master from liability for injuries, they must be directly co-operating in a particular business as distinguished from indirectly co-operating in the general business of the master. (p. 223.)

FELLOW-SERVANTS—Question of Law and Fact.—The definition of fellow-servant is for the court, but whether certain employés of a common master fall within it is a question of fact. Hence whether or not the relation exists is a mixed question of law and fact. (p. 223.)

FELLOW-SERVANTS—Question of Law, When.—Whether the relation of fellow-servants exists is a question of law when there is no dispute as to the facts, and the evidence and all the legitimate conclusions to be drawn from it are such that all reasonable men will agree to the existence of such relation. (p. 223.)

FELLOW-SERVANTS.—Members of Freight Crews are not Necessarily Fellow-servants, though employed by the same corporation, if their duties lie on different distant parts of the same division of the railroad, and where there was evidence that their duties brought them into habitual association, the question of the fact whether they were or were not fellow-servants was properly one for the jury. (p. 224.)

W. W. Barr, Charles E. Feirich and W. S. Kenyon, for the appellant.

Nobleman & Smith and W. F. Bundy, for the appellee.

403 CARTER, J. This is an action on the case in the circuit court of Marion county by appellee, against appellant, to recover for the death of appellee's intestate, from an injury received while in the service of appellant as a brakeman. There was a trial by jury and judgment in favor of the appellee for eight thousand dollars. On appeal to the appellate court this judgment was affirmed, and a further appeal has been taken to this court.

Appellant has a double track from Centralia to Mounds, in this state, the south-bound trains having superior rights over the west track and the north-bound over the east

track. In accordance with the rules of the appellant no north-bound train has any right to be on the west or south bound track unless protected by sending out a flagman to warn any train approaching from the north. On October 23, 1907, the freight train on which the decedent was employed as brakeman left Centralia over the south-bound track, and had reached a point about a half mile south of Elkville and about a mile north of Hallidayboro when a collision occurred, which caused the death of the decedent. Some little time before this, another freight train of appellant had arrived from the south at Hallidayboro station and was engaged in what is called "pulling the mine." At Hallidayboro there are two main tracks and a passing track between them. The freight train going north stopped at Hallidayboro for the purpose of taking the coal cars from a switch track, and in order to do this the train was pulled in onto the passing track and left standing there while the engine was cut off, went to the north end of the passing track and backed down the west track to the mine. It there secured six cars, which were to be put on the front end of the train, and after making the necessary movements to get off the mine tracks and get the engine on the north end of the cars it was handling, the engine with these six cars moved north up the west main track to a point immediately [404] north of the north point of the switch, which leads off of the west main track at the north end of the passing track. Just as the engine and train of cars had started to back in off of the main track onto the north end of the passing track, the train on which decedent was employed came in sight and a head-on collision followed. It is conceded that it was then too late to stop the south-bound train and too late for the engine and six cars to get out of the way, and it is also conceded that it was the duty of the north-bound crew, under the circumstances, to send out a flagman a sufficient distance ahead to the north to warn trains and that this precaution was neglected. The train-dispatcher of appellant was located at Carbondale. He had ordered the conductor of this north-bound train to "pull the mine," and knew that the engine and cars would have to be on the south-bound track in order to do the necessary switching there, but he failed to notify the crew of the train on which decedent was employed that the west or south bound track at the Hallidayboro mine would be obstructed. This was not a meeting point or a customary

passing point for these two trains and neither of the crews knew they would meet there. There was an electric signal block eight or ten car-lengths south of the north end of the passing track, which was constructed to work automatically. When there was a train or car south of this block the signal would show a red light to the north, so as to keep trains coming from the north warned, but as soon as a car or train passed out of this block to the north the light would show green. When the switch at the north end of the passing track was thrown to allow a train of cars to go in on the passing track the switch light would show red to the north. At the particular time of this accident, however, sufficient time had elapsed after the engine and cars got out of the electric block so that the semaphore light would not warn the oncoming train, and the switch light was not thrown in time to warn the crew of the obstruction. [405] In fact, the trainmen on the south-bound train saw the headlight of the engine before they saw any other indication of obstruction on the track. The evidence tended to show that there was considerable smoke there, caused by a passenger train, which had just gone north. The decedent left his widow and four children, aged nine, eight, four and one and one-half, respectively. Twin children were born after his death, on April 10, 1908.

It is first urged by appellant, as a matter of law, that the members of the two train crews were fellow-servants; that both crews were in what the evidence denominates the "chain-gang service," subject to call to handle any class of freight along the line of the road that the business might call for; that both crews at the time of the accident were engaged in the particular business in hand—that is, the operation of the St. Louis division of appellant's road. We do not think, under the evidence in this case, that the crews of the two trains were fellow-servants. "To create that relation between servants they must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety": Indiana etc. R. R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387; Duffy v. Kivilin, 195 Ill. 630, 63 N. E. 503. To make them fellow-servants under the first branch of the rule they must be directly co-operating with each other in a particular business and in

a particular line of employment. It is not sufficient that they be employed by the same master. In order to bring them within the rule they must directly co-operate in a particular business as distinguished from indirectly co-operating in the general business of the master: Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 77 N. E. 190, 4 L. R. A., N. S., 1161; Chicago etc. R. R. Co. v. White, 209 Ill. 124, 70 N. E. 588. Manifestly, the two train crews were co-operating in the general business of [406] the master in the operation of the St. Louis division of appellant's railroad but not in any particular business. One train crew was moving freight north on the line of the defendant company and the other was moving freight south. At the time of the accident the train crew going north was taking out coal-cars from the switch-yards of the coal company, while the train going south had nothing to do with this particular business. If the contention of appellant on this point were to be upheld, then would it not necessarily follow that every person employed by the railroad company on this division of the road would be a fellow-servant with every other one, under the first branch of the rule? Such is not the law.

It is even more earnestly insisted by counsel that the members of the two train crews were fellow-servants under the second branch of the rule. The engineers and conductors of both these trains testified that they knew that north-bound trains frequently crossed the south-bound track at Hallidayboro to take cars from the mine switch tracks. There was no evidence to indicate that these train crews had ever passed at this point before or to show the extent of the association in the line of their work previous to this accident. Indeed, the only proof that tends to indicate in any manner any association was that the two train crews were engaged in hauling freight on the same division of a double track railroad. The definition of "fellow-servant" is for the court. Whether certain employés of a common master fall within the definition is a question of fact; hence whether or not the relation exists is a mixed question of law and fact: Indianapolis etc. R. R. Co. v. Morgenstern, 106 Ill. 216; Hartley v. Chicago etc. R. R. Co., 197 Ill. 440, 64 N. E. 382. Whether the relation of fellow-servant exists only becomes a question of law when there is no dispute with reference to the facts, and when the evidence, and all the legitimate conclusions to be drawn therefrom, are such that all reasonable men will agree to the [407] existence of the relation of fellow-servants: Illinois Southern Ry. Co. v. Mar-

shall, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297; Indiana etc. R. R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387; Chicago etc. R. R. Co. v. Driscoll, 176 Ill. 330, 52 N. E. 921; Illinois Steel Co. v. Coffey, 205 Ill. 206, 68 N. E. 751; Chicago City Ry. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216, 70 N. E. 222.

In the case of Lake Erie etc. R. R. Co. v. Middleton, 142 Ill. 550, 32 N. E. 553, an engine hostler was on an engine which was standing on the main track near the depot and by the negligence of the engineer and crew of an incoming train a collision occurred. In Mobile etc. R. R. Co. v. Massey, 152 Ill. 144, 38 N. E. 787, a construction train and a wild freight train collided because of the negligence of the conductor of the construction train. In Chicago etc. R. R. Co. v. Flynn, 154 Ill. 448, 40 N. E. 332, the engineer of a freight train was injured because of the negligence of the brakeman of another train in not closing a switch. In Chicago etc. R. R. Co. v. House, 172 Ill. 601, 50 N. E. 151, the fireman on a passenger train was killed through the neglect of the brakeman of a freight train to close a switch. In Chicago etc. R. R. Co. v. Swan, 176 Ill. 424, 52 N. E. 916, the baggageman on a passenger train was injured through the negligence of the engineer on the same train. And in all these cases it was held that the question whether the doctrine of fellow-servants applied was one of fact, to be submitted, under proper instructions, to the jury. To the same effect are Hartley v. Chicago etc. R. R. Co., 197 Ill. 440, 64 N. E. 382; Chicago etc. R. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936; Donk Bros. Coal Co. v. Thil, 228 Ill. 233, 81 N. E. 857; Chicago etc. Ry. Co. v. Strong, 228 Ill. 281, 81 N. E. 1011; Chicago Terminal R. R. Co. v. Reddick, 230 Ill. 105, 82 N. E. 598; Gathman v. City of Chicago, 236 Ill. 9, 86 N. E. 152, 19 L. R. A., N. S., 1178.

While the facts in this record which would tend to show the relation of the two train crews are not in dispute, even if it be conceded that some of this evidence may tend to prove that the duties of the two train crews brought [408] them into habitual association, that evidence "was not of such a nature that but one conclusion could have been drawn from it, and therefore the question was properly submitted to the jury": Chicago etc. R. R. Co. v. White, 209 Ill. 124, 70 N. E. 588. We do not think anything is said in Illinois Steel Co. v. Coffey, 205 Ill. 206, 68 N. E. 751, Chicago City Ry. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216, 70 N. E. 222, Chicago etc. Ry. Co. v. Bell, 209 Ill. 25, 70 N. E.

754, or Crane Co. v. Hogan, 228 Ill. 338, 81 N. E. 1032, that would lead to a contrary conclusion. In these last cases the court was of the opinion that the undisputed facts were of such a nature that all reasonable minds must necessarily reach the conclusion that the persons in question were fellow-servants. Such is not the case here. The facts are not of such a nature as to show beyond question that the relation of fellow-servants existed between the two train crews.

Our conclusion on the question of fellow-servants renders it unnecessary for us to discuss at length the question raised in the briefs as to whether it was the duty of the train-dispatcher of appellant to give the crew of the south-bound train notice of the fact that the other train crew was taking out coal-cars from the Hallidayboro mine. We deem it sufficient to say on the facts in this case, under the rules of law laid down by this court in Rogers v. Cleveland etc. Ry. Co., 211 Ill. 126, 103 Am. St. Rep. 185, 71 N. E. 850, that this was a question of fact to be determined by the jury.

No other questions have been raised in this court in the brief and argument of appellant. The questions of fact as to whether the members of the two train crews were fellow-servants and whether the south-bound crew should have been notified by appellant were properly submitted to the jury.

The judgment of the appellate court must therefore be affirmed.

The Question as to Who are Fellow-servants and who vice-principals is considered in the notes to Mast v. Kern, 75 Am. St. Rep. 584; Fox v. Sandford, 67 Am. Dec. 588. They are fellow-servants who are co-operating, at the time of an injury, in the particular business in hand, or whose usual duties are of a nature to bring them into habitual association, or into such relations that they can exercise an influence upon one another promotive of proper caution: Chicago City Ry. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216. According to some authorities, the fact that employés are engaged in different departments of the business does not preclude their being fellow-servants: Enright v. Oliver, 69 N. J. L. 357, 101 Am. St. Rep. 710; Leishman v. Union Iron Works, 148 Cal. 274, 113 Am. St. Rep. 243; Georgia Coal etc. Co. v. Bradford, 131 Ga. 289, 127 Am. St. Rep. 228. Employés of a railroad company on one train have been held fellow-servants with employés on a different train: Still v. San Francisco etc. Ry. Co., 154 Cal. 559, 129 Am. St. Rep. 177, and cases cited in the cross-reference note thereto. But in Ault v. Nebraska Tel. Co., 52 Neb. 434, 130 Am. St. Rep. 686, where two gangs of workmen were engaged in the construction of a telephone line, each under a different foreman, the first gang digging the holes and setting the poles therein, the second gang stringing the wires on the poles, it was held that the parties employed in such separate employment were not fellow-servants.

WACHSMUTH v. PENN LIFE INSURANCE COMPANY.

[241 Ill. 409, 89 N. E. 787.]

EXECUTORS AND ADMINISTRATORS—Debt Owing to Estate of Deceased—When Deemed to be Paid.—When a solvent debtor is appointed executor of a creditor's will or administrator of his estate, the debt is by a fiction of the law regarded as collected and paid to himself in his representative capacity, and is unaffected by his subsequent insolvency. This is a modification of what is known as the Massachusetts rule. (p. 228.)

EXECUTORS AND ADMINISTRATORS—Debt Owing to Deceased.—When a debtor is appointed executor of a creditor's will and is also a devisee thereunder, the net valuation of the devised property must be taken into account with the indebtedness to the estate when the executor has not charged himself with the debt so due and alleges his insolvency as a reason for not accounting; and a sale of the land of the estate to pay debts on the ground of deficiency of personal assets will be denied in such case. (pp. 229, 230.)

William Garnett and Moran, Mayer & Meyer, for the appellants.

Ashcraft & Ashcraft, Charles L. Bartlett and Harrison B. Riley, for the appellees.

410 VICKERS, J. This is an appeal from the judgment of the appellate court of the first district affirming a decree of the probate court of Cook county which dismissed the petition of Frederick H. Wachsmuth and Louis C. Wachsmuth, executors of the last will and testament of Henry F. Wachsmuth, deceased, for leave to sell lands to pay debts. The executors have prosecuted a further appeal to this court.

Henry F. Wachsmuth died November 2, 1900, leaving a last will, by which he devised to each of his sons a piece of real estate in Chicago, and to both of them, share and share alike, a third piece of Chicago city property. His sons, who are his executors and appellants in this case, were his sole devisees. It does not appear that Henry F. Wachsmuth owned any other real estate than the three pieces above referred to. He left personal property to the amount of $5,595.08. The debts probated against his estate amounted to $12,850.33, thus showing a deficiency of personal assets of $7,254.25. The petition to sell the real estate was based on a just and true account filed December 12, 1905, which showed the deficiency of personal assets as above stated. All of the real estate of which the testator died seised was encumbered by trust deeds or mortgages placed thereon by the testator. The liabilities of the estate under these encum-

brances was $35,500. One piece of property was sold under foreclosure and failed to bring the full amount of the encumbrance against it. The parcel of real estate known as the Forty-seventh street property, which was devised to Louis C. Wachsmuth, was mortgaged for [411] $11,000. This indebtedness was paid with part of the proceeds of a $15,000 trust deed placed on the property by Louis C. Wachsmuth after his father's death. This trust deed was executed to Francis B. Peabody, and finally, by assignment, became the property of the Penn Mutual Life Insurance Company, and was by that company foreclosed and the property sold for the amount of the debt and costs, and no redemption having been made, a deed was issued by the master in chancery to the Penn Mutual Life Insurance Company on October 26, 1904, and afterward the insurance company conveyed the said property and the title thereto is now in Bernard Baumgarden. The encumbrance upon the other piece of property, which is known in the record as the Rhodes avenue property, was $10,000, and this piece was devised to Frederick H. Wachsmuth by the will.

The ground upon which the probate court dismissed appellants' petition was, that it did not appear that there was any deficiency of personal assets to pay the debts of the estate. This holding is based upon the admitted facts that the executors were at the time of their appointment indebted to their father's estate, on account of money loaned to them by their father in his lifetime, in the sum of $10,000, and that the property devised to appellants under the will was at a fair market value worth $70,000 or $34,500 more than the aggregate amount of encumbrances thereon.

The evidence shows that the appellants had property in their own right at the time they were appointed executors, valued at $5,000, and that their personal liabilities were $27,000. Deducting the individual liabilities of the executors from the value of the equities devised to them, it appears that the executors were solvent and able to pay the $10,000 indebtedness which they owed to their father's estate. Under these facts the probate court held that the debt due from appellants to the estate must be regarded as cash assets in the hands of the executors available for the payment of claims against the estate, and that so regarding [412] this amount, and adding it to the $5,595.08 of other personal assets belonging to the estate, the deficiency of personal assets disappears; hence there was no authority, under

the law, for resorting to a sale of real estate to pay debts. The appellate court took the same view of this question that the probate court did and affirmed its decree.

The appellees have assigned cross-errors on the record which call in question the rulings of the court on other questions which were decided in favor of appellees, but in the view which we have of the question already stated it will not be necessary for us to either state the facts out of which they arose or decide the questions raised by the cross-errors assigned. The ultimate question to be determined is, Should the $10,000 debt due the estate from the executors be regarded as so much personal assets, which by operation of law is converted into cash in the hands of the executors? If this question is answered in the affirmative, it follows, as a necessary sequence, that there was no deficiency in the personal property, and that the decree dismissing the petition is correct.

Appellees contend that when a debtor is appointed administrator of his creditor's estate, the debt is considered paid, and the administrator is chargeable with the amount thereof in the settlement of his accounts, regardless of the financial condition of the administrator. This contention is supported to the full extent claimed by appellees by the supreme court of Massachusetts in Leland v. Felton, 1 Allen, 531; by the supreme court of Ohio in McGaughey v. Jacoby, 54 Ohio St. 487, 44 N. E. 231; by the supreme court of New Hampshire in Judge of Probate v. Sulloway, 68 N. H. 511, 73 Am. St. Rep. 619, 44 Atl. 720, 49 L. R. A. 347, and by the supreme court of Alabama in the case of Wright v. Lang, 66 Ala. 389. It will thus be seen that the rule contended for is not without support. The reason upon which these decisions rest is that the administrator cannot sue himself, and that therefore when he is appointed, his debt to the estate is by a fiction of law regarded as collected and [413] paid to himself, as administrator. The rule laid down in the foregoing cases, which is known as the Massachusetts rule, has been modified by later cases in other states so as to permit the administrator to show that he was insolvent at the time of his appointment and so remained during the term of his office, and thus relieve himself from the consequences of failing to pay over money which he never, in fact, had and was wholly unable to obtain. The rule in its modified form is applied in the following cases: In re Walker, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991; Baucus v. Stover, 89 N. Y. 1; Baucus v. Barr, 107 N. Y. 624, 13 N. E. 939, affirming 45 Hun, 582;

McCarty v. Frazer, 62 Mo. 263; Harker v. Irick, 10 N. J. Eq. 269; Rader v. Yeargin, 85 Tenn. 486, 3 S. W. 178; State v. Gregory, 119 Ind. 503, 23 N. E. 1.

In the case last above cited the supreme court of Indiana uses the following language: "One question which seems to have been overlooked on the trial of the cause was the financial condition of Levin T. Miller, the administrator, during the period of his administration. The money collected by him while professing to act as the agent of the administrator in Missouri, and for which he had not accounted when he became administrator, was a claim in favor of his trust, which he should have inventoried and charged himself with, and if by the use of due diligence all or any part of the claim could have been saved to the estate his sureties are therewith chargeable, but if he was hopelessly insolvent they do not become liable therefor, the burden as to the question of insolvency being on the administrator and his sureties." Further on in the opinion the court says: "The debt of the administrator is to be accounted for as other debts or assets, and he may show his insolvency during the period of administration in discharge of his official liability."

So far as we are advised, this question has never been passed on by this court. It seems to us that the rule laid down in Massachusetts is liable to work a great hardship [414] upon administrators and the sureties upon their bonds. To compel sureties on administrators' bonds to augment the estate of the deceased by requiring them to pay a debt which an insolvent administrator happens to owe the estate is imposing upon them a burden not contemplated and in many cases a great hardship. Leaving out of view the rights of the sureties, it would seem equally shocking to our sense of justice to proceed against an administrator personally for a failure to pay over money which he, in fact, did not have and which he had no means of procuring. Where, however, the administrator is solvent, no such hardship can be imposed upon either the sureties or the administrator. The rule thus applied will accomplish the desired end in most cases and avoid the harsh consequences that would occasionally result from the application of the unrestricted Massachusetts rule.

Appellants, however, contend that, even under this view of the law, the decree of the county court is erroneous, because it is said that the administrators were not solvent at the time of their appointment and have not been at any

time since. This contention presents a question of fact. As already shown, the real estate devised to appellants under the will of their father was worth $34,500 over and above the encumbrances thereon. These valuations are fixed by a stipulation of the parties. After deducting all of the indebtedness chargeable against this real estate there is an excess sufficient to show that appellants were solvent at the time of their appointment as executors. If they were solvent at that time—that is, if they had property sufficient to pay all of their personal liabilities, including the $10,000 which they owed their father's estate—they were properly chargeable with their debt to the estate and it should have been regarded as collected. It can make no difference, with the transmutation which the law effects in the legal status of this debt, that afterward through some cause, appellants became insolvent and finally unable to account for the [415] debt due the estate. The status of the debt, having been fixed by their appointment as executors and their solvency at that time, cannot be changed by subsequent insolvency of the administrators. It was not only the duty of appellants to charge themselves with the $10,000 which they owed the estate and inventory it as cash on hand, but in the eye of the law this was done. The debt was paid to the estate. In this view there was no deficiency of personal assets, and there was no error in dismissing appellants' petition.

The judgment of the appellate court will be affirmed.

Executors and Administrators, Debts Owing from to Estate.—"The common-law rule that the appointment by a testator of his debtor as executor operates as a discharge of the debt, except in case of a deficiency of assets to satisfy the claims of creditors, has long since become obsolete; and an executor is now required to include such a debt in his inventory, and is liable for it the same as for other claims owing to the estate, or as for so much money in his hands. No reason is apparent why an administrator should not, in this respect, be governed by the same rules as an executor.

"The doctrine that an executor is liable for his debt as for so much money in his hands has been adopted for the sake of convenience and justice, for clearly he should be held to account for his indebtedness to the estate, and as he cannot collect it from or sue himself, the fiction may properly be indulged, in the generality of cases, that his appointment and qualification as executor convert the debt into cash in his hands. However, this fiction should not be made the instrument of injustice; and therefore, if he is insolvent, he cannot be punished for contempt or embezzlement for a failure to account for the debt as for so much money. Nevertheless, some courts have thought that the sureties on his bond are liable for his failure to so account, notwithstanding his insolvency and inability to meet his pecuniary obligations throughout the period of his administration. The supreme court of California is not entirely satisfied with this extreme doctrine, and has declined to extend it to the sureties of an insolvent administrator, observing that the statute mentions only

executors. On principle, however, there is no ground for distinction, in this connection, between executors and administrators.

"It is improbable that legislatures, in enacting statutes declaring that an executor shall be liable for his debt to the testator as for so much money in hand, intended to swell the assets of the estates of decedents by making the sureties of insolvent executors accountable for the personal debt of their principals, and the courts of perhaps a majority of the states have so held. In the absence of a controlling statute, it cannot reasonably be said that the undertaking of the sureties of an executor or administrator contemplates that they shall be liable for the debt of their principal beyond his ability to pay it, and thus contribute from their own funds to make up an estate for the deceased which he did not possess when he died. They do not undertake more than that their principal shall faithfully and honestly discharge his duties in the administration of the estate committed to him; and they should not be mulcted for his failure to do something which no degree of diligence and faithfulness will enable him to do. So far as their liability is concerned, his debt should be placed on the same footing with debts due the estate from third persons": 1 Ross on Probate Law and Practice, 423–426. To the same effect, see the note to Sanders v. Dodge, 112 Am. St. Rep. 406.

SMITH v. HUNTER.

[241 Ill. 514, 89 N. E. 787.]

WILLS—Devise to Sell or with Power of Sale.—There is a difference between a devise to an executor to sell real estate and a devise to an executor of real estate with power to sell. In the one case a naked authority is given to sell; in the other an authority to sell coupled with an interest is given. In the former, the freehold remains in the heirs until a sale is made by the executor; in the latter a freehold immediately vests in the executor. (p. 234.)

WILLS—Construction.—A will giving a life estate in lands to the husband of the testatrix and on his death the lands to be sold and the proceeds divided among certain named legatees gives the legal title not to the executor as trustee, but to the heirs of the testatrix during the life estate. (p. 234.)

JURISDICTION—Service by Publication—Notice of Decree—Requisites.—The notice of entry of a decree required, under section 19 of the chancery code, to be given to one who has been served with process by publication, must be something more than a letter written by a codefendant informing him in general terms of the result of litigation to which he has been made a party, but of which he has received no actual notice until the decree has been entered against him barring his rights in the subject matter of the suit. (p. 235.)

JURISDICTION—Parties—Executor not Representative of Heir.—The heir at law should be made a party to a bill to reform the deed under which his ancestor derived title, the executor not representing him, where by the terms of the will a sale was directed on the cesser of a life estate created by it; and a decree in such a suit to which the executor was a party is not binding on the heir

who was a nonresident of unknown address and who was served neither with process nor a copy of the publication. (pp. 234, 235.)

SPECIFIC PERFORMANCE—Abstract of Title—Relation to Date.—The sufficiency of an abstract of title, upon a bill for specific performance, is to be determined as of the date fixed by the contract or by the agreement of the parties when the party was to furnish the abstract and the deal was to be closed, and not at some time after the filing of a bill for specific performance. (p. 236.)

SPECIFIC PERFORMANCE—Abstract of Title—Sufficiency.—An abstract of title which disclosed a decree in a suit for the reformation of the deed under which the vendor derived his title, which decree barred all the rights of one who had been served neither with process nor notice of the publication, and the time limit within which such one might appear in such suit to be heard touching his rights had not expired, does not show a good merchantable title, and therefore was insufficient to maintain a suit for specific performance. (p. 236.)

SPECIFIC PERFORMANCE—Cloud on Title.—The court will not force upon a vendee a title clouded with substantial defects, or one that a purchaser may be required to engage in litigation to defend, or one that he cannot readily dispose of by reason of defects therein. (p. 236.)

SPECIFIC PERFORMANCE—Defense—Clouded Title.—A defendant in a suit for specific performance of a contract for the sale of land is bound to show only that the title which the vendor is prepared to tender him is doubtful in its character. (p. 236.)

Thomas L. Jarrett, for the plaintiffs in error.

Patton & Patton, for the defendant in error.

[515] HAND, J. This was a bill in chancery filed by Frank T. Smith in the circuit court of Sangamon county against Peter J. Hunter, Nellie Hunter and Thomas L. Jarrett to enforce the specific performance of a contract in writing bearing date January 4, 1908, whereby Frank T. Smith agreed to sell, and Peter J. Hunter agreed to buy, eighty-seven and thirty-seven one-hundredths acres of land situated in Sangamon county for the sum of fifteen thousand dollars on the second day of March, 1908. The contract provided Smith was to furnish Hunter an abstract of title to said lands [516] showing a good merchantable title to said land in Smith. Hunter refused to perform the contract and demanded that Smith return to him the one thousand dollar note signed by himself and wife, and thereupon Smith tendered to Hunter a deed to the land and filed a bill for the specific performance of the contract against Peter J. Hunter, Nellie Hunter and Thomas L. Jarrett. The latter was the attorney of Hunter, who held in his possession certain notes and mortgages executed by Hunter and wife upon said premises and other lands for a part of the purchase price of said premises. Answers were filed to the bill after a demurrer thereto had been over-

ruled, and subsequently the bill and answers were amended. Exceptions were filed by the complainant to the answers and sustained to the material parts of the same, and the defendants having stood by their answers, a decree was entered in accordance with the prayer of the bill, and the defendants have sued out this writ of error to review said decree.

Numerous questions have been discussed in the briefs filed by the respective parties, but from the view we take of the case we deem it necessary to only discuss the question whether the abstract of title furnished Hunter by Smith showed a good merchantable title to said premises in Smith at the time the contract was to be consummated.

The title to the land stood of record in Anna E. Correll at the time of her death, on October 19, 1904. By her will she provided that her husband, L. S. Correll, should have the use of said premises during his life and upon his death it should be sold by her executor, and Hugh M. Greider (who was her nephew) or his bodily heirs should be paid two thousand five hundred dollars in cash out of the proceeds arising from said sale and the balance should go to other parties whom she named in her will. After the will of Anna E. Correll had been admitted to probate, her husband, L. S. Correll, filed a bill in chancery in the circuit court of Sangamon county against Hugh M. Greider and others to reform the deed by which [517] said land had been conveyed to Anna E. Correll so as to invest himself with the fee title to said premises, and a decree was entered in accordance with the prayer of the bill. Hugh M. Greider was a nonresident of the state and service was had upon him by publication. The residence of Hugh M. Greider being unknown, he did not receive the notice required to be sent him by mail, neither was he served with a copy of the bill. He had, therefore, by virtue of section 19 of the chancery code (Hurd's Statutes of 1908, chapter 22), one year after notice in writing given him of such decree, or three years after the entry of said decree if no such notice had been given him, to appear in said suit and petition the court to be heard touching the merits of such decree so far as it affected his rights, and as three years had not elapsed between the entry of said decree and the time fixed for the consummation of the sale from Smith to Hunter, Hunter claimed the title of Smith to the premises was likely to be defeated by the decree entered in the suit of Correll v. Greider et al. being set aside or modified upon the application of Hugh M. Greider, and that Smith did not have a merchantable title to said premises, and based his refusal to perform said con-

tract upon the ground that Smith did not have a good merchantable title to said premises, as shown by the abstract of title furnished him by Smith.

It is not claimed by Smith that Greider was served with summons or by copy of the bill, or that he received the notice required to be sent him by mail in case of service by publication, in the case of Correll v. Greider et al., through which decree Smith deraigned title, but it is contended that notwithstanding those facts the abstract furnished Hunter showed he had a good merchantable title to said premises on the day on which said contract was to be consummated, and the main question in controversy in this suit is, Did said abstract of title show that Smith had a good merchantable title to said premises on that day?

[515] The will of Anna E. Correll named Thomas E. Tomlin executor of her will, and he qualified as such and was a party defendant in the case of Correll v. Greider et al., and it is contended that he represented Hugh M. Greider in said cause in such manner that the decree entered in that cause was binding upon Greider, although the court did not acquire jurisdiction of the person of Greider by service of summons, service by copy of the bill or by publication and mailing of notice, as provided by statute. By the provisions of the will of Anna E. Correll the title to the land in question did not vest in her executor but descended to her heirs, subject to be devested by sale by her executor upon the death of her husband, who had a life estate in the premises. There is a difference between a devise to an executor to sell real estate and a devise to an executor of real estate with power to sell. In one case a naked authority is given to sell; in the other an authority to sell, coupled with an interest, is given. In the former case the freehold remains in the heirs until a sale is made by the executor; in the latter case a freehold immediately vests in the executor: Jackson v. Schauber, 7 Cow. 187. In this case the legal title to the lands was not in the executor as trustee. We think, therefore, it clear that Hugh M. Greider, as heir at law of Anna E. Correll, was a necessary party in the case of Correll v. Greider et al., and that his interest in the lands of his aunt, Anna E. Correll, as her heir at law and as her devisee, was not represented by her executor in that suit in such way as to bind Greider by the decree entered in that case.

It also appears that after the decree was entered in that case the executor wrote Hugh M. Greider, whose residence he ascertained subsequent to the entry of the decree, a letter, in

which he notified him of the result of the litigation in the case of Correll v. Greider et al. in very general terms, and it is said that Greider was bound to take steps within one year from the date and receipt of such letter, under [519] the provisions of section 19 of the chancery code, to open up said decree and protect his rights in said lands or he would be bound by said decree, and as more than one year had elapsed subsequent to the entry of said decree before the execution of the contract between Smith and Hunter, the title of Smith was good as against Greider. We do not agree with this contention. The statute provides that a person who has not been served with summons or by copy of the bill, and who has not received the notice required to be sent him by mail in case of publication, shall have three years in which to petition the court in which the case is pending, to open up said decree and allow him to defend, unless he has been notified in writing of the entry of said decree, in which case he must file his petition to open up the decree within one year from the receipt of such notice. The notice required to be given a defendant served by publication who has not received the notice required to be sent him by mail, in order to bar his rights in one year, is of great importance to a defendant who has been served by publication but not received actual notice of the pendency of a suit, and we think must be something more than a letter written him by a codefendant which informs him, in general terms, of the result of litigation to which he has been made a party, but of which he has received no actual notice until a decree has been entered against him barring him of all his rights in the subject matter of the litigation: Lyon v. Robbins, 46 Ill. 276; Southern Bank of St. Louis v. Humphreys, 47 Ill. 227; Sale v. Fike, 54 Ill. 292; Martin v. Gilmore, 72 Ill. 193. We are of the opinion the letter written Greider by Tomlin did not have the effect to limit the time in which Greider might apply to the circuit court, under section 19 of the chancery code, to have his rights in the subject matter of said litigation adjudicated and determined.

It is finally urged that it appears from the supplemental bill filed by Smith in this case that Hugh M. Greider appeared [520] in the case of Correll v. Greider et al. after the commencement of this suit and filed a petition to have said decree opened up and for leave to have his rights determined in that suit, and that the court denied him such leave. The time fixed for closing the sale between Smith and Hunter was March 2, 1908, but by mutual arrangement, and with

a view to perfect, if possible, Smith's title, the time for closing the deal was extended to March 11, 1908. On that day the parties met and Hunter demanded of Smith that he obtain a quitclaim deed from Hugh M. Greider releasing his interest, if any, in said premises. Smith declined to obtain a deed from Greider, saying that it would lead to litigation. Hunter then declined to perform and demanded the thousand dollar note which he had given to Smith, and Smith then tendered to Hunter a deed for said premises and demanded that he perform the contract, and upon Hunter's refusal so to do he filed this bill. The general rule is, that the sufficiency of an abstract of title, upon a bill for specific performance, is to be determined as of the date fixed by the contract or by the agreement of the parties when the party was to furnish the abstract and the deal was to be closed, and not at some time subsequent to the filing of a bill for specific performance: Street v. French, 147 Ill. 342, 35 N. E. 814; Gage v. Cummings, 209 Ill. 120, 70 N. E. 679; Clark v. Jackson, 222 Ill. 13, 78 N. E. 6. The case of Gibson v. Brown, 214 Ill. 330, 73 N. E. 578, differs in its facts from the case at bar, and is not in conflict with the foregoing authorities.

We are of the opinion the abstract of title furnished Hunter by Smith did not show that Smith had a good merchantable title to said premises on March 11, 1908, and that when on that day Smith tendered Hunter a deed for said premises Hunter was not bound to accept the title tendered him by Smith. The law is well settled that a court of chancery will not force upon a vendee a title clouded with substantial defects, or one that a purchaser may be required to engage in litigation to defend, or one that he cannot readily [521] dispose of by reason of defects therein. All the defendant is bound to show to defeat a bill for specific performance is that the title which his vendor is prepared to tender him is doubtful in its character: Close v. Styvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; Mead v. Altgeld, 136 Ill. 298, 26 N. E. 388; Street v. French, 147 Ill. 342, 35 N. E. 814; Harrass v. Edwards, 94 Wis. 459, 69 N. W. 69.

The decree of the circuit court will be reversed and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

Equity will not Compel the Specific Performance of a Contract for the purchase of land if the title thereto is so uncertain as to affect its market value: Townshend v. Goodfellow, 40 Minn. 312, 12 Am. St. Rep. 736. To maintain a suit for specific performance against the purchaser of real estate, the plaintiff must show that the title is good

beyond a reasonable doubt: Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399. A purchaser will not be compelled to take a conveyance when there is reasonable doubt about the title: Meyer v. Madreperla, 68 N. J. L. 258, 96 Am. St. Rep. 536. That specific performance may be decreed although the title of the complainant is based on adverse possession only, see Freedman v. Oppenheim, 187 N. Y. 101, 116 Am. St. Rep. 595.

What is a Marketable Title is the subject of a note to Cummings v. Dolan (Wash.), post, p. 991.

OGDEN v. STEVENS.

[241 Ill. 556, 89 N. E. 741.]

PLEADING.—Laches must be Set Up by plea or answer so as to afford complainant an opportunity to amend, and though there are cases where the question may be raised by demurrer, if a defendant fails in his answer to set up that defense, he cannot insist on it on the hearing. (pp. 242, 243.)

STATUTE OF FRAUDS.—A Verbal Agreement to Extend the Time for Redemption from a judicial sale is valid, and not affected by the statute of frauds. (p. 243.)

MORTGAGES—Redemption—Extension of Time for.—Courts of equity will go further than enforcing verbal contracts for the extension of the period of redemption, and will grant relief where the purchaser has by a course of conduct induced the owner to refrain from redeeming within the statutory time by fraudulent representations or promises to the purchaser which do not constitute a contract. (p. 243.)

MORTGAGES—Redemption.—Where the Owner of the Equity has been induced to rely upon the representations of the creditor until the period of redemption has expired, a court of equity will grant relief. (p. 243.)

MORTGAGES—Redemption.—Where the Owner of the Equity was permitted by the purchaser to expend money for taxes, improvements, and in defending litigation concerning the property on the strength of his promise to extend the time for redemption, the court will enforce such extension. (pp. 243, 244.)

CONTRACTS—Equity Prefers Substance to Form.—Courts of equity look to the substance rather than the form of written instruments, and will seek to discover and carry into effect the real intention of the parties and enforce it according to the sense in which it was understood as shown by the subsequent acts and conduct of the parties. (p. 244.)

APPEAL AND ERROR—Weight of Findings of Trial Court.—The findings of the chancellor who had the opportunity for hearing witnesses and observing their demeanor are entitled to great weight, and will not be set aside unless manifestly against the weight of evidence. (p. 244.)

INTEREST—Penalty for Defending Rights.—Where the purchaser at a foreclosure sale refused redemption to the owner of the equity after the statutory time, he should not be penalized for defending a suit by being ordered to pay interest on certain condemna-

tion money for part of the mortgaged lands which had been deposited with the county treasurer after suit brought. (pp. 244, 245.)

Coll McNaughton and John W. Downey, for the appellant.

Eddy, Haley & Wetten and P. C. Haley, for the appellee.

557 VICKERS, J. This was a bill filed by May S. Ogden in the circuit court of Will county against Albert P. Stevens and Jerome P. Stevens to obtain a decree permitting her to redeem certain premises from a sale made under a decree entered in said court on the twenty-fifth day of September, 1897. Albert P. Stevens answered the bill, denying the principal allegations upon which the complainant predicated her right to relief. Jerome P. Stevens filed an answer disclaiming all interest in the premises, and his connection with the litigation was terminated. Upon a hearing of the evidence in open court a decree was entered in accordance with the prayer of the bill, permitting the complainant to redeem lots 4, 5 and 8, in block 1, of school section addition to the city of Joliet, as prayed for in the bill, upon the payment of the balance which might be found due the defendant upon an accounting to be had before the master in chancery in accordance with the specific directions of the decree, and the cause was referred to the master in chancery to state the account between the complainant and defendant and to report his conclusions of law and fact in relation to the matters of accounting so referred to him. The defendant has appealed from this decree and urges a reversal thereof for the reasons hereinafter stated.

558 The facts disclosed by the evidence show that prior to September 6, 1884, the premises in question were owned by Marshall B. Ogden, who died testate on said date, and by his last will the premises involved were devised to his son, Edwy C. Ogden, husband of appellee. At the time of the death of Marshall B. Ogden there was a mortgage on said premises in favor of William C. Ogden for $1,697.50. On July 15, 1892, Edwy C. Ogden executed a trust deed to William Grinton to secure a loan of $6,000 obtained from Henry K. Stevens, father of the appellant, who thereafter made a gift of said note and trust deed to appellant. The $6,000 note was payable to Edwy C. Ogden five years after date and was by him indorsed. The note drew interest at the rate of seven per cent per annum. On August 9, 1893, Edwy C. Ogden conveyed his equity in said property to M. D. Ogden.

On August 17, 1896, the holder of the note elected to declare the principal sum due because of a default in the payment of interest and filed a bill in the circuit court of Will county to foreclose the same. In December, 1896, while the foreclosure proceeding was pending, Edwy C. Ogden intermarried with the appellee, May S. Ogden, and on June 15, 1897, M. D. Ogden, for the consideration of $2,300, conveyed his equity in said lots to appellee, May S. Ogden. The foreclosure proceeding resulted in a decree on September 25, 1897, for the sum of $7,621.79. The decree not having been satisfied, the premises were sold on the 25th of October, 1897, to appellant for $7,795.99, in full satisfaction of the decree, and the master in chancery executed to appellant a certificate of purchase entitling him to a deed on January 25, 1899, unless redemption should be made. William C. Ogden, who claimed to be the owner of the note for $1,697.50, secured by a mortgage upon a part of these premises, was not made a party to the foreclosure of the trust deed. On January 5, 1897, and during the pendency of the foreclosure proceeding, William C. Ogden filed an original bill in the Will county circuit court to foreclose [559] his mortgage. Appellant and Edwy C. Ogden and others were made parties defendant to the bill filed by William C. Ogden. Appellee was not made a party to this bill. The William C. Ogden bill was dismissed by the circuit court of Will county for want of equity on April 22, 1898, which was about six months after the sale under the foreclosure of the trust deed. William C. Ogden appealed from the decree dismissing his bill to the appellate court, where the decree was affirmed December 14, 1898, before the time for redemption had expired from the sale under the decree of foreclosure of the trust deed. William C. Ogden prosecuted a further appeal to this court, and the judgment of the appellate court was affirmed by the supreme court on June 17, 1899. A petition for rehearing was filed by William C. Ogden, and was not finally disposed of until October 5, 1899, which was several months after the expiration of the time allowed by the law for a redemption from the trust deed foreclosure sale. Both appellant and appellee were interested in defeating the foreclosure proceeding instituted by William C. Ogden. The evidence shows that appellee employed and paid counsel to defend against that foreclosure proceeding, and that the defense was successfully interposed without any cost to appellant.

The foregoing facts are undisputed. The controversy between the parties relates entirely to facts now to be stated.

Appellee contends that she intended to redeem from the sale under the trust deed; that she had frequent conversations with appellant in regard to the redemption of the premises, and that the appellant assured her that all he wanted was the money that he had invested and the interest thereon, and that appellant frequently promised to accept his money and permit a redemption, both before and after the master's deed was issued to appellant. Appellant denies ever having made any such promises to appellee.

On February 1, 1899, Morrill Sprague, an attorney at the Will county bar, who had represented the defense in [560] the William C. Ogden litigation, at the request of appellee's husband and appellant, made an itemized statement of the amount necessary to redeem from the trust deed foreclosure, from which it appears that at that time there was due for principal, interest, insurance, taxes and costs, $8,974.18. At that time it was estimated by Mr. Sprague that it would probably be nine months before the William C. Ogden litigation would be finally disposed of. For the purpose of preserving appellee's right to redeem after the termination of the William C. Ogden litigation, on the said first day of February, 1899, two instruments in writing were prepared by Mr. Sprague and executed between appellant and appellee. One of these instruments on its face purports to be a contract of sale, by which the appellant agreed to sell the premises to appellee for the sum of $8,974.18, provided said sum of money, with six per cent interest thereon, was paid to him at any time within nine months from that date. The contract also provided that appellee should pay appellant as rentals on the premises $100 per month, in advance, for a term of nine months, with the understanding that if appellee paid the $8,974.18 within the time limit, she should have credit for the amount paid as rentals. The other instrument executed between the parties was an ordinary lease, by which appellant leased the premises to appellee for a rental of $100 per month. The evidence shows that appellee continued in the possession of the premises and paid the $100 per month for eight consecutive months, and that before the ninth payment came due appellant went to Mount Clemens, Michigan, for treatment for rheumatism, and that he was not at home to receive the $100 or the balance of the money under the contract, although appellee, her husband and her attorney made repeated efforts to make such payment and close up the transaction. On one occasion, after appellant returned home, appellee was denied admittance to his home on the ground that appellant was too ill to be seen

about business affairs. Finally, in November, [561] after the nine months had expired, appellant had an interview with Mr. Sprague and the appellee's husband, and he again assured them that he was willing to carry out the contract and receive his money, although the time under the written agreement had expired, and on this occasion appellant received a certified check for the ninth $100 payment.

The evidence shows that the equity in these premises was worth $10,000 to $20,000, and that appellee had made a tentative arrangement with Mr. O'Connor, a broker, to furnish her the necessary money to make a redemption of the property. Appellee's husband had also obtained a promise from another loan agent who was willing to furnish the money for the redemption and take a mortgage upon the property. Appellee informed appellant that she had such arrangements made for the money, and was ready and willing at any time to pay him all that was due him, but appellant told her that there was no hurry about the redemption; that he did not need the money, and that she might just as well pay him interest as to pay it to some other person. The weight of the evidence shows that on all of these occasions appellant recognized his obligation to take the money and release the property. During the time that appellee was occupying the premises, and while relying on appellant's promise to accept his money, appellee spent about $2,500 in taxes, expenses and improvements upon the premises. No payments were made and none were demanded from November, 1899, until March, 1900. On the latter date appellant called on appellee and presented a written lease for the premises and requested her to sign it. Appellee declined to sign the lease, and told appellant that she wanted him to take his money and release the property. Appellant replied that he did not want his money at that time and that there was no need of going to the trouble just then; that he thought he would reduce the rent to $50 a month, and that it would not make any difference about their arrangement as to the redemption, and with [562] this understanding appellee signed the lease, agreeing to pay $50 per month as rent. During the succeeding summer appellant called at the store of appellee's husband frequently, and on these several occasions appellee insisted upon a settlement and appellant's accepting what was due him and releasing the property to her, but appellant, while not refusing to comply outright, was always ready with some excuse for not settling it then. In November of that year appellant came to

the drug store kept by appellee's husband, and appellee having become suspicious that appellant did not intend to carry out his promise, presented him with a large amount of money, purporting to be the amount due him, and demanded that he release his claim upon the property. Then for the first time appellant flatly refused, stating that he preferred the property to the money. An altercation thereupon occurred between appellant and appellee's husband, in which offensive language was used. This was the last friendly interview between the parties. Within a short time thereafter Jerome P. Stevens, a brother of appellant, notified appellee that he had bought the property and that he wanted possession. Written notices to quit were served and legal proceedings threatened, until finally appellee surrendered the possession to Jerome P. Stevens. Afterward Jerome P. Stevens let the property go back to appellant, and, as already stated, disclaims all interest therein at this time.

After the commencement of this suit the Chicago, Rock Island and Pacific Railway Company obtained a right of way over a portion of two of the lots involved, and has, pursuant to the order of the county court, deposited $12,500 with the county treasurer of Will county, which remains on deposit there, representing the land condemned by the railroad company, the title to which will abide the decision of this case.

The original bill was filed in this case on January 21, 1905. Appellant contends that appellee has been guilty of laches in commencing this suit. The city of Joliet passed [563] an ordinance requiring railroads to elevate their tracks. In order to comply with this ordinance the Chicago and Rock Island company relocated a portion of its line across two of the lots involved, which, it is claimed, greatly enhanced the value of the property. Appellant contends that the filing of the bill in this case is an afterthought, due to the unusual advance in the value of the property. It is sufficient to reply to this contention that appellant does not set up the defense of laches in his answer, and the rule has been frequently announced by this court that the defense of laches, to be availed of, must be set up by plea or answer, so as to afford complainant an opportunity to amend the bill by inserting allegations accounting for the delay: Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864; Spalding v. Macomb etc. Ry. Co., 225 Ill. 585, 80 N. E. 327; Schnell v. City of Rock Island, 232 Ill. 89, 83 N. E. 462, 14 L. R. A., N. S., 874. There are cases where the question may be raised by demurrer: Kerfoot v. Billings, 160 Ill. 563, 43 N. E. 804. But where a defendant answers a bill and fails to

set up laches, he will not be allowed to insist upon such defense on the hearing.

It is next contended by appellant that his several promises relied on by appellee were void under the provision of the statute of frauds, which is set up and relied on in his answer. This position is untenable. A verbal agreement to extend the time for redemption from a judicial sale is valid and not affected by the statute of frauds: Reigard v. McNeil, 38 Ill. 400; Pensoneau v. Pulliam, 47 Ill. 58; Union Mut. Life Ins. Co. v. White, 106 Ill. 67; Taggart v. Blair, 215 Ill. 339, 74 N. E. 372. A parol contract to extend the period of time allowed for a redemption from the judicial sales has been upheld and enforced by this court in a number of cases: Schoonhoven v. Pratt, 25 Ill. 457; Nichols v. Otto, 132 Ill. 91, 23 N. E. 411; Union Mut. Life Ins. Co. v. Kirchoff, 133 Ill. 368, 27 N. E. 91. Courts of equity, in the exercise of their jurisdiction, have gone even further than the enforcement of clearly proven verbal contracts for the extension of a 244 period of redemption, and have granted relief where the purchaser has by a course of conduct induced the owner to refrain from redeeming within the statutory time by fraudulent representations or promises to the purchaser which could not be said to constitute a contract: Henderson v. Harness, 184 Ill. 520, 56 N. E. 786. Where the owner of the equity has been induced to rely upon the representations of the creditor until the period of redemption has expired, a court of equity will grant relief: Taggart v. Blair, 215 Ill. 339, 74 N. E. 372. The defense that the alleged contract is void under the statute of frauds cannot be sustained.

Appellant's most serious contention is that the decree is not supported by the evidence. The weight of the evidence supports the facts set out in this opinion. Appellee is corroborated by several witnesses to the promises of appellant that he would accept the money due and release these premises. That such was the understanding is shown by the evidence of Mr. Sprague, who at the request of the parties prepared a statement showing the exact amount necessary to redeem these premises on February 1, 1899, the day that the written contracts were made. Mr. Sprague testifies that the parties entered into those contracts for the purpose of preserving appellee's equities and extending her right to redeem until the litigation concerning the William C. Ogden mortgage was determined; that the parties had no other object in view in executing the lease and the so-called sale contract. That appellee understood that she had a continuing right to redeem

is shown by the expenditure of money for taxes, improvements and in defense of litigation concerning the property. It would not be reasonable that an intelligent person would thus spend large sums of money upon property which belonged to another. Appellant was cognizant of these expenditures, and he knew appellee was relying upon his promises in making them. Under these circumstances it would be a fraud upon appellee to thus induce her to expend money in the belief that [565] she had a right to redeem and then refuse to receive the money and release the property. Under the evidence disclosed in this record appellee's right to redeem might well be rested upon the doctrine of estoppel.

Appellant insists that by the strict letter of the written contract appellee only had an option to purchase the property within nine months, which she did not exercise, and that thereafter she had no further rights in the premises. Conceding that the written instruments executed on February 1, 1899, are susceptible of the construction contended for by appellant, still courts of equity look to the substance rather than to the form of written instruments, and will seek to discover and carry into effect the real intention of the parties and enforce it according to the sense in which it was understood by the parties, as shown by their subsequent acts and conduct with reference thereto: Pomeroy's Equity Jurisprudence, sec. 378. The question now under consideration being one of disputed fact, the finding of the trial judge to whom the cause was submitted for trial is entitled to great weight with this court. The witnesses were before the chancellor, and he had opportunities for observing their demeanor while testifying which we do not have. In such case the rule is that the finding of the trial court will not be set aside unless it is manifestly against the weight of the evidence: Higgins v. Wisner, 170 Ill. 220, 48 N. E. 692. We are not, however, required to invoke this rule in the case at bar. If the question were pending as an original proposition in this court we could not reach any other conclusion than that the weight of the evidence supports the allegations of appellee's bill. We are entirely satisfied with the result reached in the court below, but are of the opinion that the court erred in reference to the matter of interest in one respect. The court directed that appellant be required to pay interest at the rate of six per cent on the $12,500 deposited by the railroad company with the county treasurer. To require the appellant to pay interest on this sum of money is [566] to inflict upon him a penalty for defending this lawsuit. While it is true that ap-

pellee is entitled to this money and would have received it when it was paid over had appellant then conceded appellee's claim and released all right to the property, still we do not think appellant should be mulcted in damages beyond the ordinary court costs, merely because he has sought to have his rights litigated. The decree of the circuit court will be reversed in this respect, so that the master, in stating the account, will not charge appellant with interest on the $12,500. In all other respects the decree of the circuit court will be affirmed.

Decree reversed in part and cause remanded.

The Defense of Laches may be interposed by plea, answer or demurrer: Potts v. Alexander, 118 Fed. 885. And it would seem that if the evidence shows laches sufficient to defeat the relief demanded, the defense need not be pleaded in order to be available: Dexter v. MacDonald, 196 Mo. 373, 95 S. W. 359; Calavada Colonization Co. v. Hays, 119 Fed. 202; laches is a defense which may be raised upon the argument: Taylor v. Slater, 21 R. I. 104, 41 Atl. 1001; National Cash Register Co. v. Union Computing Mach. Co., 143 Fed. 342. For authorities perhaps taking a stricter view, see Hagerman v. Bates, 24 Colo. 71, 49 Pac. 139; Smith v. Russell, 20 Colo. App. 554, 80 Pac. 474; Henshaw v. State Bank of West Pullman, 239 Ill. 515, 130 Am. St. Rep. 241.

The Application of the Statute of Frauds to agreements respecting redemption from judicial sales is considered in the note to McCoy v. McCoy, 102 Am. St. Rep. 244.

MATHIAS v. FULTON.

[241 Ill. 598, 89 N. E. 697.]

REAL PROPERTY—Possession—Unrecorded Deed.—Where a party receives a deed and takes possession of the land thereby conveyed, although the deed is not recorded, such possession is notice to subsequent purchasers, who deal at their peril with the former owner and take title subject to the purchaser in possession. (pp. 246, 247.)

REAL PROPERTY — Indefeasible Possession — Illustration.—Where a mother had a life estate in lands and her daughter purchased the fee, and the mother, in consideration of the daughter's residing on and improving the property, released by parol her life estate, and the daughter went into possession, such possession supported by her deed of the fee, although unrecorded, was paramount and prevailed against subsequent purchasers from the original owner who did record their deeds. (pp. 246, 247.)

Walter Eden and Eden & Martin, for the appellant.

R. M. Peadro and M. A. Mattox, for the appellee.

599 HAND, J. This was a bill in chancery filed in the circuit court of Moultrie county by Angeline Mathias against Thomas D. Fulton, Joseph A. Miller and A. H. Miller to cancel a deed from Fulton to Joseph A. Miller and a deed from Joseph A. Miller to A. H. Miller as a cloud upon the title of Angeline Mathias to an eighteen acre tract of land situated in said county. Answers and replications were filed and the cause was referred to the master in chancery to take the evidence and report his conclusions as to the law and the facts. The evidence was taken and the master filed a report, in which he recommended that the relief prayed for in the bill be granted. Objections were filed with the master and renewed as exceptions in the circuit court and overruled, and a decree was entered setting aside and canceling the deeds from Fulton to Joseph A. Miller and from Joseph A. Miller to A. H. Miller, and an appeal has been prosecuted by A. H. Miller to this court to reverse said decree.

It appears from the pleadings, evidence and master's report that Thomas D. Fulton, on the sixth day of December, 1895, was the owner of said premises in fee, subject to a life estate therein in Cassander E. Berry, the mother of Angeline Mathias. On that day Fulton sold and conveyed said premises to Angeline Mathias for the sum of five hundred and forty dollars, which was paid by Angeline Mathias to Fulton, and Cassander E. Berry released to her daughter, by parol, her life estate in said premises in consideration that her daughter would move upon the said premises and improve the same; that shortly thereafter Angeline Mathias and husband erected a dwelling-house, barn and fences upon said premises, and occupied the said premises, by themselves or their tenants, until the time this bill was filed; that the deed for said premises from Fulton to Angeline Mathias upon its execution was delivered and remained in her possession until the date of the trial, but was not recorded until some twelve years after its delivery; that on the eighteenth 600 day of December, 1907, Thomas D. Fulton conveyed said premises by a quitclaim deed to Joseph A. Miller, and a few days later Joseph A. Miller conveyed said premises by a quitclaim deed to appellant, A. H. Miller, which deeds were recorded and are the deeds sought to be canceled.

The law in this state is well settled that where a party receives a deed and takes possession of the land conveyed thereby, his possession is notice to subsequent purchasers of his rights although he fails to record his deed, and if a subsequent purchaser deals with the former owner of the land,

he does so at his peril, and will take title subject to the rights of the prior purchaser who has taken possession under his deed: Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549; Whitaker v. Miller, 83 Ill. 381; Morrison v. Morrison, 140 Ill. 560, 30 N. E. 768; Mallett v. Kaehler, 141 Ill. 70, 30 N. E. 549. We think, therefore, the trial court properly held that the conveyances from Fulton to Joseph A. Miller and from Joseph A. Miller to A. H. Miller were void as against Angeline Mathias.

Finding no reversible error in this record, the decree of the circuit court will be affirmed.

Possession of Land is Notice of Whatever Right or Title the occupant has: Munger v. Beard & Brother, 79 Neb. 764, 126 Am. St. Rep. 688; Bridger v. Exchange Bank, 126 Ga. 821, 115 Am. St. Rep. 118; Sheldon v. Powell, 31 Mont. 249, 107 Am. St. Rep. 429; Crooks v. Jenkins, 124 Iowa, 317, 104 Am. St. Rep. 326.

Possession of Land Under an Unrecorded Deed or Contract imparts notice of the right and title of the occupant: See the note to Crooks v. Jenkins, 104 Am. St. Rep. 345; Allen-West Commission Co. v. Millstead, 92 Miss. 837, 131 Am. St. Rep. 556.

CASES

IN THE

SUPREME COURT

OF

IOWA.

McSURELY v. McGREW.

[140 Iowa, 163, 118 N. W. 415.]

CONSTITUTIONAL LAW—Legislation to Affect Pending Litigation.—When action is once commenced jurisdiction is purely a judicial question, and it is unconstitutional for the legislature to attempt to usurp the judicial function by interfering legislation to oust the jurisdiction of the court. (p. 251.)

CONSTITUTIONAL LAW—County Funds—Legislative Control.—A county, while a legal body corporate, is created a subdivision of the state for administrative and other public purposes, and is subject always to legislative control and change; its revenues may be diverted or taken altogether without redress by the citizens; and as neither they nor the county itself have any vested interest in the funds coming into the treasurer's hands, it is constitutional for the legislature to permit the deposit of county funds in bank and absolve the officers from any liability on account of them. (p. 252.)

COUNTY FUNDS—Legislative Control.—The power of a municipality to raise money by taxation is a political one, delegated by the legislature, and the fund when collected is within the control of the legislature. (p. 252.)

CONSTITUTIONAL LAW — Curative Acts — Retroactive.—A curative act is necessarily retrospective in character and may be passed to cure or validate errors or irregularities in legal or administrative proceedings except such as are jurisdictional or affecting substantive rights and to give effect to contracts for failure to comply with some technical requirement, or whenever the irregularity to be healed consists in the doing of some act, or the doing of it in such manner as the legislature might have made immaterial or have authorized by a prior law. (p. 253.)

COUNTY OFFICERS, Retroactive Release of.—The legislature has power to authorize a board of supervisors to release a county treasurer or other quasi municipal officer and the sureties on his official bond from liability for the loss of public funds on the ground that he is acting as an officer, and no one, except, perhaps, creditors, has any vested rights to the funds in his hands; and such delegation is not objectionable on the ground that it confers legislative powers upon some other body than the law-making department of the government. (pp. 256, 257.)

CONSTITUTIONAL LAW — Special Legislation Releasing County Officers.—An act of the legislature confirming the action of a board of supervisors in releasing a county treasurer and his sure-

ties from liability for the loss of public funds is not unconstitutional, either on the ground that it confers special benefit or immunity upon a particular individual, or that the effect of the act is to appropriate a sum of money to a private individual. (pp. 257, 258.)

CONSTITUTIONAL LAW—Curative Act Construed with Code Sections—Nonconflict.—Section 1457, Iowa Code, provides that a county treasurer shall not be relieved of liability on his bond by reason of having deposited money in an approved and selected bank. A county treasurer who had forborne from taking a bond for his own security by the inducements of the board and the county attorney, and in consequence of such forbearance a loss was incurred, was released from liability by the board under the authority of an act of the legislature passed for the purpose. Such an act is not in conflict with the code section, however much its propriety or wisdom may be questioned. (p. 259.)

Walker & McBeth and E. L. McCoid, for the appellants.

J. C. Mitchell and F. M. Hunter, for the appellee.

[164] DEEMER, J. H. L. McGrew was treasurer of Van Buren county, Iowa, from July, 1900, to January, 1907, and as such he gave the bond in suit, signed by his codefendants as sureties. One D. H. Moore was McGrew's immediate predecessor. At the January, 1899, session of the board of supervisors of Van Buren county a resolution was passed, authorizing said treasurer to deposit county funds in the bank of E. H. Skinner & Co. to an amount [165] not exceeding ten thousand dollars at any one time. January 12, 1899, the bank executed a bond to secure such deposits as required by law. Moore died during his incumbency of the office, and McGrew was appointed to fill the vacancy on or about July 7, 1900, and at the succeeding election in November was chosen by the electors to fill out the term. Since that he was re-elected for two full terms. After his appointment, and again after his election, he submitted to the board of supervisors and to the county attorney the question as to whether or not the previous bond given by the bank to Moore was sufficient, and as to whether or not he should obtain a new bond, and he was informed by both that he need not get a new bond, and that he had the right to make deposits in the bank under the previous resolution of the board. Pursuant to this advice he made deposits in the bank until November of the year 1904, when the bank went into voluntary bankruptcy. After the closing up of the estate in bankruptcy and receiving the dividends declared, there was still due and owing the county from the bank two thousand and ninety-one dollars and nine cents. By authority of the board the treasurer then brought action against the sureties on the bond given by the bank, and prosecuted the same to final judg-

ment, which resulted in a finding that the sureties were not liable for the deposits made in the bank. On January 7, 1907, the treasurer, being about to retire from office, made a settlement with the board of supervisors, by the terms of which he was expressly released from all liability on account of the deposits made in the bank, and given a full receipt for all money and property coming into his hands as county treasurer, and his bond was discharged, and the sureties thereon released from any liability growing out of the deposits in the bank, or on account of the failure of said bank. Thereafter, and on January 16, 1907, plaintiff, who is a resident and taxpayer of Van Buren county, caused a notice to be served upon the board of supervisors that, unless they proceeded to forthwith collect [166] the above-named balance from McGrew and the sureties on his bond, he (plaintiff) would, on behalf of himself and all other residents and taxpayers, institute an action against the treasurer and his sureties for the collection of the money for and on behalf of the county and the taxpayers thereof. The board taking no action, this suit was commenced by plaintiff on February 4, 1907, upon the official bond of the county treasurer to recover the amount lost through the failure of the bank of E. H. Skinner & Co., the petition alleging that the suit was brought on behalf of plaintiff and all other taxpayers of Van Buren county, for the benefit of the county.

On February 28, 1907, the legislature passed a curative act, purporting to legalize the acts and resolutions of the board of supervisors in settling with McGrew and releasing and discharging his bond and the sureties thereon. The act also attempted to make void any action brought, or attempted to be brought, by any citizen of the county upon the treasurer's bond, declaring that the action should be without jurisdiction and void: See Acts 32d Gen. Assem. (Laws 1907, c. 255, secs. 1, 2). This act did not go into effect until March 7, 1907, which was some time after plaintiff had commenced this suit. The defendants rely upon the actions and resolutions of the board of supervisors of Van Buren county, and upon the so-called curative act of the thirty-second general assembly. Plaintiff claims that the acts and resolutions of the board were without authority, and were and are null and void, and further says that the curative act is unconstitutional in that it deprived, or attempted to deprive, the county of certain vested rights, impaired the obligations of the treasurer's bond, granted McGrew special immunity not given to others in the same situation, and that the act is not general

and uniform in its operation, and is therefore void. The trial court adopted plaintiff's theory of the case by overruling a demurrer to the reply, pleading [167] the facts and conclusions above recited regarding the acts and resolutions of the board and the so-called curative act of the legislature. The appeal challenges this ruling, and presents nothing but the effect of the acts and resolution of the board and of the legislative enactment. Something is said in the argument regarding plaintiff's right to sue, but no such question is presented by the record now before us, and it need not be considered on this appeal. Indeed the only question presented by the demurrer is the constitutionality of the legalizing act, and to that proposition we shall give our attention.

1. Remembering that this action was commenced before the curative act became effective, it is apparent, we think, that the second section thereof is unconstitutional and beyond the power of the legislature. After action is brought it is certainly beyond the power of the legislature to declare that action void and the court in which it is pending without jurisdiction. Such matters are purely judicial, and not legislative, and under our three department system of government it is inadvisable for one to assume the powers, duties, or responsibilities of the other. When action is once commenced the question of jurisdiction is purely a judicial one, and the legislature should not attempt to usurp the functions of the judiciary by such an act as is now under consideration. These principles are so fundamental as scarcely to need the citation of authorities in their support. But see Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Dickerson v. Acosta, 15 Fla. 614; Parmalee v. Lawrence, 48 Ill. 331; Wanser v. Hoos, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449; O'Connor v. Warner, 4 Watts & S. 223; Gough v. Pratt, 9 Md. 526; State v. Carr, 129 Ind. 44, 28 Am. St. Rep. 163, 28 N. E. 88, 13 L. R. A. 177; Felix v. Board of Commrs., 62 Kan. 832, 84 Am. St. Rep. 424, 62 Pac. 667; Pennsylvania v. Wheeling & Belmont B. Co., 18 How. 460, 15 L. ed. 449; and Commonwealth [168] v. Proprietors New Bedford Bridge, 2 Gray (Mass.), 339. If the defense were bottomed upon the second section of the curative act alone it manifestly would be without merit. We may eliminate the second section of the act in question as clearly unconstitutional.

2. The case must turn upon the acts and resolutions of the board of supervisors and the effect of the so-called curative act in so far as it attempts to validate these proceedings. It is practically admitted that the county treasurer had no

right to make the bank deposits he did, and we are of opinion that the board of supervisors was without power to pass a resolution discharging the treasurer's bond and releasing his sureties. But it is contended that there was enough doubt about the matter to justify the curative act, and that, whether this be so or not, the legislature had power to cure any defects in the resolution and acts of the board, and that, even had there been no resolution, the legislature had the authority to relieve McGrew from responsibility. This is predicated upon the thought that the legislature has plenary power over counties and their officers; that no contract rights were impaired, and no vested rights taken away. If nothing but private rights were involved, it is manifest that the act could not be sustained. But the matters involved here are public, and the county of Van Buren is the real party in interest. A county, while a body corporate under our law, is a subdivision of the state, created for administrative and other public purposes, owes its creation to the state, and is subject at all times to legislative control and change. No citizen has any vested right in or to its revenues. These may be changed, diverted to other uses, or taken away, and no one may complain on the theory that his interests have been affected or any contract rights destroyed. The legislature might have permitted the deposit of county funds in banks and absolved the county officers from any [169] liability on account of such deposits. Neither the county nor any of the inhabitants thereof had any vested interest in the funds coming into the county treasurer's hands: County of Richland v. Lawrence, 12 Ill. 1; Bailey v. Mayor etc., 3 Hill (N. Y.), 531, 38 Am. Dec. 669; Pennie v. Reis, 132 U. S. 464, 10 Sup. Ct. Rep. 149, 33 L. ed. 426; Sangamon County Board of Supervisors v. City of Springfield, 63 Ill. 66; People v. Power, 25 Ill. 187; People v. Burr, 13 Cal. 343; Creighton v. San Francisco, 42 Cal. 446.

It is said that, in the matter of the application of revenues, the legislative conscience will not be interfered with by the courts, and that they may be diverted to the benefit of private individuals if the legislature is so advised. Again it is said that the power of a municipality to raise money by taxation is a political one, delegated by the legislature, and that the fund, when collected, must necessarily be within the control of the legislature: Auditor General v. O'Connor, 83 Mich. 464, 47 N. W. 443; Williams v. Eggleston, 170 U. S. 304, 18 Sup. Ct. Rep. 617, 42 L. ed. 1047; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699. The legislature undoubtedly

had power, in the first instance, to absolve its county treasurer from liability when he deposited money in solvent banks; and, as no contract rights are involved, save as the statute created such rights, there seems to be no constitutional objection to passing a retroactive law which would operate upon past transactions: State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465. The bond in suit, while a contract, was entered into between a dependent government and an officer thereof. The duties of such officer were prescribed by statute, and not by the terms of the bond, and these duties might at any time be changed without violating the terms of that instrument. Even after suit brought, the law may be changed, for there is no vested right to a particular decision: Windsor [170] v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280. 81 N. W. 476. See, as sustaining these views, Beecher v. Board of Supervisors, 50 Iowa, 538. That the legislature has plenary power over all municipal corporations and their officers is too well settled to admit of argument. And it is just as well settled that the same power exists as to public revenues. An interesting and instructive case on this subject is found in 44 Ind. 524, entitled Lucas v. Board of Commissioners. The supreme court of Indiana held that an act of the legislature, taking away from counties stock issued to them by a private corporation, in consideration of the proceeds of a certain tax, and giving the same to the taxpayers who had paid the tax, was not unconstitutional. This decision was affirmed by the supreme court of the United States upon appeal: See Tippecanoe Co. v. Lucas, 93 U. S. 108, 23 L. ed. 822. These cases contain a careful review of the authorities upon the subject, and are decisive of one of the main questions involved: See, also, Abbott on Municipal Corporations, secs. 22. 84, 88, and cases cited.

Of course, under the guise of legislative control, a private citizen cannot be deprived of any of his rights against a municipal corporation. They are as sacred as if they existed against a private one. But the municipality itself cannot complain of any act of the legislature diminishing its revenues, amending its charter, or even dissolving it entirely. It may, of course, acquire certain proprietary or private rights, not held by the public in general, of which it cannot be deprived: See Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Mayor v. Second Ave. R. R. Co., 32 N. Y. 261; Webb v. Mayor, 64 How. Pr. 10; People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 18 N. E. 692, 2 L. R. A. 255; Montpelier v. Montpelier, 29 Vt. 12, 67 Am. Dec. 748; and State v. Bar-

ker, 116 Iowa, 96, 93 Am. St. Rep. 222, 89 N. W. 204, 57 L. R. A. 244. But this rule, or rather exception to the general rule, seems to apply only [171] to property reduced to possession, or held in trust for the inhabitants of the territory as distinct from the people as a whole. It does not apply to executory contracts, or to provisions concerning funds or revenues. City, county, and township funds are subject to legislative control: Richland Co. v. Lawrence Co., 12 Ill. 1; Youngs v. Hall, 9 Nev. 212; People v. Fields, 58 N. Y. 491; Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825; Indianapolis Co. v. Indianapolis Home, 50 Ind. 215. The action in the instant case is upon a bond given by the county treasurer to secure public funds raised through a power delegated by the legislature to the municipality—a fund which had been lost without the fault of the official—and the remedy which the county had on that bond was in no sense a vested right. The liability was created by act of the legislature, and doubtless would not have existed at common law, and in so far as the inhabitants of the county are concerned that remedy may be taken away. Doubtless the legislature could not have impaired the obligation of defendant's bond in such a way as to deprive him of any of his rights thereunder, but there was no such contract between the state and the municipality or the inhabitants thereof, with reference to the defendant's liability on the bond, as comes within the constitutional limitation. Hence the legislature had the power, by proper enactment, to relieve defendant of his liability under the bond, a liability which was created primarily by the legislature, and which, in so far as the state and the various subdivisions thereof are concerned, may be changed at pleasure. There seems to be no doubt about the legislative power over the funds and revenues of a quasi municipal corporation.

The next question relates to the manner whereby that power may be executed. The act in question, denominated a legalizing one, undertakes, after reciting the facts with reference to the matter as set forth in the statement of this case, enumerated at length in the preamble, to validate [172] everything done by the board of supervisors as if fully and in every respect authorized by law. In form it is a curative or healing act; and it is argued by appellee that in this form it is unconstitutional, because not a healing act, but one of substantive legislation, unauthorized because special, not uniform in its operation, and granting special immunities contrary to the express limitations of the constitution.

It is a little difficult to define a curative act. It is necessarily retrospective in character and undertakes to cure or validate errors or irregularities in legal or administrative proceedings, and to give effect to contracts for failure to comply with some technical requirement: Meigs v. Roberts, 162 N. Y. 371, 76 Am. St. Rep. 322, 56 N. E. 838. If the defects are jurisdictional or relate to substantive contract rights, they cannot ordinarily be cured by a healing act. Generally speaking, the legislature may by subsequent act validate and confirm previous acts of a corporation otherwise invalid: Bridgeport v. Housatonic R. R. Co., 15 Conn. 475; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098; McMillen v. Boyles, 6 Iowa, 304, 391; Atchison v. Butcher, 3 Kan. 104; San Francisco v. Certain Real Estate, 42 Cal. 513; Anderson v. Santa Anna, 116 U. S. 356, 6 Sup. Ct. Rep. 413, 29 L. ed. 633. This is in accord with the general rule that a curative act may be passed whenever the irregularity to be healed consists in the doing of some act, or the doing of it in such a manner as the legislature might have made immaterial or have authorized by a prior law: Boardman v. Beckwith, 18 Iowa, 292; Richman v. Board of Supervisors, 77 Iowa, 513, 14 Am. St. Rep. 308, 42 N. W. 422, 4 L. R. A. 445; Windsor v. Des Moines, 101 Iowa, 343, 70 N. W. 214; Witter v. Board of Supervisors, 112 Iowa, 380, 83 N. W. 1041. Such an act is of necessity special, and cannot be made general, and its nonuniformity is no ground of attack: Witter v. Board of Supervisors, 112 Iowa, 380, 83 N. W. 1041.

The difficulty with the act, viewing it from the standpoint of a healing one, is to find the power of the legislature [173] to authorize the board of supervisors of Van Buren county to do the acts and pass the resolutions which were attempted to be cured. Within its field the legislature is supreme. The first section of the act now before us is purely legislative in character. It is neither executive nor judicial, and the legislature has plenary power in its field subject only to constitutional limitations or prohibitions. Its power is not a delegated one, but supreme within its proper sphere. Hence it may exercise all powers not forbidden by the constitution of the state, or delegated by the people to the general government, or prohibited by the constitution of the United States: McMillen v. Boyles, 6 Iowa, 304.

It is argued that the legislature could not have delegated to the board of supervisors the power to do the acts and pass the resolutions it did, for the reason that such an act

would have been special, and not general, would have been a delegation of legislative powers to repeal a statute, and would have granted special immunities to some not conferred upon others. In other words, it is contended that a law could not have passed in advance authorizing the board of supervisors of Van Buren county alone to release the defendant McGrew and the sureties on his bond. This argument is specious, to say the least, but we do not regard it sound. It is true that, generally speaking, laws must be uniform, and be general and not special in character; but they are not required by the constitution to be general, except where a general law can be made applicable. It must also be conceded that a legislature cannot do indirectly what it has no power to do directly. But the question here is not the form of the original act, but rather the power to do the thing which it attempted to cure by appropriate legislation: State v. Squires, 26 Iowa, 340; Iowa R. L. Co. v. Soper, 39 Iowa, 112. The substance and effect of the act in question was the release of the county treasurer [174] from liability on his official bond. Did the legislature have that power, and if it did, could it have delegated that power to the board of supervisors? This brings us down to the very crux of the controversy, and presents a proposition upon which the courts are not fully agreed. The weight of authority seems to be to the effect that the legislature may relieve a county treasurer, or other quasi municipal officer, from liability on his bond, on the theory that he is acting as an officer, and no one, save perhaps creditors, has any vested rights in and to the funds in his hands. Of the cases holding that the legislature may release a county treasurer in such circumstances are Board of Education v. McLandsborough, 36 Ohio St. 227, 38 Am. Rep. 582; Mount v. State, 90 Ind. 29, 46 Am. Rep. 192; Pearson v. State, 56 Ark. 148, 35 Am. St. Rep. 91, 19 S. W. 499; State v. Board of Education, 38 Ohio St. 3; Nelson v. Milford, 7 Pick. (Mass.) 18; State v. Hammonton, 38 N. J. L. 430, 20 Am. Rep. 404; State v. Baltimore etc. R. R., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; Shinkle v. Essex Board, 47 N. J. L. 93; New Orleans v. Clark, 95 U. S., 644, 24 L. ed. 521. See, also, 1 Dillon on Municipal Corporations, 296, and Mechem on Public Officers, sec. 916. Probably the best exposition of this view is presented in the Pearson case (56 Ark. 148, 35 Am. St. Rep. 91, 19 S. W. 499). It is bottomed upon the power which the legislature has over agencies of the state, such as counties, townships, school districts, etc.; the power being plenary and virtually unlimited in character. To the

contrary are Sanborn v. Rice Co. Commrs., 9 Minn. (Gil. 258) 273; Bristol v. Johnson, 34 Mich. 123; People v. Supervisors, 16 Mich. 254; Spaulding v. Andover, 54 N. H. 38; Johnson v. Board of Commrs., 140 Ind. 152, 39 N. E. 311; and McClelland v. State, 138 Ind. 321, 37 N. E. 1089. The decisions in Michigan are based upon special constitutional provisions not found in our fundamental law. And the Minnesota and New Hampshire cases are not directly in point, although much [175] that is said seems to support appellee's contention. The position of the Indiana court is peculiar. The strongest opinions in support of the act of the legislature are found in 44 and 90 Indiana Reports. But in the McClelland case (138 Ind. 321, 37 N. E. 1089) a departure was made, based upon the special facts there appearing, that the money lost belonged to the state school funds, none of which was raised by taxation, that there was no money in the county treasury, and that the act relieving the county treasurer from liability, and directing a return to him of the money he had paid, would result in a special tax upon a particular county for the benefit of an individual. But in the Johnson case (140 Ind. 152, 39 N. E. 311) the Indiana court holds an act relieving a county treasurer for money lost unconstitutional, no reference being made to previous cases. The decision is based solely upon the proposition that the act impairs the obligation of a contract. This proposition is regarded unsound by practically all the courts which have had occasion to consider the matter. The strongest argument against it is found in State v. Baltimore etc. R. R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319. This case was affirmed on error to the supreme court of the United States: See Maryland v. Baltimore etc. R. Co., 3 How. 534, 11 L. ed. 714. See, also, Chicago etc. R. R. v. Adler, 56 Ill. 344. That the legislature may delegate this power of release to county officials is shown in the cases already cited. Such delegation is not objectionable upon the ground that it confers legislative powers upon some other body than the law-making department of the government.

Again it is argued that it confers a special benefit or immunity upon a particular individual, and is therefore invalid. This proposition is fully answered in State v. Squires, 26 Iowa, 344. It is not to be assumed that there were other county treasurers in the same situation as McGrew. A general law could not, therefore, be made applicable, for the situation disclosed [176] a novel and most unusual state of facts. The act in question is not bad because special in

character. A law, making an appropriation to a private individual or corporation, is not and cannot be made general, and yet it is good: Merchants' U. B. W. Co. v. Brown, 64 Iowa, 275, 20 N. W. 434. Further it is argued that the effect of the act is to appropriate a sum of money to a private individual, and that this is beyond legislative power. These premises are not entirely correct; but, if they were, they do not justify the conclusion. McGrew received no money from either the state or the county for his own private gain. It was simply a question as to which should stand the loss of money which occurred without the county treasurer's fault. It was well said in Town of Guilford v. Chenango County, 13 N. Y. 143: "The legislature is not confined, in its appropriations of public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can recognize claims founded in justice and equity in the largest sense of these terms." And in People v. Burr, 13 Cal. 343, it is said that: "The power of appropriation which the legislature can exercise over the revenues of the state it may exercise over the revenues of a county, for any purpose connected with their past or present condition, except where such revenues be devoted to a special purpose." Generally speaking, the legislature may recognize a moral obligation; and, according to some of the cases, its conclusion in the matter is not subject to judicial review. We do not now hold to that broad doctrine, for a case may be so baseless as to call for judicial interference on the theory that the property of the individual is taken by taxation for a purely private end. We make no definite pronouncement upon that question at this time, for it is unnecessary to do so. Here the money was lost through no fault of the county treasurer. The equities as recited in the preamble of the bill, and as set forth in the statement of facts, are very [177] strongly in his favor, and it was simply a question as to whether he or his principals, the taxpayers of a subdivision of the state, should lose the money. The legislature concluded that the loss should be borne by the taxpayers, and it is not for us to say that the legislation should fail because of the unwisdom of the General Assembly which enacted it: See Merchants' U. B. W. Co. v. Brown, 64 Iowa, 275, 20 N. W. 434.

There is no express statute against a private appropriation as such, except it be to a corporation, although there may be implied prohibitions, based upon the thought that taxation cannot be justified for private purposes only. The defendant

McGrew, as we have already said, was not given an appropriation, nor did he receive any benefit from the money lost by the bank. He is to be held, if at all, as a county official, and the question in its last analysis is his liability as such. This thought seems to have escaped the Indiana court in its latest pronouncement upon the subject. One of the cases of that court may be explained and justified, perhaps, upon the theory that the officer had made good the loss by paying the same into the treasury, and was asking for a private appropriation, which had to be made up through a levy and collection of taxes for his special benefit. Our own case of Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215, has something upon this subject. It does not appear from the pleadings in the case, or from the act in question, that there is to be any taxation of the property of Van Buren county for the private benefit of defendant, McGrew. The legislature in its wisdom simply concluded that, according to the ordinary principles of just and fair dealing, it was not wise to have McGrew stand the loss due to the failure of the Skinner Bank. Conceding the right of review of such legislation by the courts, it does not appear that its conclusion was so baseless as to justify our interference. No special immunity was granted McGrew, as that term is used in our constitution. Conceding arguendo that it was an immunity, it does not appear [178] that there were any others in the same situation who would be excluded from the benefits of such an act. Mount v. State, 90 Ind. 29, 46 Am. Rep. 192, and New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521, contain much in support of this position.

Lastly it is said that the act in question amounts to a repeal or amendment of section 1457 of the Code providing that a county treasurer shall not be relieved of liability on his bond by reason of having deposited money in an approved and selected bank, and that such repeal can only be made by a general statute. There is no repeal of that statute. The question here is the liability of the treasurer on his official bond, given the county under the provisions of section 1183. In many states he would not be liable for money lost under the circumstances disclosed by this record; and, as we have seen, it was competent for the legislature to relieve him under these circumstances, if it saw fit to do so. Section 1457 of the Code does not create the liability. It simply provides that certain conduct on his part with reference to the disposition of the funds shall not relieve him. He is not relying in any way upon the terms of that section. His contention with reference thereto is that, by reason of the advice and consent

of the board and of the county attorney, he was induced not to take a bond for his own security, as he had a right to do under that section, and as he intended to do, and would have done but for the advice of the county officials. The mere fact that such a statute as the one under consideration will increase the burdens of the taxpayers of a particular locality has never been regarded as controlling. We have approved statutes of many kinds having this effect, as have other courts, and the mere increase of burdens has never been held to be sufficient cause for setting aside legislation. Although we find no reason for holding the act now before us unconstitutional, we must confess a prejudice against legislation [179] of this character. The precedent is not a good one and does not comport with our notions of legislative policy. But the proposition before us is not one of expediency or of wise public policy. It is purely a judicial one, and relates solely to the power and authority of the legislature, and not to the propriety of the act.

We discover no ground for disturbing the act, and the result is that the trial court was in error in overruling the demurrer, and its judgment must be, and it is, reversed.

A Curative Act is a Retrospective Law acting on past cases and existing rights, and its effect is to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements: Meigs v. Roberts, 162 N. Y. 371, 76 Am. St. Rep. 322; Ayers v. Lund, 49 Or. 303, 124 Am. St. Rep. 1046; Swartz v. Andrews, 137 Iowa, 261, 126 Am. St. Rep. 285. A statute which authorizes a city to bring an action against property owners to recover assessments, notwithstanding any irregularity or defect in the assessment proceedings, is not unconstitutional as being a usurpation of judicial authority by the legislature because it may overturn decisions of the courts, but is a curative act, though it does not use the words "ratify," "confirm," or "validate": Nottage v. Portland, 35 Or. 539, 76 Am. St. Rep. 514. But where suit has once been brought against a property owner for the recovery of a tax, and it has been duly and finally adjudged that the tax is invalid and that no recovery can be had thereon, no legalizing statute subsequently enacted will operate to nullify the effect of the judgment, and subject the property owner to another suit upon the same demand: McManus v. Hornaday, 124 Iowa, 267, 104 Am. St. Rep. 316.

The Liability of Sureties on Official Bonds for the loss of funds without fault on the part of their principal is discussed in the note to Feller v. Gates, 91 Am. St. Rep. 516.

ROHLF v. KASEMEIER.

[140 Iowa, 182, 118 N. W. 276.]

CRIMINAL LAW.—The Interpretation of Criminal Statutes Demands a Strict Construction; nothing is to be added to them by intendment. All the language is to be considered and such interpretation placed upon any debated word as was the manifest intention of the legislature. (p. 263.)

COMBINATIONS to Fix Price of Commodity—What not Included.—Labor, skilled or unskilled, is not a commodity within Iowa Code, section 5060, which renders criminal any unlawful combination, pool or trust to regulate or fix the price or fix or limit the quantity of any article, commodity or merchandise manufactured, mined, produced or sold in that state. (pp. 263–265.)

COMBINATIONS to Fix Price for Services of Physicians.—Iowa Code, section 5060, which make combinations to fix the price or quantity of commodities to be made in the state a conspiracy does not include labor combinations, and therefore does not apply to an agreement of members of the medical profession to adopt a uniform schedule of charges. (p. 266.)

Bernard Stenzel, county attorney, and J. T. Sullivan, for the appellants.

Sager & Sweet and Hageman & Farwell, for the appellee.

[183] DEEMER, J. Plaintiff, who is a physician and surgeon, with thirteen others of like profession, were indicted by the grand jury of Bremer county for the crime of entering into an agreement, combination, or understanding to fix and maintain fees and charges to be exacted for medical and surgical services in said county. Plaintiff was arrested under the indictment, and thereafter brought habeas corpus proceedings before the Honorable C. H. Kelley, judge, to secure his release from custody, claiming [184] that he was unduly and illegally restrained of his liberty, for the reason that the indictment charges no offense known to our laws, and that, if there be a law forbidding such acts as are charged against him, it is unconstitutional and void, in that it deprives him of his liberty, prevents him from acquiring or possessing property, and deprives him of his safety and the pursuit of his happiness, and deprives him of the right of contract and of the equal protection of the laws. The charging part of the indictment reads as follows:

"The said L. C. Kern, Dr. C. T. Brown, Dr. O. L. Chaffee, Dr. W. A. Rohlf, Dr. H. C. Jungblut, Dr. B. C. Dunkelberg, Dr. C. H. Graening, Dr. Stafford, Dr. A. G. Rennison, Dr. Patterson, Dr. J. F. Auner, Dr. Murphy, Dr. Bradford, Dr. Cross, on the thirtieth day of July, in the year of our Lord

1907, in the county aforesaid, being physicians and surgeons located and practicing their professions in the county of Bremer, state of Iowa, did then and there willfully, unlawfully, and maliciously conspire, combine, confederate, and agree with each other to create, organize, and enter into, and did then and there willfully, unlawfully, and maliciously enter into and become, a member of and party to a trust, pool, agreement, contract, combination, confederation, and understanding to fix, establish, and regulate and maintain the price of a commodity in the county of Bremer, state of Iowa, and did then and there willfully and unlawfully fix, regulate, and establish the price of medical service and medical skill, and the profit, benefit, fee, and compensation to be received therefor, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Iowa."

The demurrer challenges these contentions of plaintiff, and it is stoutly insisted upon this appeal that the indictment does charge an offense, and that the statute under which it was found is a valid exercise of legislative power. As the case must turn upon the construction of a statute, [185] we here copy the material parts of the section under which the indictment was found. It is section 5060 of the Code, reading as follows:

"POOLS AND TRUSTS.—Any corporation organized under the laws of this or any other state or county for transacting or conducting any kind of business in this state, or any partnership, association or individual, creating, entering into or becoming a member of, or party to any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association, or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, shall be guilty of a conspiracy."

The first point to be decided is: Do the acts charged constitute a crime under this section of the code? It will be noticed that it forbids a combination, agreement, or understanding to regulate or fix the price of any article of merchandise, or commodity, or of merchandise to be manufactured, mined, produced, or sold in this state. The primary inquiry is: Are the charges of a physician or surgeon for his medical skill or ability an article of merchandise or commodity to be produced or sold in this state. For appellant

it is contended that the word "commodity" is broad enough to cover the charge made for professional services or skill, and that the trial court was in error in holding to the contrary.

It must be remembered that the word is found in a criminal statute, and that in the interpretation of such statutes different rules apply from those which obtain in civil matters, or where contracts are involved. Nothing is to be added to such statutes by intendment, and, as a rule, they are to have a strict construction.

Moreover, it is well settled that, in construing any [186] statute, all the language shall be considered, and such interpretation placed upon any word appearing therein as was within the manifest intent of the body which enacted the law. Much of necessity depends upon the context and upon the usual and ordinary significance of the language used.

Now, the word "commodity" is derived from the Latin "commoditas," and means primarily a convenience, profit, benefit, or advantage; but in referring to commerce it comprehends everything movable—that is, bought or sold—except animals: See Webster's International Dictionary; Best v. Bauder, 29 How. Pr. (N. Y.) 489; Barnett v. Powell, 16 Ky. 409; Queen Ins. Co. v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483. This word appearing in another statute (McClain's Code, section 5454) was held to cover insurance, and it was decided that a combination to fix insurance rates was illegal: See Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428. But in that case the parties were not selling their own services. They were, as the opinion says, selling insurance, which was regarded as a commodity as used in the statute then under consideration. Here the indicted defendants were for a price giving their own services, or perhaps selling them, and the question is: Were these personal services a commodity?

As already indicated, the word must be taken in connection with the others used in the statute, and it is manifest that the commodity referred to must have been such as could be manufactured, mined, produced, or sold in the state, and the price was to be of an article of merchandise or commodity. If the contention of appellant be correct, the statute covers all kinds of personal labor, both skilled and unskilled, under the term "commodity." Indeed, this is the broad claim made by counsel. Now, whilst there is a class of political economists who treat labor as so much merchandise, the wage being regulated simply by supply [187] and demand, there is

another class, which, taking account of the personal equation, sees in it something more than a commodity, and refuses to subscribe to the doctrine that supply and demand alone regulate the price. This latter class of economists refuses to accept the doctrine that a man is rich because he has stored away within him many days' work, and are convinced that his necessities, quite as often as the demand for his labor, fixes the stipend which he is to receive. In other words, the laborer, skilled or unskilled, is not regarded as standing on an equality with him who barters in goods and merchandise. It is not, of course, within the province of courts of justice to adopt or promulgate any particular system of political science; but in the interpretation of statutes they must take notice of current political theory and conviction. If we were to adopt the view so strongly presented by appellant's counsel, it would be on the assumption that the associated words "merchandise" and "commodity" include the wages to be paid for labor, because labor is a sort of merchandise, subject to barter and sale as other goods. A fundamental rule of construction is that, where particular words are followed by general ones, the general are restricted in meaning to objects of a like kind with those specified: State v. Stoller, 38 Iowa, 321; People v. New York & M. B. R. R. Co., 84 N. Y. 565; McDade v. People, 29 Mich. 50. Now, the term "merchandise" is special rather than general, and has reference primarily to those things which merchants sell either at wholesale or retail: Jewell v. Board of Trustees, 84 N. W. 973, 113 Iowa, 47. "Commodity" is a broader term, and, when used as in the statute now under consideration, means almost any description of article called movable or personal estate: Barnett v. Powell, 16 Ky. 409; Shuttleworth v. State, 35 Ala. 415; State v. Henke, 19 Mo. 225.

Used in connection with the term "merchandise," and qualified as it is in the latter part of the section by the words "manufactured, mined, produced, or sold," it is [188] manifest that the statute was not intended to, and did not, include labor, either skilled or unskilled. It must be remembered that the statute is a criminal one, and that such statutes must be strictly construed; and, in case of doubt, the construction must be adopted most favorable to the party charged. The only ground upon which appellant can stand with any show of plausibility is that labor is a commodity to be bought, sold, or produced, as merchandise. This is a strained and unnatural construction, and gives to the word "commodity" a meaning which is perhaps permissible, but is not the com-

monly accepted one. Under our statutes, words and phrases are to be construed according to the context and the approved usage of the language: Code, sec. 48. With this in mind, we are constrained to hold that labor is not a commodity within the meaning of the act now in question. As supporting this conclusion, see Hunt v. Riverside C. Club, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40; Queen v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483. It seems to be the almost universal holding that it is no crime for any number of persons without an unlawful object in view to associate themselves together, and agree that they will not work for or deal with certain classes of men, or work under a certain price or without certain conditions: Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Commonwealth v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Rogers v. Everts, 17 N. Y. Supp. 264; United States v. Moore, 129 Fed. 630.

The statute in question was aimed at unlawful conspiracies or combinations in restraint of trade, and was manifestly not intended to cover labor unions. It is the right of miners, artisans, laborers, or professional men to unite for their own improvement or advancement or for any other lawful purpose, and it has never been held, so far as we are able to discover, that a union for the purpose [189] of advancing wages is unlawful under any statutes which have been called to our attention. As said by Judge Taft in Phelan's Case, 62 Fed. 803: "Such unions, when rightly conducted, are beneficial in character," And it would be a strained and unnatural conclusion to hold that a statute aimed at pools and trusts should be held to include agreements as to prices for labor because the word "commodity" is used therein. As the right to combine for the purpose of securing higher wages is recognized as lawful at common law, a statute enacted to prohibit pools and trusts should not be held to apply to combinations to fix the wages for labor, unless it clearly appears that such was the legislative intent. Whatever of doubt there may be regarding the power of the legislature to do so, we do not think that the act in question covers combinations to fix the labor price, whether that labor be skilled or unskilled.

Appellants rely largely upon the celebrated cases of Loewe v. Lawler, 208 U. S. 274, 28 Sup. Ct. Rep. 301, 52 L. ed. 488, 13 Ann. Cas. 815, and In re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092, and other like cases in support of their construction of the statute; but in our opinion none of these cases are applicable. The Debs case is not in point. Others involved a pool between manufacturers and still others

boycotts. In the Loewe case (208 U. S. 274, 28 Sup. Ct. Rep. 301, 52 L. ed. 488, 13 Ann. Cas. 815) defendants were engaged in a boycott of plaintiff and its customers, and were in the performance of acts calculated to destroy plaintiff's business by driving away customers, by threats and coercion were driving away plaintiff's employés, and circulating false reports regarding plaintiff and its business, the effect of which was to destroy its interstate trade. These acts were held to be an unlawful interference with interstate commerce, and a violation of the anti-trust law known as the "Sherman act" (Act July 2, 1890, c. 647, 26 Stats. 209, U. S. Comp. Stats. 1901, p. 3200). The statute before us has nothing to do with commerce; nor does it have to do with restraint of trade or commerce as does the [190] Sherman act. It has to do with pools and trusts organized in this state to fix or regulate the price of any article or commodity, or to fix or limit the amount or quality of any article, commodity or merchandise to be produced or sold in the state. Surely it has no reference to the amount or quality of labor to be produced or sold. Such a construction would be ridiculous. And, if it will not bear that interpretation, it follows that the word "commodity," when used with reference to prices, should not be held to include labor. No case has been cited which supports appellant's contention, and we have not been able to find any. On the other hand, the following lend support to our conclusions: Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A., N. S., 136; Downing v. Lewis, 56 Neb. 386, 76 N. W. 900; State v. Associated Press, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91, 51 L. R. A. 151. It would be stretching the statute entirely too far to hold that it covers combinations to fix the price of labor. That the practice of medicine and surgery is labor no one, we think, will question.

The trial court was right in discharging the plaintiff, and its judgment must be, and it is, affirmed.

Unlawful Monopolies and Trusts are discussed in the note to Harding v. American Glucose Co., 74 Am. St. Rep. 235. As to whether an unlawful monopoly is created by agreements having for their purpose the regulation of charges for personal services, see Hunt v. Riverside Co-operative Club, 140 Mich. 538, 112 Am. St. Rep. 420; Jacobs v. Cohen, 183 N. Y. 207, 111 Am. St. Rep. 730; State v. Associated Press, 159 Mo. 410, 81 Am. St. Rep. 368. In More v. Bennett, 140 Ill. 69, 33 Am. St. Rep. 216, which, perhaps, announces a doubtful doctrine, it is decided that an agreement between members of an association of stenographers to be bound by a schedule of prices to be fixed by the association, and not to compete with each other by taking or offering to take a less price, is contrary to public policy and nonenforceable.

MERCHANTS' NATIONAL BANK v. CRIST.

[140 Iowa, 308, 118 N. W. 394.]

WILLS—Provisions for Support, Who must Comply With.—A devise of property with a direction to and obligation on the devisees to provide for and take care of their father for life, which obligation is expressly made a lien on the devised property and in lieu of his distributive share thereof, does not make the executors trustees for the provision for the father, but casts on them collectively the duty to settle the estate, and individually to support and care for their father, which duties are obligatory on their acceptance of the devise. (p. 268.)

CREDITOR'S BILL—Lien for Support—Creditor's Rights.—Where a charge for the care and support of one is made a lien on devised property, a judgment creditor is warranted in proceeding in equity for the purpose of ascertaining whether any moneys remain in the hands of the defendants subject to his judgment. (p. 268.)

SPENDTHRIFT TRUSTS.—Where property is left on what is known as a spendthrift trust creditors cannot deprive the beneficiary of the support provided for him out of such property, so long as it is in accordance with his station in life; nor can the trustee and beneficiary combine to defeat the trust and purpose of the donor which was to give a support which should be free from the claims of creditors. (p. 270.)

CREDITORS, Debtor's Power Over Funds not Reachable by Them.—A surviving husband has the right to relinquish the statutory share of his wife's property and accept in its place a provision in the will for his care and support for life, and even though it is to the disadvantage of his creditors, unless the nature of the right accepted by him is such that it may be reached by them. (p. 270.)

CREDITOR'S BILL, Property and Rights Which cannot be Reached by.—Where a surviving husband has elected, under the will of his wife, to accept a provision for his care and support by the devisees, his children, in lieu of his statutory share of the wife's property, such care and support being made a lien on the property, the lien is only a security for the performance of the obligation and is beyond the reach of the husband's judgment creditors, because the husband could not convert his right to support into money so long, at all events, as he was receiving it, and his creditors can have no greater rights than he himself. (p. 271.)

WILLS.—The Duty Under a Will to Furnish Care and Support to an aged and infirm parent is not primarily a duty to pay money for that purpose, but rather to give the care and support which is usually given to parents without other home, and no duty to pay money arises until there is a failure to furnish such a home as the natural relations of the parties would suggest as a proper performance of the obligation. (p. 272.)

WILLS—Provision for Support—Incapable of Transfer.—A beneficiary cannot assign to another his right to receive care and support during his life. (p. 273.)

Sylvester Flynn and Wesley Martin, for the appellants.

McGrath & Archard and Nagle & Nagle, for the appellee.

[310] McCLAIN, J. The deceased wife of John M. Crist died possessed of property of the value of about twelve thousand dollars, which by her will was devised and bequeathed to the defendants, her children, subject to the following provision: "My beloved husband, John M. Crist, being now over seventy-two years of age and incapable of taking an active part in business affairs of any kind, I hereby obligate and direct my said children to provide him all of the necessaries and take good care of him for the remainder of his life, and I hereby make his support and care for life a lien upon the property above mentioned. This provision in favor of my husband is made in lieu of his distributive share in the property that I own at the time of my death." The three children were by the will designated as executors of the estate and authorized to sell and convey real or personal property without order of court. The surviving husband, being duly served with notice of the provisions of the will, filed his written election to accept such provisions in lieu of his distributive share in his wife's estate. Plaintiff asked to have the provision made in the will in behalf of the surviving husband subjected to the payment of its judgment, and the court found that the care and support which the defendants were by the will bound to provide for their father was of the value of at least three hundred and twenty-five dollars per year during the remainder of his life, and decreed that defendants, as executors, pay to the clerk of the district court to be applied on plaintiff's judgment semi-annually the sum of one hundred and sixty-two dollars and fifty cents so long as their father should live until plaintiff's judgment should be satisfied.

It will be noticed from the paragraph of the will above quoted that the executors are not made trustees for the purpose of carrying out its provisions in behalf of the surviving husband, but their duty is to settle the estate and to distribute the property among themselves as devisees and legatees; the duty to support and care for their father being [311] a duty imposed upon them individually, and the charge therefor being made a lien on the property devised and bequeathed to them. We think that the court erred in entering a decree evidently contemplating the control of the property by the executors so long as the husband should survive, and thus in effect creating a trust fund, the proceeds of which should be applied so far as necessary to make the payments upon plaintiff's judgment. No complaint of the decree on this ground is made by the appellants; but, for the purpose of properly

disposing of the questions argued by counsel, it is necessary to consider the law in this respect, and we find that the will does not create any trust, but imposes a duty upon the three children, as devisees, to support and care for their father. This duty would become obligatory upon them by the acceptance of the provisions of the will in their behalf. Inasmuch, however, as the charge for care and support was made a lien upon the property, plaintiff has properly proceeded in equity to subject the property so far as is necessary to the payment of whatever amount should be paid by defendants individually toward the satisfaction of plaintiff's judgment.

That the provision for the surviving husband is not in the nature of a trust is decided in Riddle v. Beattie, 77 Iowa, 168, 41 N. W. 606, wherein the plaintiff, who had conveyed real estate to one Townsend in consideration of Townsend's agreement to furnish support to plaintiff during life, asked to have such agreement enforced in equity as against the defendant, who had taken a conveyance of the land from Townsend, assuming the obligation to furnish the agreed support to plaintiff. In that case the court said: "The facts alleged in the petition do not establish a trust, arising either between plaintiff and Townsend, or plaintiff and Townsend and defendant. The petition shows that Townsend undertook to support plaintiff, and, in consideration of such agreement, the land was conveyed to [312] him. There is not a word in the petition showing a trust arising in the transaction. Defendant held the absolute title, free from any trust, and became liable to plaintiff as upon any other contract, in case he failed to perform his obligation to support her. Defendant assumed and undertook to carry out Townsend's contract, and, of course, became bound just as he was bound by the obligation of the contract, and not as a trustee." So in this case the children, by accepting their mother's property—and we assume that they have accepted the provisions of the will in their behalf by becoming executors thereof—have become bound to perform the duty imposed upon them by the will to support and care for their father, and the only substantial difference in principle between the case before us and the case cited is that here the charge is made a lien upon the property.

As the will creates no trust, the argument for appellant based on the doctrine of spendthrift trusts, so called, which is that, where property is left to a trustee, the proceeds to be used for the support of a designated beneficiary, the interest of such beneficiary may not be subjected to the payment of his debts, is not pertinent, and we need not stop to discuss the

question, as to which many authorities are cited, whether, in the absence of a specific provision terminating the rights of a beneficiary in case of bankruptcy or insolvency, a limitation will be implied such as will deprive his creditors of any claim upon the proceeds which would otherwise be paid to the beneficiary. This court has given some recognition to the doctrine of spendthrift trusts in Olsen v. Youngerman, 136 Iowa, 404, 113 N. W. 998, where it is held that the trustee and beneficiaries cannot by mutual agreement terminate such trust and defeat the purpose of the donor to give to the beneficiary a support which shall be free from the claims of creditors. The courts in this country seem generally to have held that creditors cannot [313] deprive such a beneficiary of the support provided for him out of trust property, at least so long as it is in accordance with his station in life: Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544; Johnston v. Zane's Trustees, 11 Gratt. (Va.) 552; Wales' Admr. v. Bowdish's Exr., 61 Vt. 23, 17 Atl. 1000, 4 L. R. A. 819; Roberts v. Stevens, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266; Lee v. Enos, 97 Mich. 276, 56 N. W. 550; Moore v. Simmons, 2 Head (Tenn.), 545; Stow v. Chapin, 51 Hun, 640, 4 N. Y. Supp. 496; Wilder v. Clark, 11 N. Y. Supp. 683.

In some of these cases emphasis is laid on the fact that the provision for the beneficiary is a mere gratuity from which creditors should have no advantage, and in this respect the present case is materially different from those cited. Here the surviving husband was entitled to a one-third interest in his wife's estate, of which no will of hers could deprive him without his consent, and the share of her property which he might have taken would have become liable to be subjected to satisfaction of the claims of creditors. It is very justly urged by counsel for appellee that the provision which the surviving husband accepted in lieu of his statutory share in his wife's estate was practically purchased by the surrender of such statutory share, and, if the benefit accruing to him under the will is of such nature that it can be subjected to the payment of his debts, there is no reason why it should not be thus subjected.

On the other hand, the surviving husband had a perfect right to relinquish his statutory share and accept the provision made in the will. This kind of an election cannot be controlled by creditors, although it may result to their disadvantage: Shields v. Keys, 24 Iowa, 298; Brightman v. Morgan, 111 Iowa, 481, 82 N. W. 954. Thus we have recently

[314] held that the election of a surviving husband to take the homestead for life exempt from liability to his creditors, in lieu of a distributive share which might have been subjected to the payment of his debts, is valid as against the creditors: Pickenbrock v. Knoer, 136 Iowa, 534, 100 N. W. 200. The fact, then, that the husband surrendered a right to property which might have been subjected to the payment of his debts, in exchange for the benefit which would accrue to him under the provision for his support, would not entitle his creditors to subject the benefit accruing to him out of such provision to the payment of their claims, unless the nature of the right accepted by him under the will is such that it may be reached by creditors.

We therefore reach the final question in this case unencumbered by other considerations, and that is whether the provision in the will for the support of the surviving husband of testatrix, father of the defendants in this action, is such in its nature that his creditors may subject it to the satisfaction of their claims. It is to be noticed that testatrix obligates and directs her children to provide their father with all of the necessaries and to support and take good care of him for the remainder of his life. By way of security for the performance of such obligation and direction, she makes his support and care for life a lien upon the property devised by her to her children. The duty imposed is broader than that of providing for support. It involves the care of the father, and, as reasonably interpreted, such care as children owe to an aged and infirm parent. It may be that, so far as the care required goes beyond the furnishing of necessaries and support, the duty could not be enforced in courts of law by reason of the impracticability of measuring the value of such care in money, and it follows that some of the benefits at least which the surviving husband was to receive under the provisions [315] of this will could not be discharged by paying to his creditors the cost of his support.

It is to be borne in mind that the question now before us is as to the right of plaintiff to compel defendants to pay money to be applied in the satisfaction of their father's debt as a full or partial discharge of their obligations to their father, and plaintiff's claim to have defendants' obligations converted into money and applied to the satisfaction of its judgment cannot be greater in extent than the father's right to enforce payment of money in satisfaction wholly or in part of defendants' obligation, in the absence of any claim by creditors. In other words, it is not for the plaintiff, a

creditor, by intervening between the beneficiary under this provision of the will and the devisees, to convert the duty of the latter into an obligation to pay money, unless such an obligation could be enforced by the beneficiary himself. To put it in another way, the rights of creditors, in the absence of any allegation and proof of fraud, cannot be higher than the rights of the beneficiary, for we are now concerned only with determining the pecuniary liability of the defendants. The question at once suggests itself whether the father could by his own act, and without any breach of the duty imposed on his children, by accepting the property under the will, convert his claim against them for support and care into a claim for money. We have frequently had occasion, in cases arising out of a claim for care and support for life in consideration of a conveyance of property, to recognize the principle that only when such care and support is not furnished as contemplated in the conveyance can the grantor have relief in the courts: Patterson v. Patterson, 81 Iowa, 626, 47 N. W. 768; Walker v. Walker, 104 Iowa, 505, 73 N. W. 1073; Lewis v. Wilcox, 131 Iowa, 268, 108 N. W. 536; Gardner v. Lightfoot, 71 Iowa, 577, 32 N. W. 510; Johnson v. Johnson, 52 Iowa, 586, 3 N. W. 661; Kent v. La Rue, 136 Iowa, 113, 113 N. W. 537. Thus in Newman v. French, 138 Iowa, 482, 128 Am. St. Rep. 212, 116 N. W. 468, 18 L. R. A., N. S., 218, it is said that only when the [316] obligation to support, which has been contracted for as the consideration of an agreement to convey, has been fully performed, can the contract be enforced in an action for specific performance, and it is suggested that only when the person to be supported has had reason for declining to receive the support provided or tendered in performance could he insist that the continuing obligation had been broken.

In the light of these cases, we think it clear that the duty to furnish care and support to an aged and infirm parent is not primarily a duty to pay money for that purpose, but rather a duty to give the care and support in the family which is usually given to parents without other home, and that no duty to pay money arises until there is a failure to furnish to the parent such a home as the natural relations of the parties would suggest as the proper performance of the obligation. This is the obligation which was clearly contemplated in the provision of the will now under consideration, and we think that, until defendants have failed to furnish such support, no duty to pay money can be implied

either in favor of the father himself or of his creditors. The duty was a personal one involving services, rather than compensation, and convertible into an obligation to make compensation only by a failure to render such services. Plainly the father could not have assigned to another his right to receive care and support during his life. The service required was so distinctly a personal service to the father that it could not be converted by him into a money claim. Why, then, should plaintiff be allowed to convert it into a money claim and compel defendants to pay money by way of substitution for the rendition of the personal services which they are willing and able to render? What is said in Slattery v. Wason, 151 Mass. 266, 21 Am. St. Rep. 448, 23 N. E. 843, 7 L. R. A. 393, with reference to the claim of a creditor to subject the interest of a beneficiary, [317] who under the provisions of a will was entitled to support from a child who was devisee, seems peculiarly applicable here:

"One answer to this is that the court will not interfere to change the relations of the parties at the request of a stranger. The owner of the fund is not a trustee, and his mother is not a cestui que trust who, or whose representatives, can call him to account as a trustee. He is the absolute owner of the fund, subject to the charge of his mother's support. He owes a duty to his mother, and she has a right against him. So long as the parties are satisfied, there is no occasion for any court to interfere with them. If he fails to perform his duty, the court on her application will in some way protect her rights. It may require him to give security, or it may organize a trust fund and make him or some other person trustee, and thus change the relation of the parties and the character of the fund; but the court ought to thus interfere and act only at the instance of the party in interest, and to protect her rights under the will by carrying out the intention of the testator. It will not without her complaint, and against her wishes, interfere at the suit of a third party to institute a trust, and to change the character of the fund and the relation of the parties to it, in order to defeat the intention of the testator, not only as to his daughter in law, but also as to his grandson. The whole fund is given to the grandson, charged only with the support of his mother. Whatever is not required for her support is his to enjoy. What is paid to her creditors is not used for her support, although it is paid by him. If the court should attempt to recoup his loss by limiting the amount which he should be

liable to pay for his mother's support to the amount he is to pay her creditors, while this would deprive her of a right of support under the will, it could not relieve him from his statutory obligation to support her. If, however, the relations of the parties and the circumstances were such that the court would fix and secure to Mrs. Wason (the beneficiary) the amount which should be paid to her for her support, it would take care that by so doing it did not change the condition of the property, so as to defeat, instead of carrying out, the [318] intention of the testator. If such action was sought by Mrs. Wason to protect her rights, the decree should be so framed as not to render the right alienable. When the parties do not desire the aid of the court, it will not interfere at the suit of a creditor to change the condition of the property, and thereby give him rights which the will alone does not give him, and which the testator did not mean that he should share."

The effect of sustaining the decree of the lower court in this case would be to require defendants to pay money in satisfaction of their father's debt out of property which in no sense belongs to the father, and which was not acquired from him, and which is not held in trust for his benefit, but only subject to a charge in his behalf, and leave them still bound under the will to take good care of him for the remainder of his life, and bound under the statute to furnish him support; that is, the very support in lieu of which the court requires money to be paid. It was plainly the intention of testatrix to impose upon the defendants, as devisees, the general, moral, and statutory duty of providing for their father in his old age by furnishing him a home and the necessaries of life. The parties have so construed the will, for, as appears in the record, the defendants have been living together as one family and furnishing a home to their father to his satisfaction. The only provision of the will which affects the property left to the defendants is that making the support and care for the father a lien upon the property in case of breach of duty by the defendants. The father may no doubt enforce against the property a lien for a money claim so far as the breach of duty of defendants can be compensated in money under the usual rules for measuring damages in case of a breach of such contract, but we are clearly of the opinion that plaintiff has no right to convert defendant's duty into an obligation to pay money, and thereby throw an additional burden on defendants, for it is [319] to be assumed that, even after payment of the money

which by the decree they are required to pay, they will continue to perform the obligations not only of the will, but of the statute to care for and support their father.

For the reasons indicated, the decree is erroneous not only in imposing a continuing duty upon defendants as executors, but, also, if it be construed as defining the duty of defendants as devisees, in requiring payment by them individually of money toward the satisfaction of plaintiff's judgment.

Reversed.

The Liability of Devisees for Charges Imposed by the Will for the support of a relative is discussed in the note to Steele v. Korn, 129 Am. St. Rep. 1059.

Spendthrift Trusts are discussed in the notes to Garland v. Garland, 24 Am. St. Rep. 686-697; Smith v. Towers, 9 Am. St. Rep. 405-408. See, too, the subsequent case of Jackson Square Loan etc. Assn. v. Bartlett, 93 Am. St. Rep. 416, and authorities cited in the cross-reference note thereto. To create a spendthrift trust, the following conditions must be observed: 1. The gift must be of the income only; 2. The legal title must be vested in the trustee; 3. The trust must be an active one, not a mere dry trust which may be executed under the statute of uses: Kessner v. Phillips, 189 Mo. 515, 107 Am. St. Rep. 368. The nature and validity of such trusts are further discussed in Estate of Morgan, 223 Pa. 228, post, p. 732. In Huntress v. Allen, 195 Mass. 226, 122 Am. St. Rep. 243, the validity of a spendthrift trust is sustained. The trust created in Wenzel v. Powder, 100 Md. 36, 108 Am. St. Rep. 380, is held not a spendthrift trust.

STATE v. McDAVITT.

[140 Iowa, 342, 118 N. W. 370.]

CRIMINAL LAW—Leading a Life of Lewdness.—To sustain a charge under Iowa Code, section 4943, which provides that any person found at any hotel or other place, leading the life of prostitution or lewdness, shall be imprisoned, etc., it is necessary to show more than the commission of such acts during one night only. Illicit cohabitation on one occasion, though the result of a previous arrangement, or mere private incontinence on different occasions with different persons, does not constitute the offense contemplated. To bring such an offense within the statute there must be a habitual resorting there for lewd purposes or a repeated indulgence in lewdness while living there. (pp. 276, 277.)

McHenry & Graham, for the appellant.

H. W. Byers, attorney general, and Charles W. Lyon, assistant attorney general, for the state.

342 McCLAIN, J. The charging part of the indictment was as follows: "The said Rector McDavitt on or about the

eighth day of May, A. D. 1908, in the county of Polk, and state of Iowa, did willfully, unlawfully and feloniously resort to, use and occupy and was found in a certain hotel situated in the county aforesaid, and known as the Morgan Hotel, for the purpose of lewdness, the said hotel being then and there in the possession of and under the control of Phillip Morgan." The section of the code under which the indictment was found is as follows: "Sec. 4943. Prostitution. If any person for the purpose of prostitution or lewdness, resorts to, uses, occupies or inhabits any house of ill-fame or place kept for such purpose, or if any person be found at any hotel, boarding-house, cigar store or other place, leading the life of prostitution or lewdness, such person shall be imprisoned in the penitentiary not more than five years." The jurors were instructed that if defendant did resort to, use and occupy the hotel described for the purpose of lewdness, he was leading a life of lewdness at such hotel within the statute. The evidence connected the defendant with the hotel only as a person who there had and occupied a room in which during one night acts of lewdness were committed.

We think that the indictment did not charge a crime under the statute, and that the instruction which authorized a conviction on proof of the acts charged in the indictment was erroneous. The statute, so far as it has reference to the facts which the evidence tended to prove, makes it criminal to resort to a house of ill-fame for the purpose of lewdness, or to be found in a hotel leading a life of lewdness, and it was for the second form of the [344] offense that the defendant was indicted and convicted. Does the commission of acts of lewdness during one night, constituting parts of a continuous transaction, amount to the leading of a life of lewdness within the statute. Plainly not; for if resorting to a hotel for the purpose of lewdness constitutes the leading of a life of lewdness, there was no occasion for making a distinction in the statute between a house of ill-fame and a hotel. It would have been sufficient to describe the crime as consisting in the resorting to a house of ill-fame or a hotel for the purpose of lewdness. But it was plainly intended that the leading of a life of lewdness should amount to something more than resorting for the purpose of lewdness. The language of our statute has not been interpreted by this court or the courts of other states, so far as we can discover. We have held that the commission of acts of lewdness by a man in his own house does not render it a place kept for that

purpose within the first clause of the section above quoted: State v. Irvin, 117 Iowa, 469, 91 N. W. 760. And in this case the language used in State v. Russell, 95 Iowa, 406, 64 N. W. 281, now relied upon by the counsel for appellee, is very materially qualified. We have also held that to establish the charge of resorting to a house of ill-fame for the purpose of prostitution or lewdness only one such act need be shown: State v. Shaw, 125 Iowa, 422, 101 N. W. 109. But cases relating to living in adultery or lewd cohabitation seem to be somewhat in point on the interpretation to be given to the phrase "leading a life of lewdness" as used in our statute, and the uniform holding is that illicit cohabitation on one occasion, though the result of a previous arrangement, or mere private incontinence on different occasions with different persons, does not constitute such a crime: Smith v. State, 39 Ala. 554; Bodiford v. State, 86 Ala. 67, 11 Am. St. Rep. 20, 5 South. 559; Pruner v. Commonwealth, 82 Va. 115; Jackson v. State, 116 Ind. 464, 19 N. E. 330; Lawson v. State, 116 Ga. 571, 42 S. E. 752; Mitten v. State, 24 Tex. App. 346, 6 S. W. 196; Turney v. State, 60 Ark. 259, 29 S. W. 893; State v. Marvin, 12 Iowa, 499. No doubt a person might lead a life of lewdness at a hotel by habitually resorting there for lewd purposes, or by repeatedly indulging in lewdness while living there, but no such conduct is charged in the indictment or indicated by the evidence.

The judgment of conviction is reversed.

For Authorities Bearing upon the Decision in the Principal Case, see the note to People v. Salmon, 113 Am. St. Rep. 271; and the subsequent case of Boswell v. State, 48 Tex. Cr. Rep. 47, 122 Am. St. Rep. 731.

BECK v. HECKMAN.

[140 Iowa, 351, 118 N. W. 510.]

DEEDS—Easement—Violation—Remedy.—On a sale of land if the deed contains a covenant that the vendee and his assigns shall not for twenty-five years from the date thereof erect a fence east of a given line, such restriction creates an easement or servitude upon the land conveyed, and the vendor can enforce his right in equity or sue for damages at his election. (p. 280.)

DEEDS—Alteration.—The burden of proof of the alteration of a deed is on the party alleging it. (p. 279.)

DEEDS—Easement—Onerous Covenant—Contrary to Public Policy.—A covenant that the vendee and his assigns shall not for twenty-five years from the date of the deed erect a fence on a specified part of the land conveyed is not contrary to public policy, nor can the vendee impugn his covenant by averment of its inutility, harshness or inequity. (p. 280.)

McLaughlin & Shankland, for the appellant.

Bowen, Bremner & Alberson, for the appellee.

[352] WEAVER, J. The plaintiff was the owner of a tract of land lying east of the division line between the northeast quarter and the northwest quarter of the section. He also owned a one acre lot adjoining the first-mentioned tract on the west side of said line, while defendant owned the larger tract from which the one acre lot had been carved out. A private way had been opened for some distance along the line between the quarter sections, and on the west side of this way and about thirty-two feet from the east line of said lot plaintiff built and maintained a fence. Defendant was quite anxious to purchase this lot, and from time to time during a period of several years sought to open negotiation therefor. Plaintiff expressed a willingness to sell, but insisted as one of the conditions thereof that defendant should covenant or agree to leave the fence where it then stood, in order to preserve or make more convenient the entrance to his remaining land on the east side of the line. This, for a time at least, the defendant was not willing to concede. Finally, an agreement was reached, or supposed to have been reached, the agreed price was paid, and a deed bearing date November 28, 1902, was executed and delivered by plaintiff to the defendant. The deed is in the ordinary form, with the usual covenants of warranty, except a clause inserted therein following the description of the property, in the following words: "It is hereby agreed by the said Fred C. Heckman that he or his transferees are not to build any fence or other obstruction [353] on the above-described land east of the fence now on said land for a term of twenty-five years from this date." Four years later the defendant moved the fence some twelve feet to the east, bringing it into line with the remainder of the fence inclosing the private way which has now been converted into a public road. Thereupon this action was begun in equity, setting up the foregoing state of facts, and asking that defendant be enjoined from maintaining said fence east of the site or location on which it stood at the date of the deed. Answering the petition, the de-

fendant denies that said restrictive clause in the deed is binding upon him because, as he alleges, it was incorporated into the said instrument long after the purchase of the land, without any consideration therefor, and without his knowledge or consent. Other matters alleged in the answer being mere conclusions of law, we need not here set them out. The court found for the plaintiff, and defendant has appealed.

The claim of the appellant that the restrictive clause in the deed was inserted after the purchase was completed is not sustained by the record. He received the deed, according to his own admission upon the witness-stand, knowing it contained said provision. He took and held possession of the land under it, has ever since retained it, and it is his only evidence of title. Assuming for the purposes of this case that it is competent for him under such circumstances and the issues joined herein to deny the obligation imposed by such covenant, the burden is surely upon him to establish such defense by a fair preponderance of the evidence. In this he clearly failed. The testimony upon the part of the plaintiff is quite strongly supported by defendant's own admissions as a witness that, when the deed was tendered to him, it contained the restriction in its present form, except that it provided no time limit. He objected to it in that form, and asked that the reservation be given [354] some definite limit, and thereupon plaintiff took the deed and added the words "for a term of twenty-five years from date." With this modification he accepted it, and, as the weight of the evidence tends to show, then paid the remainder of the purchase price.

But counsel say that, even if this issue be found against defendant, the covenant was one for the personal benefit of the grantor, and not for the benefit of the land on the east side of the line, and plaintiff's remedy, if any, is at law for damages, and not in equity. Such is not our view of the law. The effect of the restriction was to create an easement or servitude upon the land conveyed, for the benefit of the remaining land owned by the defendant on the east side of the line, and we find no authority, and none is cited by counsel, to the effect that, when he has obtained title to the land subject to such restriction or burden, the grantee may proceed at once to destroy the right thus reserved and remit the other party to a remedy in damages: Pomeroy's Equity Jurisprudence, sec. 12. It is true that cases may be found where it is held that a change of circumstances destroying

or nullifying the essential purpose sought to be subserved by the covenant will justify the court in refusing an injunction for its enforcement: Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365. But no such change is shown in the present case.

Nor do we find anything in this covenant which is opposed to public policy, as counsel seem to think. A direct grant or conveyance of the use of this strip of ground for a period of twenty-five years would present no features calling for the condemnation of a court of equity, and, if this be true, we are unable to see why a reservation or withholding of the same use in a deed by the owner of the entire estate should not be equally effectual. It is wholly aside from the point to say that the enforcement of such covenant works a hardship [355] to the appellant, or is unreasonable or inequitable, as urged in argument. Under the decree of the district court, the appellant gets everything he purchased or bargained for. He was under no compulsion to make the purchase, and, if the ownership of this acre of ground seemed sufficiently desirable to induce him to agree to the terms demanded and to accept a deed containing the restriction, it is neither unjust nor inequitable that he be required to observe its limitations.

It is not a question whether the appellee really needs the right or easement which he claims or whether he may discontinue its use without serious detriment to his remaining land. He reserved or excepted from the conveyance to appellant the right to thus use and occupy the strip in question, and the court will protect his right thereto without stopping to consider whether such right has any substantial money value.

The decree rendered by the district court is right, and it is therefore affirmed.

Covenants Restricting the Use of Land are discussed in the note to Ladd v. City of Boston, 21 Am. St. Rep. 484. Conditions and restrictions in deeds against interference with the flow of light and air over the premises are considered in the note to Wakefield v. Van Tassell, 95 Am. St. Rep. 219. According to Gibert v. Peterler, 38 N. Y. 165, 97 Am. Dec. 785, where one who has covenanted to convey land holds under a deed which provides that if any erections are made on the land which obstruct a certain view of a certain neighbor, the land shall be forfeited to the grantors for such neighbor's use, his estate is upon condition, which condition is valid, although in favor of a stranger, and his title is not perfect.

Alteration of Writings.—The Burden of Proof, where a writing appears to have been altered, of showing whether this alteration occurred before or after its execution is considered in the note to Burgess v. Blake, 86 Am. St. Rep. 128.

HERRICK & STEVENS v. SARGENT & LAHR.

[140 Iowa, 590, 117 N. W. 751.]

VENDOR AND VENDEE—Abandonment of Contract—Estoppel.—Where the vendee impliedly abandons his contract, either as valueless or from sinister motives, and afterward expressly refers to others as purchasers of the land described in it, and subsequently acquires by tortuous device a paper title to such lands at a date when he was aware of the sale to a bona fide purchaser, he is estopped from asserting title against such purchaser. (pp. 285–287.)

PUBLIC LANDS—Location by Soldier's Warrant.—The rights of the locator of land under a soldier's warrant date from the time when the location is made and not from the delayed issuance of the patent. The legal title remained in the United States, but the locator was the equitable owner because from the date of the location the land ceased to be a part of the general domain. (p. 287.)

PUBLIC LANDS—Location by Soldier's Warrant—Taxation.—Although the issuance of the patent for land located under a soldier's warrant has been delayed by reason of conflicting claims, the equitable title is in the locator from the date of location, entry at the land office and certificate of entry obtained, and it then becomes liable for taxation. (p. 288.)

PUBLIC LANDS—Location by Soldier's Warrant—Sale for Taxes.—Land located under a soldier's warrant are exempt from taxation under the federal statute for three years after issuance of the patent, but this exemption is limited to the soldier himself and does not pass to an assignee. A sale, therefore, of such land for taxes due while the title was in such assignee is valid. (pp. 289, 290.)

PUBLIC LANDS—Location by Soldier's Warrant—Sale for Taxes—Effect of Subsequent Issuance of Patent.—Where lands located under a soldier's warrant, in respect of which the patent has not issued, are sold for nonpayment of taxes thereon, the subsequent issuance of the patent to another does not affect the title of the purchaser under the tax deed. (p. 290.)

PUBLIC LANDS—Relation Back of Patent—Taxation.—As soon as a patent issues for land located by a soldier's warrant, it relates back to the original location and removes any possible doubt as to the taxable character of the property after that date. (p. 290.)

Healy & Healy, for the appellants.

F. H. Helsell, for the appellees.

591 WEAVER, J. The pleadings in this case are voluminous, if not confusing. The abstract of appellants set forth a "petition," an "amended and substituted petition," an "amendment to the substituted petition," "answer, cross-petition, cross-bill and counterclaim," "answer to cross-petition," "reply to cross-petition," "answer to cross-petition and counterclaim," "answer to cross-petition and cross-bill and counterclaim," "reply to the answer and cross-petition of the plaintiff," closing with a document entitled "Amendment to answer to the defendants' cross-petition and coun-

terclaim and as amendment to the cross-petition and as a reply to the amendments of the defendants filed since last term of court."

This competitive contest between the pleaders, extending from March 6, 1903, to October 27, 1905, seems to demonstrate that the determination to have the last word is a characteristic not peculiar to the sex against which it has often been charged. The history of the title to the land in controversy may be set out as follows: A soldier's land warrant which had been issued to one Jacob Huston and assigned to one Schaffer was located upon the tract June 15, 1857, and record of the entry made in the proper [592] office. On February 6, 1885, Schaffer and wife made a quitclaim deed to the land to G. W. Patterson, who, in turn, deeded to M. E. Griffin, who deeded to Ainsworth, who deeded to Simmons, the last-named deed being made April 15, 1885. On February 11, 1889, Schaffer, for some reason, made another quitclaim to Patterson. In 1889 Simmons deeded the land back to Ainsworth, who, in 1894, conveyed the land by warranty deed to Richardson. On October 28, 1896, Richardson conveyed to Ainsworth, and on January 3, 1901, the latter conveyed to John Watson, who is or was one of the plaintiffs in this action. It should also be said that, before Ainsworth deeded to Simmons on July 10, 1885, the latter had obtained a tax deed for the land on a sale made in 1875 for the delinquent taxes of the year 1873, so that his subsequent grantees obtained whatever title said deed conveyed, as well as such title as had been obtained through the succession of conveyances from Schaffer. Watson and wife went into possession of the land, making their home thereon under his contract of purchase a considerable time before the title was conveyed to him. In April, 1900, Watson, then being in possession, received five dollars from the defendants Sargent & Lahr, giving them a writing acknowledging its receipt as "part payment on the east half of the southeast quarter of section 11-94-35, Garfield township, Clay County, Iowa, balance to be paid when abstract is furnished." This receipt was signed by John Watson alone. The purchase price was not stated, nor is any time fixed in which the sale was to be consummated. On January 26, 1901, Watson, his wife joining, entered into a written contract with Sargent & Lahr for the sale of the land for two thousand two hundred and twenty-three dollars, of which five dollars was acknowledged to have been paid down, the further sum of

twelve hundred and ninety-five dollars to be paid on delivery of possession March 1, 1902, and the remainder to be paid by the assumption of an existing mortgage upon the property. Watson also undertook to perfect the title [593] by March 1, 1902, and Sargent & Lahr agreed to a forfeiture of their rights under the contract if payments were not made strictly in accordance with the agreed terms. On June 13, 1902, Watson and wife, claiming that the foregoing contract had been abandoned, entered into a contract with the plaintiffs Herrick & Stevens to sell said land to them for two thousand and twenty dollars, of which one hundred dollars was paid down, the further sum of nine hundred dollars to be paid on delivery of possession March 1, 1903, and the remainder to be satisfied by the assumption of the existing mortgage debt. On February 26, 1903, the same parties made a supplemental contract, by which it was agreed that F. C. Gilchrist, Esq., should proceed to quiet and settle the title to the land in a manner satisfactory to the parties, and that the costs of the proceedings should be borne by them in equal shares, and, in the event that the title should not be settled satisfactorily, the vendees had the option to surrender the contract and receive a return of the advance payment. On March 3, 1903, seven days after the date of this supplemental agreement, Watson, under their promise to protect him in so doing, united with his wife in making a warranty deed of the land to Sargent & Lahr. Soon thereafter this action was instituted in the name of John Watson and wife and Herrick & Stevens as plaintiffs against Sargent & Lahr as defendants to quiet their title to the farm.

It is the claim of the plaintiffs that whatever rights the defendants may have obtained under their contracts above mentioned were abandoned by them, and that defendants by their representations and conduct are estopped from now asserting any claim to the land adverse to the plaintiffs. In addition to such rights as they may have obtained under their contracts and deed aforesaid, defendants assert title to the land wholly independent of Watson, and this title they trace as follows: It will be remembered, as we have already stated, that the land warrant was located on the tract and entry made on June 15, 1857, by [594] one Schaffer, from whom the Watson title (omitting now any reference to the tax deed) is traced. So far as shown, this entry was never canceled or set aside, but it appears that on February 24, 1858, Schaffer assigned his certificate of location to Amos Stanley, and

authorized him to receive the patent. No patent was ever issued to any person until since the commencement of this action, when one was procured as will be hereinafter shown. On August 11, 1870, Stanley and wife conveyed by warranty deed to S. V. Landt, and on February 7, 1872, Landt conveyed to Hiram Balliett, a resident of Pennsylvania. Balliett died intestate, and, if he had ever conveyed the land during his lifetime, the deed does not appear of record, nor is there anyone in court claiming under a title so derived. After the contracts by Watson to both Sargent & Lahr and Herrick & Stevens had been made, and the strife thus inaugurated was in progress, Sargent & Lahr appear to have discovered the heirs of Hiram Balliett, and procured a deed by which the defendants became vested with whatever interest or title said heirs had to convey. On February 8, 1904, when this action had been pending nearly a year, F. A. Lahr and Charles Sargent filed with the commissioner of the general land office their affidavits that they were then the absolute and unqualified owners of the land located by Schaffer on June 15, 1857, and that they had acquired all of the interest of said Schaffer and all other persons who had or claimed any interest in said land, and asked to be permitted to make a cash substitution for the location by warrant, and that patent issue accordingly in the name of Sargent & Lahr, or in the name of Amos Stanley. On February 15, 1904, said defendants paid the sum of one hundred dollars to the receiver of the land office at Des Moines, Iowa, and received from the register of said office a certificate reciting that, in pursuance of law, Amos Stanley had purchased the land in question at the rate of one dollar and twenty-five cents per acre, and had paid said sum in [595] full, and that the said Amos Stanley was entitled to receive a patent from the land described. On September 14, 1904, a patent was issued in the name of Amos Stanley. Relying both upon their claim of title thus derived through Stanley, and upon their conveyance from Watson of the title derived through Schaffer independent of Stanley, defendants resist the claim of the plaintiffs, denying the allegations made by the plaintiffs as grounds of estoppel. It will be recalled that Watson, who entered into the contract and supplemental contract for the sale of the land to defendants, and later made a contract and supplemental contract for the sale of the same land to Herrick & Stevens, and authorized a suit to be brought to quiet the title against defendants,

within a week thereafter deeded the land to defendants, and three days later appeared as coplaintiff herein to quiet the title against his own conveyance to the defendants.

The next step which we need mention in this game, in which Watson appears to have been assigned the role of shuttlecock, was as follows: On the same day on which the petition herein was filed Watson, who had received some money from defendants in consideration for his deed of March 3, 1903, removed to Wisconsin, and thereafter, on August 13, 1903, defendants' counsel prepared and procured Watson and wife to execute a dismissal of the suit as to them, filing with such dismissal a statement that they never authorized the use of their names as plaintiffs, whereupon Herrick & Stevens amended the petition, making Watson and wife defendants. As a witness Watson first swore that he had no recollection of ever signing the paper dismissing the suit, but finally remembered that he had executed it at the request of defendants, but did not know its real purport, except that defendants informed him there was trouble over the land, and they needed such instrument. He repeats, however, that he neither employed nor authorized anyone to file said paper in the district [596] court. The trial court, after hearing the evidence, found that the contract under which defendants' title through Watson originated had been abandoned by the parties thereto prior to the contract given by Watson to plaintiffs, and that the deed thereafter made by Watson to defendants was received by them with full notice and knowledge of the outstanding contract between Watson and wife and the plaintiffs, and that said conveyance was so obtained with the fraudulent intent to prevent the completion of the sale to plaintiffs. A decree was entered setting aside and canceling the deed to defendants, who were ordered to convey the title so obtained to the plaintiffs. It was also adjudged that the patent from the United States issued in the name of Stanley was procured by the fraud and misrepresentation of the defendants, and the same was held to be of no effect against the rights of the plaintiffs. Other provisions of the decree are not material on this appeal.

1. We will first consider as briefly as possible the equities as between plaintiffs and defendants under their several contracts and dealings with the pliable Watson. It is true that defendants' contract was of prior date, and Herrick & Stevens had both constructive and actual notice that such agreement had been made. Being prior in time, defendants were prior

in right, unless it be also shown that they had abandoned the purchase before the date of the contract with plaintiffs, or unless their conduct with reference thereto was such as to estop them from asserting any claim to the land against the plaintiffs. The deed procured by the plaintiffs from Watson after the scramble began cuts no material figure in the case; for, if the defendants are not in position to rely on their contract of January 26, 1901, a title procured from Mr. Watson after the contest began, and with knowledge of the plaintiffs' claim, would be subject to such claim in their hands precisely as it would in the hands of their grantor. Though [597] the evidence is by no means conclusive, we are disposed to agree with the trial court in finding that the defendants are not in position to insist upon the priority of their contract. The plaintiff Herrick testifies that defendants, or at least one of them, informed him they had thrown up the contract with Watson, and that on March 1, 1902, when said contract matured, they had told Watson they would not go on with it. He further says that, when he learned the contract had been recorded, he applied to defendants, asking them to quitclaim the land in order to clear the title, and they promised so to do. On another occasion he says that Watson in his hearing reminded the defendant Lahr of the agreement to quitclaim, and asked him why he did not do so, and Lahr replied "because there is more money in it for us not to." These statements are denied by defendants, but plaintiffs' version is strongly corroborated by Mr. Gilchrist, who says that he applied to Mr. Lahr for a quitclaim to the plaintiffs, and Lahr admitted they had promised to quitclaim, but said they had now obtained additional rights in the land. He further stated, according to this witness, that they—defendants—claimed nothing under the Watson title, and that said title did not amount to anything. Quite significant, also, of the attitude of the defendants with reference to this land in 1902, is the testimony of one Bronlee, who, holding a claim for collection against Watson, applied to Sargent & Lahr, who were collection agents for the house represented by the witness, for information as to the possibility of obtaining payment. Lahr informed the witness that Watson had sold his farm to Herrick & Stevens, and advised the witness to see Watson, and get an order from him on Herrick & Stevens. In pursuance of this suggestion, Lahr took the witness out to Watson's place, and advised the latter to settle the claim in

the manner suggested. On the following day Watson made the order which was presented to, and accepted by, Herrick & Stevens. The order was made [598] payable on March 1st, when the contract for sale to Herrick & Stevens would mature, and was left by the witness in the possession of Sargent & Lahr for collection. This conduct on defendants' part is not only consistent with the theory that they had abandoned all claim to the land under their contract with Watson, but is quite inconsistent with the idea that they were then asserting any right or claim thereunder. Without extending this opinion to recite all of the testimony and circumstances bearing upon this feature of the case, we have to say we are reasonably satisfied that defendants, either because they thought there was no profit in the land under their contract, or because they believed they could get an independent title at less cost, did abandon the thought of taking title from Watson until some time after the latter had entered into the contract to convey to the plaintiffs.

2. We have next to consider whether the line of conveyances from Stanley to Landt and the Balliett heirs to the defendants constitutes an independent title paramount to the title which plaintiffs obtained or contracted for from Watson. If this depended solely on the comparative validity and effect of the deed by Schaffer, the entryman, to Patterson, and the deed by Stanley, assignee of the certificate of location, to Landt, it might be a question of some doubt whether the latter would not be preferred in equity. But, as we have seen, a tax title to the property was obtained by Simmons before he received conveyance of the Schaffer title, and this title through intermediate conveyances became vested in Watson before the making of the contract by him to the plaintiffs. If, therefore, this tax deed was valid, it became the foundation of a new and independent title from the state, and a determination of the relative rights of Stanley and Schaffer and their several grantees is unnecessary.

The appellants deny the validity of the tax title, because, as they say, neither the legal nor equitable title to [599] the land had passed from the United States at the time the taxes for which the sale was made were assessed and levied, and because under the statutes of the United States land located under a soldier's warrant is exempt from taxation for a period of three years after the issue of patent therefor. We are of the opinion it is not correct to say that the equitable title

to this land had not passed from the United States at the time these taxes accrued. The warrant held by Schaffer was located in the year 1857, and from that date either Schaffer, the entryman, or Stanley, the assignee of the certificate of location, was entitled to receive a patent from the United States. While the legal title remained in the United States, it was so held for the benefit of the person who at the date of the location was the holder of the warrant or for the assignee or grantee of such person. From the date of the location the land ceased to be a part of the general domain of the government open to purchase or settlement by anyone, and the legal title was thereafter held by the government as in the nature of a trust for the use of the person showing himself entitled to the benefit of said location. The fact which is made to appear, that the formal approval of the location and issuance of the patent were suspended because of apparently conflicting assignments of the warrant, does not affect this conclusion. The officers of the government were not denying the right of the holder to locate the warrant on this land; but, in view of the fact that the original holder appeared to have made two assignments of it, further action was suspended until the apparent conflict of rights thus created could be removed. The rights of the locator in the premises do not date from the time when he succeeded in removing the cloud, but from the date when the location was actually made. It is the well-established doctrine that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted [600] to use the legal title of the government to avoid his just share of taxes: Wisconsin C. R. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687. And the fact that patent is suspended during some investigation or controversy concerning the rights of the person claiming such patent does not necessarily prevent the application of this rule: Northern Pac. R. R. Co. v. Patterson, 154 U. S. 130, 14 Sup. Ct. Rep. 977, 38 L. ed. 934; Maish v. Arizona, 164 U. S. 609, 17 Sup. Ct. Rep. 193, 41 L. ed. 567; Farmers' Loan & Trust Co. v. Northern Pac. R. R. Co., 76 Fed. 15.

The case of Witherspoon v. Duncan, 71 U. S. 210, 18 L. ed. 339, is in principle quite parallel with the one before us. There the government had provided for the donation of certain lands to settlers who had been required to vacate other lands ceded to an Indian tribe. A party entitled to locate a claim under this provision did so, and received the receipts

of the register and receiver of the land office, but for some reason the issuance of patent was suspended or delayed. Meanwhile another person entered the land, and obtained a certificate therefor. Before the patent finally issued upon the first entry, a tax title had been obtained by a third person. This title was held good. The court there overruled the same argument now advanced in behalf of the appellants, and says: "In no just sense can lands be said to be public lands after they have been entered at the land office and certificate of entry obtained. If public lands before the entry, after it, they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first were authorized by law, confers no right on the buyer, and is a void act. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make a proper conveyance as soon as it can, and, in the meantime, it holds a naked legal fee in [601] trust for the purchaser who has the equitable title": See, also, Carroll v. Safford, 44 U. S. 441, 11 L. ed. 671.

The patent title to the land in question, whether it is traced through the Schaffer conveyance, as appellees contend, or through the Stanley conveyance, as appellants contend, rests on the Schaffer entry in 1857, and from that date the land became subject to assessment and taxation, and the tax deed to Simmons, therefore, passed a good title, unless this result is avoided by the effect of the exemption by which, under the laws of the United States, lands given as bounty for military service shall, while they continue to be held by the patentee, be exempt from taxation by any state or municipal authority for the term of three years from and after the date of the patent issued therefor. As the patent in this case did not issue until the year 1904, it is argued that a tax title resting upon an assessment and levy made long before that date must be held void. It is to be observed, however, that, while this land was located under a soldier's warrant, it was not located by the soldier himself. He sold his right to make the entry to Schaffer, but the exemption from taxation was in the nature of a personal privilege which did not pass with the right of entry to his assignee. This we have repeatedly ruled in other decisions involving like question: See Long v. Olson, 115 Iowa, 388, 88 N. W. 933, and cases there cited. No other objection

to the validity of the tax deed is raised by the defendants, and we see no escape from the conclusion that it passed a good title to the grantee therein named.

4. It follows from the conclusions announced in the foregoing paragraphs of this opinion that the findings of the district court must be affirmed, unless the patent which defendants procured to be issued pending this litigation operates in some way to strengthen their position and give them a claim upon the title. But we see no logical or equitable [602] ground upon which to base such a holding. The patent was issued not to Sargent & Lahr, or either of them, but to Amos Stanley, and they can obtain no right nor title by virtue of such patent, except as they are able to trace it through said patentee. That title has been eliminated by tax sale and deed. So far, then, as the record discloses Watson's title was good against the world, and as we have already held that appellees' contract for the purchase of the land from Watson must prevail over the contract and deed made to the appellants, it follows that the decree of the trial court cannot be disturbed.

Counsel severely criticise that provision of the decree which finds that the patent was procured by fraud, and declares that instrument void. We are of the opinion that, whatever may have been the intent of appellants in making the representations complained of in procuring the issuance of the patent, their conduct in that respect did not operate as a fraud upon the appellees. It was to their interest to have the patent issued either to Schaffer or Stanley. In either event, the passing of the legal title from the government related back to the date of the entry in 1857, and served to remove all doubt as to the taxable character of the property after that date, thus affirming the sufficiency and efficacy of the tax deed. There was no occasion, we think, for declaring the patent void, but, as the appellants are not prejudiced thereby, and the appellees did not appeal, we are not inclined to modify the decree in that respect. If, as counsel seem to think, the decree in this respect is a mere brutum fulmen without effect upon the existence or validity of the patent, then no one is harmed.

The decree of the district court is affirmed.

EXEMPTION FROM TAXATION OR ASSESSMENT OF LANDS OWNED BY GOVERNMENTAL BODIES OR IN WHICH THEY HAVE AN INTEREST.*

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I. Nature of the Right to be Exempt from Taxation.

A tax in the ordinary sense is not a debt. It does not involve any element of a contractual obligation: State v. Chicago etc. Ry. Co., 128 Wis. 449, 108 N. W. 594. All property is held subject to the payment of taxes which are imposed as an incident of sovereignty. But while taxation exacts money from individuals as their share of the public burden of maintaining the government, theoretically the taxpayer receives just compensation in the benefits conferred by the government in the proper application of the taxes: Lucas v. Purdy, 142 Iowa, 359, 120 N. W. 1063. A land tax creates no personal liability against the owner of the land. It must be collected, if at all, by a

sale of the particular tract against which it is charged: Toy v. McHugh, 62 Neb. 820, 87 N. W. 1059. The right of taxation is never presumed to be surrendered by the sovereign power, and such surrender is never made, unless it be the result of express terms or necessary inference: Mayor etc. of Baltimore v. Baltimore etc. R. R. Co., 6 Gill, 288, 48 Am. Dec. 531. "Exemption from taxation is a privilege of the government, not an incident to the property. In the hands of the government, the lands are exempt, but the moment the title vests in a private individual, it becomes liable to the burdens which are imposed on other property of like character": State v. Moore, 12 Cal. 56.

As a general rule, all property within the state is liable to taxation, and when a claim of exemption is made, it must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption: People v. Coleman, 135 N. Y. 231, 31 N. E. 1022. In the absence of an express exemption from taxation of property owned by a governmental body, an exemption can be implied only when the property is actually devoted to a public use: San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33; Essex Co. v. Salem, 153 Mass. 141, 26 N. E. 431. An exemption from taxation can be allowed only where the law under which it is claimed clearly allows it: Hart v. Plum, 14 Cal. 148; People v. Roper, 35 N. Y. 629; People v. Davenport, 91 N. Y. 574; English v. Crenshaw, 120 Tenn. 531, 127 Am. St. Rep. 1025, 110 S. W. 210, 17 L. R. A., N. S., 753; Harvey Coal etc. Co. v. Dillon, 59 W. Va. 605, 53 S. E. 428, 6 L. R. A., N. S., 628. Where doubt exists as to the construction of a law permitting the taxation of state property, the doubt must be resolved in favor of the state: People v. Miller, 94 App. Div. 567, 88 N. Y. Supp. 253. In other words, tax laws should be liberally construed in favor of the state: Bacon v. Board of State Tax Commrs., 126 Mich. 22, 86 Am. St. Rep. 524, 85 N. W. 307, 60 L. R. A. 321. But a tax law providing for an exemption from taxation is strictly construed: Montgomery v. Wyman, 130 Ill. 17, 22 N. E. 845; Sanitary District v. Martin, 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201; State v. New Orleans etc. Light Co., 116 La. 144, 40 South. 597, 7 Ann. Cas. 724; Sindall v. Mayor etc. of Baltimore, 93 Md. 526, 49 Atl. 645; State v. Casey, 210 Mo. 235, 109 S. W. 1; Roosevelt Hospital v. Mayor etc. of New York, 84 N. Y. 108; Hibernian Ben. Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769, 42 Pac. 3, 30 L. R. A. 167; Zazoo etc. R. Co. v. Thomas, 132 U. S. 174, 10 Sup. Ct. Rep. 68, 33 L. ed. 302; Winona & St. Paul Co. v. Minnesota, 159 U. S. 526, 16 Sup. Ct. Rep. 83, 40 L. ed. 247.

Indeed, it is a principle of interpretation of statutes, applicable to questions of taxation of governmental bodies, that they do not apply to the sovereign unless named: Springville v. Johnson, 10 Utah, 351, 37 Pac. 577.

The general principle which runs through all of the cases on this subject is that the state does not tax its own property employed in or used for governmental purposes: State v. Board of Levee

Commrs., 75 Miss. 132, 21 South. 661. But a state or municipality has the power to tax its own property if it sees fit to do so: Norfolk v. Perry Co., 108 Va. 28, 128 Am. St. Rep. 940, 61 S. E. 866; State v. Recorder of Mortgages, 45 La. Ann. 566, 12 South. 880. And Congress, having full power over the public domain, may subject portions of it to state taxation upon such conditions as it sees fit. But if taxable under certain conditions, the conditions must exist in order to make the power of taxation by the state available: State v. Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686. Likewise, a state may, in ceding lands to the United States to be used for a military reservation or other purpose, reserve the right to tax private property in the territory so ceded: Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. Rep. 995, 29 L. ed. 264.

II. General Rule Respecting the Exemption of Lands Owned by the Public from Taxation.

It is a well-settled rule that land owned by the United States, the state or any of the political subdivisions of the state is exempt from general taxation. This exemption, although one of ancient origin, is in almost all jurisdictions confirmed by some express constitutional or statutory declaration. It is universally declared in the acts of Congress admitting the various states into the Union and reiterated in the constitutions of the states upon their admission pursuant to such organic act: Biscoe v. Coulter, 18 Ark. 423; Carraway v. Moore, 75 Ark. 146, 86 S. W. 993; Hall v. Dowling, 18 Cal. 619; People v. Morrison, 22 Cal. 73; People v. Shearer, 30 Cal. 645; Mundee v. Freeman, 23 Fla. 529, 3 South. 153; Penick v. Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A., N. S., 1159, 12 Ann. Cas. 346; State v. Stevenson, 6 Idaho, 367, 55 Pac. 886; People v. United States, 93 Ill. 30, 34 Am. Rep. 155; McCaslin v. State, 99 Ind. 428; Sully v. Poorbaugh, 45 Iowa, 453; Herrick v. Sargent, 140 Iowa, 590, ante, p. 281, 117 N. W. 751; Bradford v. Lafargue, 30 La. Ann. 432; Gachet v. New Orleans, 52 La. Ann. 813, 27 South. 348; Camden v. Camden Village Corp., 77 Me. 530, 1 Atl. 689; Sanborn v. Minneapolis, 35 Minn. 314, 29 N. W. 126; State v. Itasca Lumber Co., 100 Minn. 355, 111 N. W. 276; Dixon v. Porter, 23 Miss. 84; Ricks v. Baskett, 68 Miss. 250, 8 South. 514; Wilkinson v. Jenkins (Miss.), 33 South. 838; Wright v. Cradlebaugh, 3 Nev. 310; State v. Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686; People v. Board of Assessors, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; Croner v. Cowdrey, 19 N. Y. Supp. 908; Buckley's Lessee v. Osburn, 8 Ohio, 180; Braxton v. Rich, 47 Fed. 178; Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670, 29 L. ed. 845; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687.

"On general principles, and by well-nigh universal opinions of courts of last resort, public property is exempt from taxation, and this independently of any positive law, constitutional or statutory. The burdens of taxation are laid upon citizens in order to raise necessary revenues for the administration of government in all the

departments of the state. The state legislates for the purpose of raising revenues from the citizens, and not for the purpose of raising them from itself. Its property is used for the proper discharge of governmental functions. It has no income save such as is derived from taxation of its citizens and their private property, and this income never exceeds, or should never exceed, the mere amount absolutely necessary to the exercise of these functions. And especially does not the state tax its own property employed in or used for governmental purposes": State v. Board of Levee Commrs., 75 Miss. 132, 21 South. 661.

In discussing this subject, Mr. Justice Harrison, in City of Norfolk v. Perry Co., 108 Va. 28, 128 Am. St. Rep. 940, 61 S. E. 866, said: "Ordinarily the state does not tax its own property, but it has the power to tax it if it sees fit to do so: Cooley on Taxation, 3d ed., p. 263. And this would be true also of a city having general powers of taxation, as the city of Norfolk has: Norfolk v. Norfolk Landmark P. Co., 95 Va. 564, 28 S. E. 959.

"The reason governments of a state or city do not tax their own property is that it would render necessary new taxes to meet the demands of such a tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy: Cooley on Taxation, 3d ed., p. 263."

The inherent character of the exemption of public lands from taxation was remarked upon by Mr. Justice Field in the case of Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687, which involved the taxation by a state of lands which belonged to the United States. The learned justice said: "It is familiar law that a state has no power to tax the property of the United States within its limits. This exemption of their property from state taxation—and by state taxation we mean any taxation by authority of the state, whether it be strictly for state purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the state, the object and extent of the taxation would be subject to the state's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax there buildings might be taken from the possession and use of the United States. The constitution vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise: Van Brocklin v. Tennessee, 117 U. S. 151, 168, 6 Sup. Ct. Rep. 670, 29 L. ed. 845, 851.

"This doctrine of exemption from taxation of the property of the United States, so far as lands are concerned, is in express terms affirmed in the constitution of Wisconsin, which ordains that the state 'shall never interfere with the primary disposition of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof, and no tax shall be imposed on land the property of the United States': Const. 1848, art. 2, sec. 2. It follows that all the public domain of the United States within the state of Wisconsin was in 1883 exempt from state taxation."

The United States, as the owner of land within the limits of a state, occupies, however, the position of any private proprietor with the exception of the exemption from state taxation: Hicks v. Bell, 3 Cal. 219; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

"Taxes are charges levied by the sovereign or state upon the property and persons of its subjects or citizens, and not charges upon itself or its own property. Revenue is the object of taxation, and none would result from the state's taxing its own property. It would be merely taking money out of one pocket and putting it into another": People v. Doe, 36 Cal. 220.

But the state has the power to subject its own lands to taxation. "Inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the state or its municipalities. Such property is, therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it": Trustees of Public Schools v. Trenton, 30 N. J. Eq. 667.

The exemption of the public property of the state, county or municipality from taxation is regarded as a question of policy, and the power exists to make such property subject to the burdens of taxation: State v. Bank of Smyrna, 2 Houst. 99, 73 Am. Dec. 699; Sanitary District v. Martin, 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201; In re Swigert, 123 Ill. 267, 14 N. E. 32; State v. Recorder of Mortgages, 45 La. Ann. 566, 12 South. 880; People v. Board of Assessors, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148.

And in some states land belonging to the state or its political subdivisions is made subject to taxation by statutory provisions: People v. Miller, 94 App. Div. 567, 88 N. Y. Supp. 253.

III. Governmental Bodies to Which the General Rule Applies.

a. In General.—As was shown in the preceding subdivision, the rule of exemption applies to such sovereign bodies as the United States and the states. It naturally applies also to the minor political subdivisions of a state.

Both counties and municipalities are merely political subdivisions of the state, to which, for convenience, the state delegates the right of sovereignty under certain prescribed limitations: Penick v. Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A., N. S., 1159, 12 Ann. Cas. 346.

"Cities and towns are political corporations, local subdivisions of the state government by means of which, within specified territorial limits, public order is maintained, schools and highways are established, and public health preserved. They exist only for public purposes. It is contrary to the law of their being that they should by taxation acquire, hold and make profit from money, as do private corporations and individuals. They have but one method for obtaining it, namely, taxation; but one use for it, namely, the promotion of the public good; they hold it temporarily as stewards of the people until the public creditor demands it. Taxation implies tribute from the governed to some form of sovereignty; not the transfer of the property of the latter from one of its servants to another. A tax is levied by a town upon the property of its inhabitants; it is not a charge upon the property which itself already holds for the use of the public. Money in the keeping of a municipality as the result of the exercise of its power of taxation, for one public use, is not to be made to pay tribute to another public use. It has ceased to be taxable property in any legislative or judicial sense. The proceeds of one assessment must be protected against a second, else possibly the public money might be eaten up by the cost of successive assessments and collections, in its passage from the taxpayer to the public creditor. So well established is this principle that, if the statute relative to the assessment and collection of taxes had contained no reservation whatever in favor of property held by cities and towns for public purposes, the courts would have assumed that the legislature did not include such in the term 'taxable property,' but that these words were used with such limitation as repeated judicial decisions and approved commentators upon law have put upon them. Inasmuch, however, as the assessment of taxes is intrusted to the towns to be made by men skilled in the valuation of property, but presumably unlearned in legal distinctions, the legislature from abundant caution has inserted an exemption of property belonging to the United States, or to this state, and of bulidings with their appurtenances belonging to any town or city. And as the exemption of a courthouse belonging to the United States does not find its first recognition and sole support in this statute, no more does the exemption of town property devoted to the use of the public": Town of West Hartford v. Board of Water Commrs., 44 Conn. 360. Within the scope of the powers delegated to it, a city stands for the state, and property acquired by it in the due exercise of its mandate stands in the same position in respect to exemption from taxation as if owned by the state itself: Gachet v. City of New Orleans, 52 La. Ann. 813, 27 South. 348. Hence land belonging to counties, towns and municipal corporations are governed by the same

rule of exemption which applies to the state itself: Biscoe v. Coulter, 18 Ark. 423; Low v. Lewis, 46 Cal. 549; People v. Austin, 47 Cal. 353.

b. Instrumentalities of Government.—The controlling question when considering the exemption of property from taxation is not who holds the legal title, but who holds the equitable title. Hence where land equitably belongs to the state, it is exempt notwithstanding that the legal title may temporarily be in the name of some individual or board, such as the board of regents of the state agricultural college: Board of Regents v. Hamilton, 28 Kan. 376.

Some difficulty is, however, encountered in determining whether the boards and commissions found in various states constitute the alter ego of the state in their ownership of property devoted to the public use. But the matter is generally regulated by statute.

If the trustees of a college created by the state are appointed by the state and derive all of their powers from the state, which may withdraw or modify them at pleasure, the land held by them is regarded, for the purposes of taxation, as belonging to the state and thus exempt from taxation: Illinois Industrial University v. Champaign County, 76 Ill. 184. And lands held by a reclamation district are regarded as public property of the state acquired by its agents, and for that reason exempt from taxation: Reclamation District v. Sacramento Co., 134 Cal. 477, 66 Pac. 668. Likewise lands held by a levee district are not subject to taxation: Bonner v. St. Francis Levee District, 77 Ark. 519, 92 S. W. 1124. But in Illinois it was held that a sanitary district is not such an arm of the government as would entitle property acquired by it to be exempt as property of the state: Sanitary District v. Martin, 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201.

In School District v. Howe, 62 Ark. 481, 37 S. W. 717, the court sustained an argument that land held by a school district was not property belonging to the state within the meaning of a constitutional provision exempting such property. The court said: "It is further said that a school district is one of the governmental agencies of the state; that property belonging to it is property of the state, and, as such, not subject to taxation; but such contention, as applied to the facts of this case, is not tenable. A school district is a creature of the state, and the General Assembly enacts the laws under which the property of such a district is acquired and used. But the property of a school district is not the property of the state, any more than the property of a city or county is the property of the state: Pearson v. State, 56 Ark. 153, 35 Am. St. Rep. 99, 19 S. W. 499; Cooley's Constitutional Limitations, 290, 291. The title of this property is not in the state, but in the school district of the city of Fort Smith, and it does not come within the meaning of section 2, article 14 of the constitution, which has reference to property held by the state in trust for schools and colleges, and to the public school fund of the state of which this property is not a part."

It will be observed, however, that the decision in the Arkansas case was made to turn upon the phraseology of the state constitution.

Doubtless in most states statutory provisions exist which exempt such lands regardless of whether the title is held by a municipality, school district, township or other body. In Illinois it was held that a municipality under such circumstances is a mere agency employed by the state in executing the trust arising from the federal donation of school lands: City of Chicago v. People, 80 Ill. 384.

The general rule is that the various instrumentalities of government are not subject to taxation: Penick v. Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A., N. S., 1159, 12 Ann. Cas. 346. But in applying this principle to the taxation of a branch of the Bank of the United States, Mr. Chief Justice Marshall declared it did not extend to a tax against the real property of that bank: M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579. And in Tennessee the land of a bank which was chartered for the benefit of the state, and all the stock of which was owned and controlled by it, was taxed, although the business of the bank was held exempt from taxation: Nashville v. Bank of Tennessee, 1 Swan, 269. But in Georgia it was held that the word "corporation" in a statute taxing railroads did not include a railroad owned and controlled exclusively by the state and the income of which was devoted to the support of the state: State v. Atkins, 35 Ga. 315, Fed. Cas. No. 5350. In California it was sought to exempt lands owned by a railroad from taxation on the ground that it was an instrumentality of the federal government; but the court said: "There is another reason which we think conclusive upon this point, and that is, that the tax in question is not a tax imposed upon the business of the corporation defendant, but only upon its real property situate within the state. The principle upon which mere means created by the federal government, as agencies in the execution of its powers, are to be exempted from state taxation, has never been applied to the exemption of real property within the state, even when occupied or used exclusively in connection with the business which is itself exempted": People v. Central Pac. R. Co., 43 Cal. 398.

IV. Exemption of Land Owned by the Public from Special Taxes or Assessments for Local Improvements.

a. Distinction Between Liability for Taxation and for Special Taxes or Assessments.—Some confusion has arisen among the authorities as to the effect of what are commonly called tax sales on account of the failure of the courts, at times, to distinctly show whether the sale was one for the nonpayment of a general tax or for a special tax or assessment for local improvements. Public property which is exempt from taxation may nevertheless be subject to assessment for local improvements.

The general levy of taxes is generally regarded as a contribution in return for the general benefits of government without regard to any special protection afforded to the individual paying the tax. A tax may, however, be for local purposes, such as are levied by a county, but it is imposed on all upon whom the state imposes a tax

for state purposes. Local assessments are not considered as burdens but as an equivalent or compensation for the enhanced value which the property derives from the local improvement for the cost of which the assessment is made: Munson v. Atchafolaya Basin Levee Dist., 43 La. Ann. 15, 8 South. 806. Although the imposition of an assessment for a local improvement is an exercise of the taxing power, it is not regarded as taxation within the provisions of tax laws: Board of Improvement etc. v. Sisters of Mercy, etc., 86 Ark. 109, 109 S. W. 1165; Chambers v. Satterlee, 40 Cal. 497; New York etc. Ry. Co. v. Hammond, 170 Ind. 493, 83 N. E. 244; Porter v. R. J. Boyd Pav. etc. Co., 214 Mo. 1, 112 S. W. 235. This distinction was clearly stated by the court in Roosevelt Hospital v. Mayor etc. of New York, 84 N. Y. 108. The court said: "In a broad sense, taxes undoubtedly include assessments, and the right to impose assessments has its foundations in the taxing power of the government; and yet in practice, and as generally understood, there is a broad distinction between the two terms. Taxes, as the term is generally used, are public burdens imposed generally upon the inhabitants of the whole state, or upon some civil division thereof, for governmental purposes without reference to peculiar benefits to particular individuals or property. Assessments have reference to impositions for improvements which are specially beneficial to particular individuals or property, and which are imposed in proportion to the particular benefits supposed to be conferred. They are justified only because the improvements confer special benefits, and are just only when they are divided in proportion to such benefits."

b. Effect of Statutory Exemption from Taxation on Liability for Local Assessments.—Inasmuch as it is well settled that there is a distinction between taxation and assessments for local improvements, many of the courts declare that mere constitutional and statutory exemptions of land owned by the public from taxation do not necessarily exempt such lands from a liability for assessments for local improvements: Board of Improvement v. Little Rock School Dist., 56 Ark. 354, 35 Am. St. Rep. 108, 19 S. W. 969, 16 L. R. A. 418; San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33; City Street Imp. Co. v. Regents of University of California, 153 Cal. 776, 96 Pac. 801, 18 L. R. A., N. S., 451; McLean Co. v. Bloomington, 106 Ill. 209; Adams Co. v. Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; Edwards & W. Const. Co. v. Jasper, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006; Board of Commrs. v. Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; Louisville v. McNaughten (Ky.), 44 S. W. 380; Charnock v. Fordoche etc. Levee Dist., 38 La. Ann. 323; City of Clinton v. Henry Co., 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; Hassan v. Rochester, 67 N. Y. 528; Nalle v. Austin (Tex. Civ. App.), 103 S. W. 825; In re Howard Ave. North, 44 Wash. 62, 120 Am. St. Rep. 973, 86 Pac. 1117, 12 Ann. Cas. 417; New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44 L. ed. 96.

c. Liability for Special Taxes and Local Assessments.

1. **In General.**—The authorities relative to the question whether land owned by the public is exempt from local assessments are not entirely harmonious. The weight of authority, as will be shown in the following subdivisions of this section, is to the effect that such lands are not exempt. The matter, however, is often regulated by statute.

In Higgins v. City of Chicago, 18 Ill. 276, the court said: "The assessment of public taxes, or special assessments for public improvements, upon the public property of the state, county or municipal corporations, is a mere question of policy. The power exists to make it bear its share of the one or other. It may be exempted from the one and subjected to the other: Canal Trustees v. City of Chicago, 12 Ill. 405; Ross v. Mayor of New York, 3 Wend. 335.

"The language authorizing an assessment on property for benefits from laying or extending streets (Charter, cap. 6, sec. 2) is very broad and comprehensive, and no reason is apparent why the public square may not receive a due share of the benefit with any other realty on the same street. The corporation of the city or the county may, if not specially exempted, justly pay a part of the assessments proportionate to the benefits conferred by the improvements. Such mode of apportioning the burden is very just and reasonable, for under it alone many taxpayers will contribute a share for the benefits bestowed on their property in common who otherwise would pay nothing, and yet enjoy the enhanced benefits resulting from the improvement."

But some courts are reluctant to sustain local assessments upon public property unless the authority to make the same is clearly expressed in some statutory enactment: State v. City of Hartford, 50 Conn. 89, 47 Am. Rep. 622; Polk Co. Sav. Bank v. State, 69 Iowa, 24, 28 N. W. 416; Mt. Vernon v. People, 147 Ill. 359, 35 N. E. 533, 23 L. R. A. 807; Worcester Co. v. Worcester, 116 Mass. 193, 17 Am. Rep. 159; Big Rapids v. Mecosta Co., 99 Mich. 351, 58 N. W. 358.

The supreme court of Georgia, in discussing this subject, in City of La Grange v. Troup Co., 132 Ga. 384, 64 S. E. 267, said: "There is no express provision in the charter of the city that public property shall be subject to the assessment provided for, nor is there any provision in the charter excepting public property from the operation of such assessment. When a city is given authority to assess abutting property for a part of the cost of street improvements, and nothing is said as to whether or not public property is or is not excepted, there is much conflict in the authorities of other jurisdictions as to whether or not such public property can be lawfully assessed for a pro rata part of the cost of such improvements: 28 Cyc. 1117; 25 Am. & Eng. Ency. of Law, 1187; 1 Page & Jones on Taxation by Assessment, sec. 582; Elliott on Roads and Streets, sec. 550. We think the better view is that where general power is given a municipality to levy local assessments upon the property

benefited by street improvements, and there is no provision clearly showing that public property shall be subject to such assessment, there is an implied exception in favor of its exemption. The municipality cannot assess abutting public property unless the power to levy such assessment is clearly given. This view is supported by many authorities cited in connection with the text employed by the authorities above referred to. While the question may not have heretofore been directly before this court for decision, in the case of City of Atlanta v. First Methodist Church, 86 Ga. 730, 13 S. E. 252, 12 L. R. A. 852, it was recognized in the discussion of the subject found on page 736 et seq. of 86 Ga., and the view which we entertain as constituting the true rule of law is there expressed by Chief Justice Bleckley. In Elliott on Roads and Streets, section 550, the following language is used: 'Public property held for governmental purposes, as a courthouse, cannot be sold to pay an assessment levied for the improvement of a street unless a sale is expressly authorized by the statute, nor will such property ordinarily be deemed within the general words of a statute delegating, in general terms, the authority to levy local assessments. Statutes conferring a general authority to assess are usually construed as operating upon property subject to legal process, and not upon property held for governmental purposes by the state or any of the local instrumentalities of government.'

"In view of the provisions of the act creating a charter for the city of La Grange (Acts 1901, p. 477), giving power to make assessments against abutting property for street improvements, we think public property is not, under such act, liable to assessment. The only provision for the collection of such assessment is the sale at public outcry of the property assessed. It is provided in the act referred to that such sale shall vest absolute title in the purchaser, and that the city marshal 'shall have authority to eject occupants and to put purchasers in possession.' We do not think it was intended that such provision should apply to the property on which is situated the courthouse and jail of the county."

In Missouri the court declared that while it is competent for the law-making power to include public property belonging to a city or county within an assessment for a local improvement, such property is not included except by express enactment or clear implication: St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298.

In a leading case in Massachusetts the exemption from such local assessments was based on the same general grounds which are urged against the taxation of such public property. The court, however, laid great stress upon the necessity for the property to be used for public purposes. The court said: "The immunity of these estates from taxation depends, however, in our opinion, upon other grounds than that of a statute exemption, and extends to taxation not only for general public purposes, but for local improvements of a public nature. Without regard to the statute exemption, property appropriated to public uses, as by the railroads, has been repeatedly held

not to be subject to taxation in this commonwealth: Worcester v. Western R. R., 4 Met. 564, 567; Boston & Maine R. R. v. Cambridge, 8 Cush. 237; Wayland v. County Commrs., 4 Gray, 500; Charlestown v. County Commrs., 1 Allen, 199.

"Although taxation in the cases referred to was for general public purposes, and we find no case where the exemption has been extended to assessments like the present, yet the property treated in them as appropriated to public use was not so essentially public in its character, nor so strictly appropriated to public use, as the real estate of these petitioners. The works constructed by a railroad corporation, for instance, and held under its charter, are to a certain extent public works, intended for public use, and under the control of the public, but their management, subject to such control, is in the hands of a private corporation, the property is that of such corporation, and the private rights therein are of great importance. The property held by the petitioners is strictly public, paid for from the public funds, managed by the public authorities, devoted to public purposes, and no private person has any rights or authority therein": Worcester County v. Worcester, 116 Mass. 193, 17 Am. Rep. 159.

Inasmuch as some courts appear to draw some distinctions as to whether the property is owned by the state or a municipality in determining its liability for an assessment, we will discuss the cases with reference to such ownership of the public property. We will in another subdivision consider the effect of the use to which the land is put on its liability for both taxes and assessments for local improvements.

2. **Effect of Want of Authority to Sell the Property by Tax Sale.** Some courts, in assigning reasons for holding that public property is not liable for an assessment for local improvements, lay great stress upon the point that under statutory provisions existing in that particular state public property cannot be sold except under certain limitations and restrictions, and that no provision is expressly made for the sale of public property as an enforcement for the nonpayment of such an assessment. It is contended that the court cannot provide a remedy, and must conclude that the legislature did not intend public property to be affected by the general act under which the assessment was made in the absence of the property of the public being expressly mentioned.

Thus it was said in Worcester Co. v. Worcester, 116 Mass. 193, 17 Am. Rep. 159, that: "The mode provided for the enforcement of the assessment under the Statutes of 1867, chapter 106, certainly leads to the conclusion that it was not contemplated that it could be applied to property like this of the petitioners. Where wholly new powers are given, they are to be enforced as the statute giving them provides, and the remedy given thereby is exclusive of every other: Roxbury v. Nickerson, 114 Mass. 544; West Roxbury v. Minot, 114 Mass. 546. The only remedy given for the collection of this assessment is by means of the lien created upon the estate assessed,

which must be enforced by a sale thereof. We do not think that it was the intent of the legislature to subject estates like these of the petitioners to such a remedy, when its enforcement might operate to deprive them of the very instrumentalities by which they were able to perform the duties imposed upon them, and might be attended with serious inconvenience or positive injury to the administration of justice in the commonwealth."

A similar reason was given very great weight in the case of La Grange v. Troup Co., 132 Ga. 384, 64 S. E. 267, the court saying: "If the property on which the courthouse and jail are located be subject to such local assessments, to strictly enforce the only provisions of the act providing for the collection thereof would require a levy on and sale of the public property and an eviction of the occupants thereof, and would deprive the county of the instrumentalities by means of which, through its officers, it is enabled to perform the functions of government. To levy upon and sell the courthouse and jail would be to allow the municipality to invade the power and authority of the county, and seriously interfere with its governmental operations and the administration of justice. We think a power of such far-reaching consequences is not to be inferred from a general act; but to entitle a municipality to its exercise, it would have to be clearly granted by the legislature, if it could be granted at all by it, and we do not think that the charter of La Grange, giving power generally to assess abutting property for local street improvements, gives it the power to collect from the county any part of the costs of such improvements."

Perhaps the strongest argument along these lines is that to be found in City of Clinton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494. The court said: "But there are other considerations not to be overlooked in seeking for the intention of the legislature. In the first place, property owned by a county or other municipal corporation and used for public purposes cannot be sold on execution. It is against public policy to permit such property to be sold; for the effect of a sale would be the destruction of the means provided by law for carrying on the government: 2 Dillon on Municipal Corporations, 4th ed., secs. 576, 577; Freeman on Executions, 2d ed., sec. 126. And section 2344 of the Revised Statutes of 1879 is declaratory of the same principle. Hence it has been held that a schoolhouse cannot be sold under a judgment against the board of education: State v. Tiedemann, 69 Mo. 306, 33 Am. Rep. 498. It is indeed clearly and distinctly admitted by the plaintiffs that this courthouse property cannot be sold to satisfy these assessments. The plaintiffs do not pray for a judgment enforcing the lien, the remedy, and only remedy, given by the statutes, but they ask a general judgment against the county.

"In the next place, it is a general rule of law that where, as here, the statute creates a new right and prescribes a remedy, the statutory remedy is exclusive: Endlich on Interpretation of Statutes, sec. 154. And the principle applies to the collection of these local assessments:

Roxbury v. Nickerson, 114 Mass. 544; West Roxbury v. Minot, 114 Mass. 546; Worcester Co. v. Mayor etc., 116 Mass. 193, 17 Am. Rep. 159; Edgerton v. Huntington School Tp., 126 Ind. 261, 26 N. E. 156. It was held in the case of St. Louis v. Clemens, 36 Mo. 467, under a law making tax bills a lien on the property assessed, and providing that the contractor might collect the tax bills by 'ordinary process of law,' that the proceeding was one in personam, and that the contractor was entitled to a general judgment to be enforced by a general execution. But that case was overruled by the subsequent cases of Neenan v. Smith, 50 Mo. 525, and St. Louis v. Allen, 53 Mo. 44. These cases hold that local assessments can be upheld alone on the ground of compensation in benefits to the particular property assessed, and in view of which it was held that the words 'ordinary process of law' meant such process as was adapted to the enforcement of the lien. The case last cited goes much further, and holds distinctly that a law attempting to authorize a general judgment over against the property owner on a special tax bill would be unconstitutional and void. Since the ruling made in those cases it has been repeatedly held that the judgment must be, and can only be, one enforcing the lien against the particular property. Such is the settled law of this state: Carlin v. Cavender, 56 Mo. 286; St. Louis v. Bressler, 56 Mo. 350; Seibert v. Copp, 62 Mo. 182; Louisiana v. Miller, 66 Mo. 467; Higgins v. Ausmuss, 77 Mo. 351.

"According to these adjudications, proceedings to enforce special tax bills are in the nature of proceedings in rem, and compulsory payment of the judgment can only be by a sale of the assessed property. As public property like that here in question cannot be sold on general or special execution, and as the legislature has provided no other remedy than that of enforcement of the lien, it is quite evident that the statute in question does not apply to or include property owned by a county and used for governmental purposes.

"It is true the cases last cited were all suits against private property owners; and as it is within the power of the legislature to make property devoted to public uses liable for local assessments, and as it is contrary to public policy to permit public property to be sold, we may and do concede that the legislature can provide for the payment of local assessments against public property out of the general treasury. Such a provision would doubtless be sufficient to show an intent to make such property liable for these assessments; but the legislature has made no such provision. The argument, therefore, that the courts can devise a remedy where there is a right does not meet the issue in this case; for the real question is, whether the city had the power or right to levy the assessments upon public property, and we are unable to find any evidence of such a legislative intent."

Similar views have also been expressed by other courts: State v. City of Hartford, 50 Conn. 89, 47 Am. Rep. 622; Baltimore Co. v. Maryland Hospital for the Insane, 62 Md. 127.

But other courts of equal respectability take a contrary view and declare that the fact there is no method under the law by means of which the public property can be sold to enforce the collection of the assessment is no reason why the right to make it should be denied, for there are other methods provided by law by which the payment may be enforced in case the public body owning the property refuses to pay the assessment. The payment in most states may be enforced by a judicial proceeding or a direct payment from the public treasury: McLean Co. v. Bloomington, 106 Ill. 209; Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580; Franklin Co. v. City of Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; Paine v. Spratley, 5 Kan. 525; Leavenworth v. Laing, 6 Kan. 274; Hassan v. Rochester, 67 N. Y. 528; In re Vacation of Howard Street, 142 Pa. 601, 21 Atl. 974.

In one of the leading cases on this subject the court, after adverting to the great injustice on private land owners in exempting the state from liability for assessments for local improvements, said: "Although the state cannot be made a party to an action to enforce such a claim and be sued in its sovereign capacity, it may be assumed that the state will provide means for the liquidation of assessments imposed by virtue of laws enacted by its legislature, and that, as has been frequently done heretofore, appropriations will be made for that purpose": Hassan v. Rochester, 67 N. Y. 528.

So, also, in Franklin Co. v. Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788, the court very pertinently observed: "A courthouse cannot be sold or disposed of under tax proceedings or at forced sale for special assessments or taxes levied upon the ground thereof. Such grounds are for the uses and purposes of the public, and are essential to the administration of the executive and judicial duties of the county and state, and therefore are not subject to sale for taxes or upon judgments rendered against a county. Perhaps it ought to be assumed when a special assessment is made in accordance with the provisions of the statute for the opening or improvement of a public street, that the officials of the county would allow and provide for the payment of the same without any action or other legal proceedings being necessary. It is presumed that the sovereign or state will do no wrong. If a county, however, refuses to pay the special assessments or taxes legally levied against its property, as such property, on account of the public uses to which it is applied, cannot be sold at a tax or other forced sale, there is no impropriety, after the claim is disallowed, in permitting the district court on appeal to adjust the amount thereof. The judgment can then be paid as other judgments against a county: Gen. Stats. 1889, par. 1618. Such rule, it seems to us, will be beneficial to all concerned, will work no hardship upon anyone, and permit the streets and sidewalks around public grounds to be improved and repaired as the statute prescribes, and in an equitable manner: Cooley on Taxation, 572, 573; Hassan v. Rochester, 67 N. Y. 528; McLean Co. v. Bloom-

ington, 106 Ill. 209; Adams Co. v. Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155. The Illinois cases are very much to the point."

A municipality in paying an assessment for a local improvement pays it as the agent of the entire body of its citizens who are assumed to have been benefited to that extent: Charnock v. Fordoche etc. Levee Dist., 38 La. Ann. 323; New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44 L. ed. 96.

The assessment should be paid out of the public treasury and not enforced by a sale of the public property. But if payment is not made, mandamus will lie to compel it: McLean Co. v. Bloomington, 106 Ill. 209.

It seems to us that in view of the fact that an assessment for a local improvement is regarded as compensation for a benefit to the property assessed, that a law which imposes the payment of the portion of the benefit to public property upon the contiguous private owners is in effect taking their property without due process of law, inasmuch as it makes them pay for a benefit shared in by all the citizens of the political subdivision owning the property.

3. **Rule as Applied to Lands of the United States.**—The question whether property of the United States is subject to assessment for local improvements is one which apparently has not been before the courts very frequently. It is quite likely that such property would be exempt from such assessments by reason of the compacts made by the states with the federal government upon the states being admitted into the Union.

The question, however, arose directly in the case of Fagan v. Chicago, 84 Ill. 227, where it was sought to assess for local improvements land used by the federal government as a postoffice and custom-house. The court, in refusing to sustain the assessment, said: "We apprehend that no rule is more uniformly recognized than that property of government is never taxed, unless expressly required by statute. It would only be to pay money from the treasury to be returned thereto. It could be of no kind of benefit. It would be entirely useless, and hence the government never requires such an act to be performed. Nor under our system of government can the states tax the general government, its agents or property, nor can the general government tax the states, their agents or property: See McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborne v. Bank of the United States, 9 Wheat. 738, 6 L. ed. 204. In these cases it was held that the states have no power to tax the instrumentalities of the general government employed in the performance of its proper functions.

"In the case of Dobbins v. Commissioners of Erie Co., 16 Pet. 447, 10 L. ed. 1022, it was held that there was a limitation on the taxing power of a state, which prohibits it from taxing the instruments, emoluments and persons which the United States may use and employ as necessary and proper means to the exercise of their sovereign power. Now, this block of ground is used and employed by the general government for a custom-house, postoffice, etc., or in erecting

buildings for that purpose. Now, custom-houses, postoffices and court-houses are necessary instrumentalities, and are proper means to be employed by the general government in executing its sovereign power. This land was purchased by them for the purpose, and the state legislature gave their consent that it might be so used, and ceded to the United States jurisdiction over the same. This is, then, in its fullest sense, one of the instrumentalities employed by that government in the proper exercise of its sovereign power, and falls within the principle of those decisions. The case of Nathan v. Louisiana, 8 How. 82, announces the same doctrine. This property, then, could not be taxed or assessed by the state.

"But it may be said that this is not strictly a tax, but is a requirement on the owner simply to pay the amount that his property is increased in value by the improvement, and does not operate as a burden on the property. We are aware that such is the theory of these assessments, and that they differ materially from taxes; but it does not, therefore, follow that public property may be assessed. A municipal corporation has no power to assess or exact from the state or the general government any sum for benefits conferred. The power to levy taxes or impose assessments for benefits can only be exercised on the governed, and not on the governing power, whether state or federal. Nor does a fair construction of the statute authorizing these assessments contemplate the exercise of such a power. The whole statute manifestly applies to individuals and individual property. It refers to persons alone, and not to either the state or general government; and it is a familiar rule of interpretation that a law which refers to inferiors is never applied to superiors. Again, all grants are taken most favorably to the government or the public. Hence, when the power was granted to these municipal governments to make such assessments, it would not be a favorable construction to the government to hold that the assessment might be imposed on government property. Such a power cannot be implied, but can only be exercised when expressly granted. No such power was expressly granted in this statute, and hence there is no pretense for its exercise, and this block was not liable to such an assessment, and there was no error in holding it was exempt."

The question also arose in a California case, and the court held the land of the United States was not liable for a local assessment. The court said: "The argument is that though the land of the United States, or of the states, or of a municipal corporation, may be exempt from taxation for revenue purposes, they are not necessarily exempt from assessment for local improvements, and that within the district to be benefited the same rule of equality and uniformity which governs taxation for revenue applies to assessments. Whilst it may safely be conceded that all laws of a general nature are required by the constitution to have an equal and uniform operation upon all persons and property on which they operate at all, it does not therefore result that the property of the federal or state governments, or even of a municipal corporation, which is but a local subdivision of

the state government, must necessarily be liable to assessment for a local improvement equally with private property within the district to be benefited. It is well settled in this state and elsewhere that the property of the United States, or of the state, or of a municipal corporation, is not subject to taxation for revenue purposes: People v. McCreery, 34 Cal. 432; People v. Shearer, 30 Cal. 645; Fall v. Marysville, 19 Cal. 391; Low v. Lewis, 46 Cal. 549.

"A tax 'is a charge levied by the sovereign power upon the property of its subjects. It is not a charge upon its own property, nor upon property over which it has no dominion': People v. McCreery, 34 Cal. 432. The power of assessment is but a portion of the powers of taxation, and if the sovereign cannot tax its own property for general revenue purposes, it cannot be doubted that it may exempt it from assessment or taxation in any form. The rule of equality and uniformity cannot be more stringent in respect to local than to general taxation, and if it has no application in the latter case to the property of the sovereign, it can have none in the former. The exemptions from assessment of the property specified in subdivision 14, section 4 of the act, do not, therefore, render the act void, or the assessment illegal": People v. Austin, 47 Cal. 353.

Although the California decision is doubtless correct in view of the provisions of the act of Congress admitting California into the Union, and of the constitutional provisions of that state, still the reasoning of that court in the case cited is not satisfactory if it be deemed that a distinction exists between general taxes and local assessments to the effect that the latter are mere compensation for the benefits accruing to the land assessed.

There is dicta to be found in several cases to the effect that lands of the United States cannot be subjected to local assessments: San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33; Edwards etc. Const. Co. v. Jasper Co., 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006. While in a Maryland case there is a dictum to the effect that though such lands are exempt from taxation, they are not exempt from liability for local assessments: Baltimore v. Green Mt. Cemetery, 7 Md. 517. The case of Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670, 29 L. ed. 845, though involving the question of general taxation of property of the United States, is interesting in this connection.

In the absence of organic acts of the United States and state constitutional provisions exempting the lands of the United States from local assessments, we see no logical reason why land of the United States not used for governmental or public purposes should be exempt from such local assessments, since the United States in its proprietorship of such lands holds them as any private individual holds lands.

4. **Rule as Applied to Lands of the State.**—A stricter rule is observed in respect to holding the state liable for local assessments than is followed in respect to cities, villages and counties. The latter are mere agencies of the state through which local government is conveniently administered, and the state may authorize property

held by one of its agencies to be burdened with a charge for a benefit to another of its agencies to the extent of the benefits received. Under a constitutional provision declaring that "the state of Illinois shall never be made defendant in any court of law or equity," the property of the state has been held exempt from a local assessment, since the assessment cannot be made without in effect making the state a party to a proceeding at which the party assessed is allowed an opportunity to be heard: City of Mt. Vernon v. People, 147 Ill. 359, 35 N. E. 533, 23 L. R. A. 807. This distinction is also remarked upon in Edwards etc. Const. Co. v. Jasper Co., 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006.

Lands of the state are not exempt from assessments for local improvements unless made so by special statutory provisions, even though the legislature has exempted such lands from general state and county taxes: Hassan v. Rochester, 67 N. Y. 528. The state may, however, exempt its own property from assessments for local improvements: People v. Austin, 47 Cal. 353. But courts of great respectability have declared that property of the state is not liable to an assessment for local improvements in the absence of a statute authorizing the imposition of such assessment. And where the language of the statute authorizing the assessment does not clearly authorize it, its imposition has been refused: State v. Hartford, 50 Conn. 89, 47 Am. Rep. 622; Polk Co. Sav. Bank v. State, 69 Iowa, 24, 28 N. W. 416; Louisville v. McNaughten, 19 Ky. Law Rep. 1695, 44 S. W. 380; Baltimore Co. v. Maryland Hospital for the Insane, 62 Md. 127. The principle upon which these decisions are based is stated in State v. Kilburn, 81 Conn. 9, 129 Am. St. Rep. 205, 69 Atl. 1028, as follows: "The city could not, without the permission of the state, assess benefits against it as the owner of land benefited by a public improvement. General expressions granting it liberty to assess all persons specially benefited would not import such permission. The state holds the immunities in this respect belonging by the English common law to the king. It is not to be sued without its consent. Its rights are not to be diminished by statute, unless a clear intention to that effect on the part of the legislature is disclosed by the use of express terms or by force of a necessary implication: State v. Hartford, 50 Conn. 89, 47 Am. Rep. 622."

It is within the power of the legislature to make public property devoted to a public use liable for local assessments. But general language in a statute giving cities power to levy local assessments is not sufficient to embrace property of the state which is devoted to strictly public uses: City of Clinton v. Henry Co., 115 Me. 557, 37 Am. St. Rep. 415, 22 S. W. 494.

An important consideration in the determination of whether lands of the state are exempt from local assessments is whether they are used for governmental and public uses or whether they are merely used by the state as a private corporation or individual would use them. Inasmuch as this phase of the subject must be considered

in connection with the taxation of lands of other political bodies, we will discuss that phase of the subject in a separate subdivision.

5. **Rule as Applied to Lands of Counties and Cities.**—We do not believe that the reasons for exempting property of the state from general taxation apply to the imposition of assessments for local improvements, and especially so in the case of property owned by a county or other like body, which is not used for a governmental or public use. Hence we believe that an exemption from such assessments must arise from statutory provisions. The gist of the reasons why such assessments should be imposed was very tersely and cogently stated by Mr. Justice Deemer in Edwards etc. Const. Co. v. Jasper Co., 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006, in a very able opinion in which he reviewed the authorities pro and con on the subject. The learned justice said: "While authority to levy such assessments is traceable to the taxing power, they are nevertheless assessed on the theory that the property against which they are levied is benefited thereby to the extent of the levy, and the municipality acts as an agent, merely, in collecting the tax. The district improved is never coextensive with the county or city, and it is not true that in paying the assessment the county must raise money to pay over to itself, and that no one would be benefited but the officers employed in the collection of the tax. There is no reason why the county, the city, or the school district should not pay for the benefits received by it the same as any other property owner. Of course, their property may not be sold, but there is no reason why the amount of the tax should not be paid out of the treasuries of these institutions; and if the governing bodies fail to make payment, mandamus will lie to compel them to do so. Counties and cities are bodies corporate, may sue and be sued, may acquire and hold property, and make all contracts for the control, management and improvement of the same. Reduced to its last analysis, the question is one of power in the city to levy the assessment against the county property. The statute giving the power is broad enough to cover lots or land owned by municipal or quasi-municipal corporations, and, if there be any exemption, it is to be implied, unless we hold with those courts which say that county or state property is not to be included unless expressly mentioned, or by necessary implication inferred. We are not disposed to apply this last-mentioned rule in construing our statutes. Such property is expressly exempted from general taxation, but no such exemption is made from special assessments. Even without a statute, property devoted to governmental use would not, in the absence of express authority, be taxed, and the fact that it is expressly exempted in one case and not in the other is strong evidence that the legislature did not intend to exempt it from special assessments. There are certain implied exemptions because of the nature of the proceedings. Property held by the United States or by the state itself cannot be made liable for two reasons: 1. Because it cannot be sold on execution, nor may any lien be created against it; and 2. Because neither the state nor the United

States can be sued, nor may judgments be enforced against either. But one of these reasons applies to county property. While its property cannot be sold on execution, it may sue and judgments may be enforced against it, the same as against an individual, and these judgments, when rendered, may be enforced by mandamus." In adverting to the several theories followed by the courts on this subject, the justice, in the fore part of his opinion, said: "So much may be said in favor of either contention made by the parties that, as usual, the adjudicated cases are in direct and irreconcilable conflict, and it is useless to try to harmonize them. One line proceeds upon the theory that under statutes similar to our own, all property abutting upon the streets or alleys, and all owners of property, are subject to special assessments; that taxation is the rule and exemption the exception, and that an exemption statute should be strictly construed; that while the property of a municipal corporation cannot be sold under execution, or a lien declared against it, yet the tax is a personal charge against the owner, which may be enforced by mandamus or other appropriate remedies. The following are of that class: City of Sioux City v. Independent School Dist. of Sioux City, 55 Iowa, 150, 7 N. W. 488; McLean Co. v. City of Bloomington, 106 Ill. 209; City of New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44 L. ed. 96; Adams Co. v. City of Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; Franklin Co. Commrs. v. City of Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; St. Louis Public Schools v. City of St. Louis, 26 Mo. 468; Hassan v. City of Rochester, 67 N. Y. 528; In re Vacation of Howard St., 142 Pa. 601, 21 Atl. 974. The other line of cases hold, in effect, that public property used for governmental purposes, as a courthouse, will not ordinarily be deemed within the words of a statute delegating in general terms authority to levy local assessments; that statutes conferring general authority to assess should be construed as operating upon property subject to legal process, and not upon property held for governmental purposes by the state or any of the local instrumentalities of government; and that without a statute granting the right to make such assessments, either expressly or by necessary implication, that right does not exist: See Lowe v. Board of Commrs., 94 Ind. 553; Edgerton v. School Tp., 126 Ind. 26, 26 N. E. 156; Worcester Agricultural Soc. v. Mayor etc. of City of Worcester, 116 Mass. 189; Leonard v. City of Brooklyn, 71 N. Y. 498, 27 Am. Rep. 80; Polk County Sav. Bank v. State, 69 Iowa, 24, 28 N. W. 416; City of Leavenworth v. Laing, 6 Kan. 274; City of Big Rapids v. Board of Supervisors of Mecosta Co., 99 Mich. 351, 58 N. W. 358; Board of Improvement v. School Dist. of Little Rock, 56 Ark. 354, 35 Am. St. Rep. 108, 19 S. W. 969, 16 L. R. A. 418; Baltimore Co. Commrs. v. Board of Managers of Maryland Hospital for Insane, 62 Md. 127; State v. City of Hartford, 50 Conn. 89, 47 Am. Rep. 622; City of Toledo v. Board of Education, 48 Ohio St. 83, 26 N. E. 403; City of Rochester v. Town of Rush, 80 N. Y. 302; People v. Doe G. 1034, 36 Cal. 220; City of Nashville v. Smith, 86 Tenn. 213, 6 S. W. 273;

Harris v. Boyd, 70 Tex. 237, 7 S. W. 713; Fagan v. City of Chicago, 84 Ill. 227; Piper v. Singer, 4 Serg. & R. 354; People v. Board of Assessors, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; City of Camden v. Camden Village Corp., 77 Me. 530, 1 Atl. 689; City of Hartford v. West Middle Dist., 45 Conn. 462, 29 Am. Rep. 687; Trustees for Support of Public Schools v. Inhabitants of City of Trenton, 30 N. J. Eq. 667; Green v. Hotaling, 44 N. J. L. 347; Witter v. School Dist., 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905; City of Clinton v. Henry Co., 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494. It is true that in many of these cases the precise question was not involved, although expressions are to be found therein which support appellee's contention."

In Michigan it is held that there is an implied exemption where public property is owned and used by the entire county for public purposes only. That whenever the taxing power seeks to impose a tax upon such property it must be able to point to legislative or constitutional authority: Big Rapids v. Mecosta Co., 99 Mich. 351, 58 N. W. 358. The matter is one which is largely regulated by statutory provisions. And where the statute authorizing the levying of assessments provided for the payment by the city of the cost of the improvements in front of "real estate not subject to assessment or special taxes," it was held that county property was exempt from an assessment: Van Steen v. City of Beatrice, 36 Neb. 421, 54 N. W. 677. And under a general power to assess abutting property for street improvements, it has been declared that in the absence of any provision clearly showing that public property shall be subject to such assessment, there is an implied exception in favor of the exemption of county property: La Grange v. Troup Co., 132 Ga. 384, 64 S. E. 267. In a Texas case a local assessment against a county courthouse was refused on several grounds, namely, that in lands held for a public use the increased value from the improvement could not apply as in the case of individuals, that the city was foisting a debt upon the county without its sanction, and that the purposes of exempting from general taxation obtain equally as against special assessments and that the inhibition against the sale of public property negatived the power to assess: Harris v. Boyd, 70 Tex. 237, 7 S. W. 713.

The objections of the Texas court are, however, well met by the opinion of the Kansas supreme court in Franklin Co. v. City of Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788, a case arising under perhaps typical statutory conditions. In that case the power to impose assessments for local improvements was stated in general terms without exempting courthouses or other public grounds. The court said: "Streets and sidewalks in front of or around a courthouse square or other public ground should be kept in as safe condition by the city as other streets and sidewalks. It is not just that the other abutting lot owners pay the special assessments intended to improve or benefit the courthouse square. It is certainly unfair that the taxpayers of the city should pay for all the special

improvements beneficial to the courthouse square, when all the taxpayers of the county are equally interested therein.

"It is said by Judge Cooley that 'it is no objection to an assessment for a local work that the property assessed is used for a purpose that will not be specially advanced by the improvement; as, for instance, that it is dedicated to the purposes of sepulture, or is occupied by a building erected for the purposes of public worship, or is devoted to school or charitable purposes, or constitutes the track of a railroad, or is put to any use to which the market value of the property is unimportant. There is nothing necessarily permanent in any present use; not sufficiently so, at least, to give it a controlling influence in determining principles of taxation. Even public property is often subjected to these special assessments; there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under eminent domain': Cooley on Taxation, sec. 458; St. Louis Public Schools v. St. Louis, 26 Mo. 468. We do not think that the phrase in paragraph 790, General Statutes of 1889, concerning 'the taxable property chargeable therewith,' restricts a city from levying special assessments or taxes upon public grounds, because, if construed as is claimed by counsel for Franklin county, then all the property used exclusively for literary, educational, scientific, religious, benevolent, and charitable purposes will also be exempt from the levy or payment of special assessments or taxes. This is contrary to the general view held by the profession, and is opposed to the practice prevailing in the cities. While such property is exempt from taxation under section 1, article 11 of the constitution, it is not exempt from special assessment or taxes for the improvement of streets or sidewalks. The serious difficulty in this case is as to the manner of collecting the special assessment. We held in the case of Board of Commissioners of Stafford Co. v. First Nat. Bank of Stafford, 48 Kan. 561, 30 Pac. 22, that, as the statute makes special provision for the collection of taxes, they are not a debt in the ordinary sense of the term, and consequently an action will not lie for their recovery. We have no inclination to change that ruling. A courthouse cannot be sold or disposed of under tax proceedings or at forced sale for special assessments or taxes levied upon the ground thereof. Such grounds are for the uses and purposes of the public, and are essential to the administration of the executive and judicial duties of the county and state, and therefore are not subject to sale for taxes, or upon judgments rendered against a county. Perhaps it ought to be assumed when a special assessment is made in accordance with the provisions of the statute for the opening or improvement of a public street, that the officials of the county would allow and provide for the payment of the same without any action or other legal proceedings being necessary. It is presumed that the sovereign or state will do no wrong. If a county, however, refuses to pay the special assessments or taxes legally levied against its property, as such property, on account of the public uses to which it is applied,

cannot be sold at a tax or other forced sale, there is no impropriety, after the claim is disallowed, in permitting the district court, on appeal, to adjust the amount thereof. The judgment can then be paid as other judgments against a county: Gen. Stats. 1889, par. 1618. Such rule, it seems to us, will be beneficial to all concerned, will work no hardship upon anyone, and permit the streets and sidewalks around public grounds to be improved and repaired as the statute prescribes, and in an equitable manner: Cooley on Taxation, 572, 573; Hassan v. City of Rochester, 67 N. Y. 528; McLean v. Bloomington, 106 Ill. 209; Adams Co. v. City of Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155."

The same general reasons naturally apply to an assessment imposed upon property belonging to a city as apply to lands belonging to a county. Land belonging to cities have frequently been assessed for local improvements. Sometimes, however, the assessment has been entered against the city in the shape of a general judgment under the authority of the statute authorizing the assessment: Scammon v. Chicago, 42 Ill. 192; Correjolles v. Foucher, 26 La. Ann. 362; Barber Asphalt Pav. Co. v. St. Joseph, 183 Mo. 451, 82 S. W. 64; Ross v. New York, 3 Wend. 333; People v. Syracuse, 63 N. Y. 291; People v. Reis, 109 App. Div. 748, 96 N. Y. Supp. 597; Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545; New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44 L. ed. 96. In New Jersey it was declared that property of a city used for public purposes is not subject to a local assessment in the absence of language in the statute indicating an intention to assess it: Green v. Hotaling, 44 N. J. L. 347, affirmed in 46 N. J. L. 207.

6. **Rule as Applied to Public School Lands.**—The same conflict of authority exists in respect to the liability of school property for local assessments as is found in respect to property owned by other governmental bodies. The line of demarkation of these authorities is well shown by the court in the case of In re Howard Ave. North, 44 Wash. 62, 120 Am. St. Rep. 973, 86 Pac. 1117, 12 Ann. Cas. 417, which involved an assessment against a school district for the widening and extending of a street. The court said: "The respondent contends that no express exception having been made, appellant's property is liable. Appellant contends that, as the statute does not in so many words direct that public school property shall be assessed, authority to make an assessment does not exist, nor can it be implied. Well-considered cases have been cited in the briefs supporting each of these contentions, there being an irreconcilable conflict of authority. Appellant, in support of its position, has cited, with others, the following cases: Pittsburgh v. Sterrett Subdistrict School, 204 Pa. 635, 54 Atl. 463, 61 L. R. A. 183; Clinton v. Henry Co., 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; Sutton v. School of Montpelier, 28 Ind. App. 315, 62 N. E. 710; Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625; Witter v. Mission School Dist., 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905; Harris Co. v. Boyd, 70 Tex. 327, 7 S. W. 713.

"The respondent cites, with others, the following cases: Commissioners of Franklin Co. v. Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; Edwards & Walsh Const. Co. v. Jasper Co., 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006; Higgins v. Chicago, 18 Ill. 276; Scammon v. Chicago, 42 Ill. 192; County of McLean v. Bloomington, 106 Ill. 209; Adams Co. v. Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; Sioux City v. Independent School Dist., 55 Iowa, 150, 7 N. W. 488; Harson v. Rochester, 67 N. Y. 528.

"Our view is that the authorities cited by the respondent are the best founded in reason. We think that said eminent domain act, under which the city authorities have proceeded, must be held to impose upon the commissioners a legal duty to assess the property of the appellant in proportion to the benefits received. There is no contention that the lots have been improperly included within the assessment district, or that they have not been specially benefited by the improvement. Had the legislature in enacting the law of 1893 intended to exempt public school property from its just proportion of the burdens of said special assessment, it is only reasonable to assume that such intention would have been expressly declared in the words of the statute. An exemption of any portion of the benefited property located within the assessment district would necessarily cause an increased burden to be imposed upon other benefited property located therein, and in view of this result we should refrain from adopting a construction of the statute which would relieve appellant's property, especially when there is no good reason for holding that such an exemption was intended by the legislature."

Sometimes it is contended that a local assessment directed against school property is in fact one directed against the state, but this contention was decided against in Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580, the court holding that the board of education of Chicago merely held such property in trust for the use of the schools of that city, and any interest which the people may have had in the property was confined to the people of that city. The court also declared that street improvements were of great benefit, if not of actual necessity, to school property, and that special assessments for that purpose was but a method of applying the funds of the school district for the benefit of the schools.

In Kentucky, however, an assessment for the construction of a street was refused on the ground that under the state constitution the fund to maintain the school system could be appropriated to "no other purpose": Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625. And in Montana the court refused to sustain an assessment against a school district for street sprinkling on the ground that it did not materially enhance the value of the property for educational purposes, and did not justify an invasion of the school fund, which was required to be held inviolate and used for educational purposes alone. The court, though intimating that some local improvements might be of such a beneficial character as to be assessable, remarked: "That

which partakes of the nature of a luxury—is ephemeral in duration and evanescent in character—lasts but a single day and then disappears, and leaves the property in the same condition it was before, is not such an improvement as justifies the expenditure of a school fund, which, the constitution says, 'shall forever remain inviolate'": Butte v. School Dist., 29 Mont. 336, 74 Pac. 869.

In several instances the refusal of the court to sustain the assessment against the school property has been based on the ground that the particular lands were part of the lands granted by the United States in trust for the public schools, and that it would be a violation of that trust under the constitutional provisions requiring the application of the funds of such lands strictly to school purposes: People v. Trustees of Schools etc., 118 Ill. 52, 7 N. E. 262; Edgerton v. School Tp., 126 Ind. 261, 26 N. E. 156; Erickson v. Cass Co., 11 N. D. 494, 92 N. W. 841. But in Illinois in a subsequent case the court held that school property which was no part of the lands donated by the United States for school purposes, and which had not been acquired with funds from that source, was subject to local assessments: Board of Education v. People, 219 Ill. 83, 76 N. E. 75. Assessments against school properties for local improvements have been sustained in other cases also: Sioux City v. Independent School Dist., 55 Iowa, 150, 7 N. W. 488; St. Louis Public Schools v. St. Louis, 26 Mo. 468; State v. Henry, 28 Wash. 38, 68 Pac. 368. But, on the other hand, other courts declare that such assessments are not authorized unless expressly made so by the statute: Board of Improvement v. School Dist., 56 Ark. 354, 35 Am. St. Rep. 108, 19 S. W. 969, 16 L. R. A. 418; Hartford v. West Middle Dist., 45 Conn. 462, 29 Am. Rep. 687; Sutton v. School City of Montpelier, 28 Ind. App. 315, 62 N. E. 710; Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625; Toledo v. Board of Education, 48 Ohio St. 83, 26 N. E. 403; Pittsburgh v. Sterrett Subdistrict School, 204 Pa. 635, 54 Atl. 463, 61 L. R. A. 183. In the case last cited the nonliability of school property for such assessments is based on the theory that they are an exercise of the taxing power of the state, even though imposed on the theory of being compensation for benefits received by the property.

In California, the rule prevails that land belonging to a school district is only liable for an assessment for a street improvement when used for private purposes or held as an investment or for rentals, but that it is not liable if used for school purposes: Witter v. Mission School Dist., 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905.

V. Exemption from Taxes or Assessments as Dependent upon Use Made of the Land.

a. **Whether the Land must be Used for Governmental or Public Purposes.**—Inasmuch as the power to tax involves the power to destroy, it has been regarded as settled that the state has no power to tax lands of the United States regardless of how the title to them was acquired or for what purposes they are held or used by it. It is immaterial whether the property is used as a means or instru-

mentality for the execution of any of the constitutional powers of the federal government: People v. United States, 93 Ill. 30, 34 Am. Rep. 155; McGoon v. Scales, 9 Wall. 23, 19 L. ed. 545; Kansas Pac. Ry. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670, 29 L. ed. 845. In the last-cited case, which is an exhaustive discussion of the foundation of the exemption of the property of the United States from taxation, the court observed: "In short, under a Republican form of government, the whole property of the state is owned and held by the state for public uses, and is not taxable, unless the state which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction. Whether the property of one of the states of the Union is taxable under the laws of that state depends upon the intention of the state as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a state depends upon the will of its owner, the United States, and no state can tax the property of the United States without their consent."

The question whether the nature of the use made by the state of land owned by it has any effect upon its exemption from general taxation does not appear to have arisen. And from the nature of the constitutional and statutory provisions exempting such lands from liability to taxation, the manner of such use would be immaterial. It would likewise be immaterial in the absence of any such provisions because of the basic reason assigned for such exemption, namely, the folly of gathering taxes from itself to pay to itself.

The above question has, however, arisen in connection with the taxation of lands belonging to counties, towns and cities. In numerous instances it has been declared that such lands, in order to be exempt from taxation, must be used for some public purpose: West Hartford v. Board of Water Commrs., 44 Conn. 360; People v. Chicago, 124 Ill. 636, 17 N. E. 56; Callanan v. Wayne Co., 73 Iowa, 709, 36 N. W. 654; Louisville v. Commonwealth, 1 Duvall, 295, 85 Am. Dec. 624; Commonwealth v. Makibben, 90 Ky. 384, 29 Am. St. Rep. 382, 14 S. W. 372; State v. New Orleans, 110 La. 405, 34 South. 582; Camden v. Camden Village Corp., 77 Me. 530, 1 Atl. 689; Wayland v. County Commrs. of Middlesex, 4 Gray, 500; Essex Co. v. Board of Assessors, 153 Mass. 141, 26 N. E. 431; Newark v. Clinton Tp., 49 N. J. L. 370, 8 Atl. 296; Galveston Wharf Co. v. Galveston, 63 Tex. 14.

And exemptions fom assessments for local improvements have been sustained in some instances on the ground that the property was used by the governmental body for public purposes: San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291; Witter v. Mission School Dist., 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905; Worcester Co. v. Worcester, 116 Mass. 193, 17 Am. Rep. 159; Big Rapids v. Mecosta Co. v. Supervisors, 99 Mich. 351, 58 N. W. 358.

In some instances the exemption of municipal lands from taxation is made by statute dependent upon their actual use in the exercise

of municipal functions or public purposes: Sanitary Dist. v. Hanberg, 226 Ill. 480, 80 N. E. 1012; Clark v. Sprague, 113 App. Div. 645, 99 N. Y. Supp. 304; Cincinnati v. Lewis, 66 Ohio St. 49, 63 N. E. 588; Chester Co. v. White, 70 S. C. 433, 50 S. E. 28.

In City Street Imp. Co. v. Regents of University of California, 153 Cal. 776, 96 Pac. 801, 18 L. R. A., N. S., 451, the court in holding land belonging to the state university, not in actual use for school purposes, not exempt from an assessment for a street improvement, said: "The principle is that public policy itself will deny and forbid the application of general laws to property so held in trust for public purposes, as public school buildings, city or county municipal buildings, and the necessary land upon which they stand, because of the grave interference with necessary public functions, governmental or educational, which would thus result. The private right of the individual must give way to the general good of all. But the rules goes no further, and whenever lands, though owned by some public agent or mandatory of the government, school boards, counties or cities, penal or reform institutions, or institutions for the feeble-minded or insane, are not in use in the performance of a public function, such lands, in the absence of a constitutional or legislative restriction (such as we have seen does not exist in this state), are justly compelled to bear their part of the expense, which goes directly to increase their values."

But in Utah land of a municipal corporation, rented by it for pasturage, was held exempt from taxation under a statute exempting "property owned by this territory, or any county, city or school district," on the theory that the statute was clear, and that the city partook of sovereignty, and that the rules exempting sovereigns applied to it: Springville v. Johnson, 10 Utah, 351, 37 Pac. 577.

Though property may be devoted to a public use, it is not necessarily devoted to a governmental use. Land on which a state capitol is situated is exempt from local assessments on the ground of being devoted to a governmental use. Land used for school purposes though devoted to a public use is not used for governmental purposes, and hence is liable to such an assessment as incidental to its proper use: Polk Sav. Bank v. State, 69 Iowa, 24, 28 N. W. 416.:

"A municipal corporation has a double character. In one it acts strictly in its governmental capacity; in the other for the profit or convenience of its citizens. Considered in the latter light, it occupies the attitude of a private corporation merely, while in the former it is an arm of the state government or a part of its political power. It is an imperium in imperio. The property necessary to the exercise of those duties which are strictly governmental is exempt from taxation, but this is not so of that which is held by the municipality for the comfort of its citizens, individually or collectively, or for money-making purposes merely": Clark v. Louisville Water Co., 90 Ky. 515, 14 S. W. 502.

So, also, in Camden v. Camden Village Corp., 77 Me. 530, 1 Atl. 689, it was said: "There is a distinction between property held and owned

for profit by a municipal corporation, like a private individual, charged with no public trust or use, which is private in its nature, and that which it holds in general or special trust for purposes general to the objects of the corporation. In the former case it is the legitimate subject of taxation, and no reason exists why it should be exempt from the general rule; while in the latter case, such property, forming a part of the means and instrumentalities of the corporation, called into use in the administration of government, is held to be exempt from taxation upon principle as well as upon authority Taxation is a sovereign right, essential to the existence of government, and, as a rule, attaching upon all property within the jurisdiction of the state. But in our system of government, both state and national, there are limitations as well as exceptions to the rule. The federal government cannot tax the public means and instrumentalities of the state, nor the state the public means and instrumentalities of the national government, so as to interfere or impair their efficiency in performing the functions by which they are designed to serve that government: National Bank v. Commonwealth, 9 Wall. 362, 19 L. ed. 703; Thomson v. Pacific R. R., 9 Wall. 591, 19 L. ed. 799; Burroughs on Taxation, 505. There is no express constitutional prohibition upon the state against taxing the means and instrumentalities of the general government, but it is held to be prohibited by necessary implication: Collector v. Day, 11 Wall. 123, 20 L. ed. 125. Courthouses, jails, townhouses, schoolhouses, poorhouses, and other buildings appropriated to public uses, owned by municipal corporations, and incident to such corporations, are but the means and instrumentalities used for municipal and governmental purposes, and are therefore exempt from general taxation, not by express statutory prohibition, but, as we have seen, by necessary implication."

b. Effect of Pecuniary Profit Being Derived from the Land.— Where land belonging to a county is not actually appropriated to any public use, but, as a matter of fact, is rented to private individuals in the same manner as similar property belonging to private persons is, it is not exempt from taxation: Essex Co. v. Salem, 153 Mass. 141, 26 N. E. 431. But the fact that a part of a city hall is rented for the use of lectures and other public entertainments, when not in use by the municipality does not detract from its character as a public building, since such use is merely incidental and subsidiary to the objects for which it was constructed: Camden v. Camden Village Corp., 77 Me. 530, 1 Atl. 689. And the fact that a city has constructed a city hall larger than its present needs, and rents portions of it for stores, lodge-rooms and opera-house purposes, does not render it taxable, but the legislature has the right to tax a part of such property and exempt other parts if it sees fit to do so: Columbia v. Tindal, 43 S. C. 547, 22 S. E. 341.

But where the use of the property for other than public purposes comprises the primary and not the secondary objects of holding the property, the property ought not to be wholly exempt from taxation.

This view of the law was followed in New Jersey. A city purchased a farm of one hundred acres in another municipality, on which there was a dwelling-house and buildings necessary to carry on farming operations, for the purpose of obtaining five acres thereof to be used for a burial place for the poor of the city. Only two and a half acres had been actually used for that purpose during a period of ten years, and the remainder of the land were so used by the city as to derive a pecuniary profit. The court refused to allow an exemption of the whole premises and restricted the exemption to the portion actually used for burial purposes: Newark v. Clinton Township, 49 N. J. L. 370, 8 Atl. 296.

But in another New Jersey case property of a borough in another county was held exempt under the statute then in force notwithstanding that a pecuniary profit was derived from the land: Hackettstown v. Warren Co., 63 N. J. L. 191, 42 Atl. 838. Likewise in Utah, the court construed the statute to exempt a farm owned by a city from taxation although it was rented by the city for pasturage: City of Springville v. Johnson, 10 Utah, 351, 37 Pac. 577. But in several other cases agricultural lands owned by a city and not devoted to a public use were held not exempt from taxation or assessment: San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291; People v. Chicago, 124 Ill. 636, 17 N. E. 56; Cincinnati v. Lewis, 66 Ohio St. 49, 63 N. E. 588. In the last case cited it was stated that it was immaterial that the rentals from the property were used for public purposes.

And where land is purchased and held by a school district solely as an investment for its funds and for purposes of sale or rent, it is not exempt from taxation as "public property used exclusively for public purposes," since it is held for pecuniary profit: School Dist. v. Howe, 62 Ark. 481, 37 S. W. 717. So, also, land of a university which is devoted to pasturage for hire, the growing of nursery stock and general farming is not exempt from taxation: Ottawa University v. Franklin Co., 48 Kan. 460, 29 Pac. 599. And where land is devised to a town in trust for the benefit and improvement of a park upon condition, however, that the property itself shall not be devoted to public use but only its income, the property is not exempt from taxation, since a pecuniary profit is derived from it: Town of Mitchellville v. Board of Supervisors, 64 Iowa, 554, 21 N. W. 31.

c. **Effect Where More Land is Held Than is Necessary for Public Purposes.**—In West Hartford v. Board of Water Commrs., 44 Conn. 360, the city of Hartford purchased three hundred and twenty-seven acres in West Hartford for the purpose of constructing reservoirs for its water supply. About one hundred and forty acres of this land was not necessary for this purpose, but was purchased with the other land because the whole could be purchased at a better bargain than a part. Though the title was in the water commissioners, the land was held to be equitably the property of the city.

The court, in refusing to exempt the one hundred and forty acres, said: "The commissioners purchased the whole of certain tracts of which a part only was necessary for their purpose, for the reason that they could thus obtain the whole for a less price than a part, and they now hold one hundred and forty and three-quarters acres, valued at two thousand dollars, thus bought. Practically this land was a gift to the city. We cannot deny them the privilege of accepting it and turning it to their profit. But they cannot ask, and we cannot concede, the right thus unnecessarily to enlarge the municipal exemption and extend it over land which they did not buy and have never expected to use for the public good. They are under no obligation to hold it, and so long as they do, they should pay the taxes assessed upon it."

But land purchased for a municipal water system, although not actually used for that purpose, if reasonably necessary for the purpose and not held for speculation or remote contingencies, is exempt from taxation: Water Commrs. v. Gaffney, 34 N. J. L. 131. But in a later case land purchased for an extension to the water supply system but not used for that purpose except to a very small extent was held taxable until actually used: Perth Amboy v. Barker, 74 N. J. L. 127, 65 Atl. 201.

The cases in the last preceding subdivision also bear on this question.

d. Effect Where Land is Merely Held for Possible Public Use in Future.—The mere fact that property is purchased by a county with the intention of some time in the future using it for enlarging the jail and jail grounds does not entitle it to be exempt from taxation, where it is not used for any public purpose and as a matter of fact is rented to private persons as any other private property might be: Essex Co. v. Salem, 153 Mass. 141, 26 N. E. 431.

e. What Uses are Sufficient to Exempt the Land.

1. In General.—Buildings and other property owned by a municipality and used for public purposes germane to the objects of the municipality are not generally taxable. They are but the means and instrumentalities used for municipal and governmental purposes: Camden v. Camden Village Corp., 77 Me. 530, 1 Atl. 689; Newark v. Clinton Tp., 49 N. J. L. 370, 8 Atl. 296.

Where land was conveyed to a county in part payment of money embezzled by its county treasurer and was not held by the county for speculative purposes or with the idea of cultivating it, it is exempt from taxation, since it is used for a county purpose: Durkee v. Greenwood Co. Commrs., 29 Kan. 697. Likewise lands purchased by a county for its own protection upon a judgment in its favor is exempt from taxation under a statute exempting land "devoted to the public use, and not held for pecuniary profit": Gibson v. Howe, 37 Iowa, 168.

2. Property Used in the Administration of Government.—Property of the United States used as a custom-house, postoffice, mint, or the

like, is exempt from both taxation and local assessments, but such exemption does not depend upon the uses to which the property is put, but exists because of the ownership being in the federal government: Fagan v. Chicago, 84 Ill. 227; Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670, 29 L. ed. 845.

Lands on which are placed a building occupied by the supreme court and the state capitol are exempt from assessments for local improvements: City of Mt. Vernon v. People, 147 Ill. 359, 35 N. E. 533, 23 L. R. A. 807; Polk Sav. Bank v. State, 69 Iowa, 24, 28 N. W. 416.

Property, such as courthouses and jails, which are necessary to the administration of government, are universally exempt from general taxation: Louisville v. Commonwealth, 1 Duvall, 295, 85 Am. Dec. 624; Worcester Co. v. Worcester, 116 Mass. 193, 17 Am. Rep. 159; St. Louis v. Gorman, 29 Mo. 593, 77 Am. Dec. 586; Grafton Co. v. Haverhill, 68 N. H. 120, 40 Atl. 399. A city hall is likewise exempt from taxation: City of Columbia v. Tindal, 43 S. C. 547, 22 S. E. 341. But the courts do not agree as to whether courthouses and the like are exempt from assessments for local improvements. The question necessarily depends upon the phraseology of the statutes of the various states. In some states such property has been held exempt: La Grange v. Troup Co., 132 Ga. 384, 64 S. E. 267; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; Piper v. Singer, 4 Serg. & R. 354; Harris Co. v. Boyd, 70 Tex. 237, 7 S. W. 713. While in other states it has been held liable for such assessments: Adams Co. v. Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; Edwards etc. Const. Co. v. Jasper Co., 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006; Franklin Co. v. City of Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; Clinton v. Henry Co., 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494.

Lands on which is located a reform school to which young boys are committed by the courts are exempt from general taxation: Newark v. Verona Township, 59 N. J. L. 94, 34 Atl. 1060. And such an institution has also been held exempt from local assessments on the ground of being an agency of the state performing functions properly belonging to the state government: Louisville v. McNaughten, 19 Ky. Law Rep. 1695, 44 S. W. 380. Likewise a state hospital for the insane under the management of a board of managers has been exempted from local assessments: Baltimore Co. v. Maryland Hospital for the Insane, 62 Md. 127.

In Georgia it has been held that an armory owned and occupied by a command of the volunteer military forces of the states is not exempt from general taxation. Although it was admitted that the property was held for public purposes, it was decided that the ownership of it was not in such a subordinate political subdivision of the state as is required by the state constitution: Board of Trustees Gate City Guard v. Atlanta, 113 Ga. 883, 39 S. E. 394, 54 L. R. A. 806.

3. **Fire Departments, County Farms, Almshouses and Public Cemeteries.**—Property of a city used exclusively for fire department purposes is exempt from taxation: Owensboro v. Commonwealth, 105 Ky. 344, 49 S. W. 320, 44 L. R. A. 202; Commonwealth v. Paducah, 31 Ky. Law Rep. 528, 102 S. W. 882; Erie Co. v. City of Erie, 113 Pa. 360, 6 Atl. 136.

A county poor farm or almshouse is not subject to taxation: Directors of Poor etc. v. School Directors etc., 42 Pa. 21; Armstrong Co. v. Overseers etc. (Pa.), 15 Atl. 892. But following a strict construction of the statute, it has been held that a county farm is subject to taxation, since the statute exempts only "almshouses on county farms": Grafton Co. v. Haverhill, 68 N. H. 120, 40 Atl. 399. Lands of a municipality used for the burial of the poor are not taxable: People v. Doe G. 1034, 36 Cal. 220; Louisville v. Nevin, 10 Bush, 549, 19 Am. Rep. 78; Newark v. Clinton Tp., 49 N. J. L. 370, 8 Atl. 296.

4. **Public Markets and State Liquor Dispensaries.**—Although under a statutory provision a public market-house is made exempt from taxation, a building for that purpose owned by a private corporation is not exempt, although declared by a city ordinance to be a public market and exempt: State v. Cooley, 62 Minn. 183, 64 N. W. 379, 29 L. R. A. 777. A building and stock of liquors used as a dispensary for the sale of liquors as provided for by the Georgia law is such "public property" as is exempt from general taxation under the general statutes of that state: Walden v. Town of Whigham, 120 Ga. 646, 48 S. E. 159. But such a dispensary is not exempted from paying the annual tax in the nature of a license required by the act of 1898: Sheffield v. Board of Commrs. of Dispensary, 111 Ga. 1, 36 S. E. 302.

5. **Transportation Facilities Such as Wharves, Ferries, Bridges and Canals.**—A municipality in its ownership of wharves, piers and the like acts in the capacity of a private owner: Note to Goddard v. Inhabitants of Harpswell, 30 Am. St. Rep. 403. And accordingly it has been held liable to taxation for a wharf, though it has been said that the wharf cannot be sold for the nonpayment of such taxes. The taxes may be collected by a suit: Commonwealth v. Louisville (Ky.), 47 S. W. 865. But such a wharf owned by a city is not liable to a local assessment, even though in the possession of a railroad company: Louisville & N. R. Co. v. Nehan, 23 Ky. Law Rep. 889, 64 S. W. 457. Though in New York piers owned by the city and leased by it were held not taxable against the city: People v. Barker, 153 N. Y. 98, 47 N. E. 46. The question arising in cases of that sort is whether the governmental body has parted with its ownership: Baltimore etc. Dock Co. v. Baltimore, 97 Md. 97, 54 Atl. 623; Baltimore etc. Dock Co. v. Baltimore, 195 U. S. 375, 25 Sup. Ct. Rep. 50, 49 L. ed. 242. Sometimes under statutory provisions a wharf built on tide lands under a contract of purchase from the state is considered as belonging to the purchaser for purposes of taxation: Gray's Harbor Co. v. Chehalis Co., 23 Wash. 369, 63 Pac. 233.

Land owned and used by a municipality as a landing place for a ferry owned by it is exempt from taxation: People v. Assessors of Brooklyn, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; Block v. Sherwood, 84 Va. 906, 6 S. E. 484. But such a ferry slip is liable for a local assessment: Ross v. Mayor etc. of New York, 3 Wend. 333.

Lands belonging to the state and constituting the Erie canal are exempt from an assessment for local improvements: Elwood v. Rochester, 43 Hun, 102. But where canal lands owned by the state are granted to a board of trustees, they lose their character as property of the state, and are liable to an assessment for local improvements: Trustees of Ill. etc. Canal v. Chicago, 12 Ill. 403.

A toll bridge owned by the United States or by two cities is not taxable even though it is maintained by a subsidiary corporation, since the latter is merely an agent of the municipalities: Chicago etc. R. Co. v. Davenport, 51 Iowa, 451, 1 N. W. 720; Commonwealth v. Newport etc. Bridge Co., 32 Ky. Law Rep. 196, 105 S. W. 378; Regina v. McCann, L. R. 3 Q. B. 677. But in Illinois such a bridge was held liable to taxation because not included in the classes of property exempt under the statute: In re Swigert, 123 Ill. 267, 14 N. E. 32. Where the bridge is owned by a private individual or corporation, it is not exempt from taxation, because the state has a reversionary interest in it: Fall v. Marysville, 19 Cal. 391; State v. Proprietors of Bridges etc., 21 N. J. L. 384.

6. **Schools, Parks, Public Squares, Boulevards and Streets.**—Schools are, of course, used for a public purpose. The rule of exemption in respect to them was discussed in subdivision IV, c, 6.

Lands devoted to public parks and squares are exempt from general taxation: People v. Salomon, 51 Ill. 37. But mere dedication to the public as a park without the land being claimed or accepted as such by virtue of the dedication is not sufficient to exempt it from taxation: Traylor v. State, 19 Tex. Civ. 86, 46 S. W. 81. And a dedication of a park for the mere benefit of the owners of lots fronting on the park is not sufficient to give it such a public character as will exempt it: McChesney v. People, 99 Ill. 216.

The assessment of parks and public squares for local improvements is a question of public policy for each municipality. In many instances they have been held liable for such local assessments: Higgins v. Chicago, 18 Ill. 276; Scammon v. Chicago, 42 Ill. 192; Edwards etc. Const. Co. v. Jasper Co., 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006; In re Turfler, 44 Barb. 46; In re City of New York, 38 Misc. Rep. 600, 78 N. Y. Supp. 51; while in other cases, owing to statutory or charter provisions, they have been held exempt from such local assessments: City of Clinton v. Henry Co., 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; Herman v. Omaha, 75 Neb. 489, 106 N. W. 593; State v. Several Parcels of Land, 79 Neb. 638, 113 N. W. 248; People v. Gilon, 41 Hun, 510. But often the expense of such local improvements is made merely a charge against the city as a whole: Marquez v. New Orleans, 13 La. Ann. 319; Boyd v. Milwaukee, 92 Wis. 456, 66 N. W. 603.

Where a board of park commissioners are vested with full and exclusive power to govern all parks and boulevards under their jurisdiction, a city cannot levy an assessment on them for local improvements: West Chicago Park Commrs. v. Chicago, 152 Ill. 392, 38 N. E. 697.

A public street cannot be subjected to taxation: Warren v. San Francisco, 150 Cal. 167, 88 Pac. 712. Nor can a public street be assessed as property benefited by local improvements in the absence of specific language by the legislature indicating the contrary: Smith v. Buffalo, 159 N. Y. 427, 54 N. E. 62.

7. **Property Used by Municipality for Gravel Supply or Storage Place for Tools.**—Land purchased by a municipality for the purpose of obtaining therefrom gravel for the construction and repair of its streets and used for that purpose is appropriated to such a public use as exempts it from taxation: Somerville v. Waltham, 170 Mass. 160, 48 N. E. 1092. But the mere fact that a lot owned by a city is used by it as a place for the storage of tools does not exempt it from taxation: Negley v. Henderson, 21 Ky. Law Rep. 1394, 55 S. W. 554.

VI. Exemption of Lands of Municipally Conducted Public Service Corporations.

There is an irreconcilable conflict among the authorities on the question whether land belonging to a municipally owned system of waterworks is exempt from taxation. The weight of authority, however, favors the exemption of such lands from taxation. The objection urged against the exemption of lands used for that purpose is that the ownership and maintenance of a water supply system by a municipality is not within the scope of such bodies, and that when they enter into this field of operations they act in a private capacity. The arguments pro and con on this question are elaborate and exhaustive, but we do not consider it within the province of this note to review them. It seems to us, however, that regardless of the question whether a municipal waterworks system is a matter properly within the domain of a municipality, the question of real importance is whether the taxpayers of distant places not benefited by the water system should be burdened with the additional taxes caused by the withdrawal of large bodies of land from tax assessment by being used for the supply of water to distant cities. It is undoubtedly unjust to the taxpayers of the county where the land is situated if they do not participate in the benefits arising from the waterworks.

In the following cases land used by a municipality in the operation of its waterworks system has been held exempt from taxation: Colorado Springs v. Board of Commissioners, 36 Colo. 231, 84 Pac. 1113; West Hartford v. Water Commrs. of Hartford, 44 Conn. 360; Board of Commrs. v. Wellington, 66 Kan. 590, 72 Pac. 216, 60 L. R. A. 850; Frankfort v. Commonwealth, 29 Ky. Law Rep. 699, 94 S. W. 648; Commonwealth v. Covington, 32 Ky. Law Rep. 837, 107 S. W. 231,

14 L. R. A., N. S., 14; Covington v. Highlands, 33 Ky. Law Rep. 323, 110 S. W. 338; Inhabitants of Wayland v. Middlesex Co., 4 Gray, 500; Miller v. City of Fitchburg, 180 Mass. 32, 61 N. E. 277; Board of Water Commrs. v. Auditor General, 115 Mich. 546, 73 N. W. 801; Hackettstown v. Conover, 63 N. J. L. 191, 42 Atl. 838; Nashville v. Smith, 86 Tenn. 213, 6 S. W. 273; Smith v. Nashville, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469; Clarksville v. Montgomery Co. (Tenn. Ch.), 62 S. W. 33, 56 Atl. 662; Styles v. Newport, 76 Vt. 154, 56 Atl. 662.

Sometimes, however, the exemption is confined to lands within the boundaries of the municipality owning the waterworks system: Newport v. Unity, 68 N. H. 587, 73 Am. St. Rep. 626, 44 Atl. 704. In New York a restriction of this character is expressly declared by statute: People v. Heis, 157 N. Y. 42, 51 N. E. 410; City of New York v. Mitchell, 183 N. Y. 245, 76 N. E. 18. But in other cases the courts have held that such lands, even though situate outside of the municipal boundaries, are exempt from taxation: Colorado Springs v. Board of Commrs., 36 Colo. 231, 84 Pac. 1113; Perth Amboy v. Barker, 74 N. J. L. 127, 65 Atl. 201; Styles v. Newport, 76 Vt. 154, 56 Atl. 662.

In Pennsylvania lands which are part of a municipally owned water system have been held taxable: Chadwick v. Maginnes, 94 Pa. 117; Erie Co. v. Waterworks Commrs., 113 Pa. 368, 6 Atl. 138. The earlier cases in Kentucky maintained very strenuously the proposition that municipally owned waterworks were taxable on the ground of being a purely private venture on the part of the municipality, but the later cases as shown above have overruled these earlier cases: Negley v. Henderson, 21 Ky. Law Rep. 1394, 55 S. W. 554, 22 Ky. Law Rep. 912, 59 S. W. 19; Commonwealth v. Makibben, 90 Ky. 384, 29 Am. St. Rep. 382, 14 S. W. 372; Clark v. Louisville Water Co., 90 Ky. 515, 14 S. W. 502; Newport v. Commonwealth, 106 Ky. 434, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518; Covington v. Commonwealth, 107 Ky. 680, 39 S. W. 836. But where a statute merely allows a town to exempt the reservoir of a water company when granting it permission to lay its pipes and maintain reservoirs, it is not authorized to exempt the reservoir of a city which had been constructed before the vote on exemption was taken. The exemption must be one of the terms of a grant, and not a mere gratuity after the grant has been made: Bowen v. Newell, 16 R. I. 238, 14 Atl. 873. In Vermont, although an exemption from taxation of such part of the water plant as was used in supplying the municipality owning the plant was allowed, the court very properly refused to exempt a part of the system which was used solely for the purpose of supplying another community: Styles v. Newport, 76 Vt. 154, 56 Atl. 662.

But where a municipality owning its own waterworks system makes some arrangement whereby it turns the maintenance and operation of the plant over to a private individual or corporation, it becomes taxable while under the control of such other person or corporation:

Mobile v. Stein, 54 Ala. 23; Los Angeles v. Los Angeles City Waterworks, 49 Cal. 638.

Municipally owned lighting plants are exempted from taxation on substantially the same grounds urged for the exemption of municipally owned waterworks: Frankfort v. Commonwealth, 29 Ky. Law Rep. 699, 94 S. W. 648; Commonwealth v. Paducah, 31 Ky. Law Rep. 528, 102 S. W. 882. But where a municipality had merely authority to maintain an electric lighting plant to light its own streets and not to furnish electricity to its inhabitants and those of other towns, the merging of the public service performed in supplying its own needs and the private service in supplying the wants of such other towns makes it so difficult to determine how much was put to either use that the whole plant becomes taxable: Village of Swanton v. Town of Highgate, 81 Vt. 152, 69 Atl. 667, 16 L. R. A., N. S., 867.

A municipally owned gas-well, including pipe-lines, pumping plant and machinery, which was used for furnishing natural gas to citizens of the municipality, was exempted from taxation in Ohio: Toledo v. Hosler, 54 Ohio St. 418, 43 N. E. 583.

VII. Effect of Land of Political Body Being Situated Outside of Its Own Boundaries.

Land belonging to one state but situated in another state is exempt from taxation, regardless of the fact of its location in such other state: Emerson v. Washington Co., 9 Me. 88; Stoutz v. Brown, 5 Dill. 445, Fed. Cas. No. 13,505. Likewise land belonging to one county but situated in another county is nevertheless exempt from taxation. Such exemptions, however, are generally allowed by a construction of statutes which expressly exempt lands of the United States, the state and the counties of the state: Guthrie Co. v. Carroll Co., 34 Iowa, 108; Warren Co. v. Nall, 78 Miss. 726, 29 South. 755; Davis v. Burnett, 77 Tex. 3, 13 S. W. 613. And by the weight of authority land of a municipality which is devoted to a public use is held exempt from taxation regardless of whether it is situated outside of the boundaries of the municipality: Colorado Springs v. Board of Commissioners, 36 Colo. 231, 84 Pac. 1113; West Hartford v. Hartford, 44 Conn. 360; Somerville v. Waltham, 170 Mass. 160, 48 N. E. 1092; Board of Freeholders v. Collins, 60 N. J. L. 367, 37 Atl. 623, affirmed in Washington Tp. v. Board of Freeholders, 61 N. J. L. 695, 43 Atl. 1097; Perth Amboy v. Barker, 74 N. J. L. 127, 65 Atl. 201; People v. Assessors of Brooklyn, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; Styles v. Newport, 76 Vt. 154, 56 Atl. 662. The injustice of the rule, especially with respect to lands owned by the minor subdivisions of the state and used for the benefit of localities distant from the place where the land is situate, was recognized by the supreme court of New Hampshire, which, in an able opinion, held such lands taxable: Newport v. Unity, 68 N. H. 587, 73 Am. St. Rep. 626, 44 Atl. 704. In the case last cited Mr. Justice Wallace said: "To interpret this statute so as to

exempt the property or a town used for public purposes, which is situate in another town, is to extend the exemption beyond the reason and purpose of the statute. To thus interpret it would be to give it a meaning which would make its operation unequal, and not in accord with the spirit of our taxation laws, which are based upon the just and equal distribution of the burden of public taxes. It is not to be presumed that it was the intention of the legislature to accomplish so unjust a result as to deprive one town of its taxable property for the benefit of another, or that one town should be deprived of its right to tax property within its limits which was used for public purposes, in which it or its people had no interest, and from which they derived no benefit, and which were beneficial alone to some other town and its people. This doctrine, carried to its legitimate conclusion, might practically bankrupt some of our smaller towns, by depriving them of a very large portion of their territory upon which to exercise the power of taxation; as, for example, suppose the late Austin Corbin had given to the town of Newport his park, situate outside the limits of that town, and embracing a large portion of the area of several adjoining towns. It would require express terms to warrant a holding that one town can invade another, and, by taking a portion of the territory for their own benefit, whether the purpose be, in a legal sense, public or private, subject the remaining lands of such town to a heavier burden of taxation."

In New York, under express statutory provisions, it is now held by the courts of that state that lands belonging to a municipality, but situated outside of its boundaries, are taxable: People v. Duryea, 59 App. Div. 488, 69 N. Y. Supp. 388; New York v. Husted, 106 App. Div. 614, 94 N. Y. Supp. 1111; City of New York v. Mitchell, 183 N. Y. 245, 76 N. E. 18. In People v. Hess, 157 N. Y. 42, 51 N. E. 410, the court in commenting upon the policy of this law said: "It thus appears the legislature was of opinion that public policy required, if a municipality saw fit to acquire valuable property within the boundaries of another municipality, it was only just to the latter that the former should pay its share of the local taxes. It is only within recent years that municipal corporations have found it necessary generally to acquire title to property beyond their boundaries. The rapid growth of the great cities of the state has made the question of an adequate supply of wholesome water of paramount importance, and all the larger cities have been forced to acquire extensive property rights in the natural water supply of adjacent territory. In many instances cities have condemned or purchased a large amount of real estate within the limits of some neighboring municipality in order to secure a water supply, and, unless liable to local taxation thereon, the taxpayers owning the remaining real estate are subjected to greatly increased tax burdens. As between these taxpayers and the municipality receiving all the benefits under this transaction, natural justice suggests that the latter should be assessed for the purposes of taxation on the property so acquired outside of its corporate

limits. The letter of the statute and the policy upon which it is founded lead to this conclusion."

VIII. Exemption from Taxes or Assessments as Dependent upon the Character or Condition of the Title of the Public in the Lands.

a. Whether Title must be in Name of Governmental Body.—Where land equitably and in fact belongs to the state or some agency of the state, it is exempt from taxation, notwithstanding that the title thereto rests in some individual, board or commission: City Street Imp. Co. v. Regents of University of California, 153 Cal. 776, 96 Pac. 801, 18 L. R. A., N. S., 451; Trustees of Academy of Richmond Co. v. City Council of Augusta, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151; Illinois Industrial University v. Champaign Co., 76 Ill. 184; Kansas State Agricultural College Regents v. Hamilton, 28 Kan. 376; Dickinson Co. Commrs. v. Baldwin, 29 Kan. 538; Tulare Education Fund's Admrs. v. Board of Assessors, 38 La. Ann. 292; Auditor General v. Regents of the University, 83 Mich. 467, 47 N. W. 440, 10 L. R. A. 376.

But the mere fact that a railroad system, such as the Union Pacific Railroad system, was constructed under the direction and authority of Congress and was obligated to perform certain duties for the government and pay to the government a certain percentage of its revenues, does not make it such an agency of the government as to exempt its lands from taxation: Thomson v. Union Pac. R. Co., 9 Wall. 579, 19 L. ed. 792; Union Pac. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787. A railroad company cannot claim exemption from taxation of its lands on ground of being an instrumentality of government, because it is employed by the government in carrying the mails, troops and munitions of war: People v. Central Pac. R. Co., 43 Cal. 398. And the fact that the rates of a public service corporation are regulated by a municipality, and that the latter may purchase the plant at a fixed price, does not make the corporation such a public agency as to exempt its land from taxation: Appeal of Des Moines W. Co., 48 Iowa, 324; People v. Forrest, 97 N. Y. 97.

b. Manner of Acquiring Title to the Land.—The exemption of land belonging to the government does not depend upon how it was acquired by the government, but simply on the fact that it is owned by it: People v. Assessors of Brooklyn, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148. Thus land obtained by the state at foreclosure sale is not thereafter taxable while owned by the state: Chicago v. People, 80 Ill. 384. The same is true where the land has escheated to the state: State v. Stevenson, 6 Idaho, 367, 55 Pac. 886; Reed v. State, 74 Ind. 252; Croner v. Cowdrey, 19 N. Y. Supp. 908. And where land has been sold or forfeited to the state for nonpayment of taxes, it is not subsequently liable to taxation in the absence of a statute allowing such subsequent taxation: Muskegon Lumber Co. v. Brown, 66 Ark. 539, 51 S. W. 1056; Gachet v. New Orleans, 52 La. Ann. 813, 27 South. 348; Aztec Copper Co. v. Auditor General, 128 Mich. 615, 87 N. W. 895; State v. Heman, 7 Mo. App. 420; State v. Smith, 13 Mo. App.

421; Buckley's Lessee v. Osburn, 8 Ohio, 180; Glenn v. Brown, 99 Va. 322, 38 S. E. 189; Sayers v. Burkhardt, 85 Fed. 246, 29 C. C. A. 137; Rich v. Braxton, 158 U. S. 375, 15 Sup. Ct. Rep. 1006, 39 L. ed. 1022. The rule is the same where the land was bid in by the United States at a sale for the nonpayment of direct taxes: Van Brocklin v. Anderson, 117 U. S. 151, 6 Sup. Ct. Rep. 670, 29 L. ed. 845. The question whether the state may tax land after it has been bid in by it at a tax sale is sometimes regulated by statute: Berglund v. Graves, 72 Minn. 148, 75 N. W. 118.

c. **Where Governmental Body has Only Reversionary Interest or Conditional Estate.**—The exemption from taxation will not be extended to property in which the interest of the state is not immediate, but very remote and contingent: Thomson v. Union Pac. R. Co., 9 Wall. 579, 19 L. ed. 572. The interest of the state must be a present one, and not a mere reversionary interest, in order for the property to be exempt from taxation: Fall v. City of Marysville, 19 Cal. 391; State v. Proprietors of Bridges, etc., 21 N. J. L. 384. The mere fact that property is subject to forfeiture to the United States if certain conditions are not fulfilled does not prevent the land from being taxed against the present owner. "It would be a very harsh doctrine that would deny the right of the state to tax lands because of a mere possibility that they might lapse to the United States": Baltimore etc. Dock Co. v. Baltimore, 195 U. S. 375, 25 Sup. Ct. Rep. 50, 49 L. ed. 242.

d. **Where the Land is Held Merely in Trust.**—Land held by a municipality in trust for a purpose which any other trustee might execute as well is not exempt from taxation: McChesney v. People, 99 Ill. 216; St. Louis v. Wenneker, 145 Mo. 230, 68 Am. St. Rep. 561, 47 S. W. 105. So, also, land held by a chancellor of the state in trust under a will for beneficiaries who have not been ascertained is not exempt from taxation: Chancellor of State v. City of Elizabeth, 65 N. J. L. 483, 47 Atl. 455, affirmed 66 N. J. L. 687, 52 Atl. 1130.

But lands held by a city in trust for the public schools of the state are exempt from taxation: Chicago v. People, 80 Ill. 384. So, also, are lands granted by Congress to a state in trust for works of internal improvement while the trust is still unexecuted and the lands not disposed of to private persons: Wisconsin Central R. Co. v. Taylor Co., 52 Wis. 37, 8 N. W. 833; Tucker v. Ferguson, 22 Wall. 527, 22 L. ed. 805.

e. **Where Governmental Body has Merely a Mortgage Interest.**—Land on which the owner has placed a mortgage in favor of the state, securing a loan from the school fund, is liable in the same manner to taxation as other lands. But such loans are generally protected by statutory provisions which make a sale for nonpayment of taxes subject to the mortgage lien of the state: Harrison v. Williams, 39 Ark. 315; McWhinney v. Logansport, 132 Ind. 9, 31 N. E. 449; State v. Shaw, 28 Iowa, 67; Reynolds v. Weiss, 27 Wis. 450. The same rule is applicable to an assessment for local improve-

ments: State v. Kilburn, 81 Conn. 9, 129 Am. St. Rep. 205, 69 Atl. 1028.

A mortgage made to the chancellor of the state on an investment of moneys in the chancery court is governed by the same rule which exempts mortgages in favor of the state from taxation: Trustees of Public Schools v. Trenton, 30 N. J. Eq. 667.

f. **Where Governmental Body has Only a Temporary or Possessory Interest.**—Temporary buildings erected by the United States upon lands leased by it for a short period, for the housing of its employés engaged in constructing public works, and removable by it when no longer used, are personal property of the government and not taxable with the land: Andrews v. Auditor, 28 Gratt. 115. The fact that the United States during the Civil War forcibly seized certain property and used it first as a military prison and subsequently as a hospital, did not exempt it from taxation, the court saying: "The property, to be exempt from taxation, must belong to the national government—the title and ownership must be vested in it. If the government, in the execution of its powers or to carry out its functions, finds it necessary and convenient to rent property, it cannot be held that the landlord, during the time the property is so occupied, can be exempted from paying taxes. So, if the government or a private individual with a strong hand forcibly intrudes into and seizes the possession of property, it will make no difference with reference to the taxing power. Taxes are assessed against the real owner without regard to temporary occupancy, and the obligation of payment follows the assessment. There is no evidence to show that the government ever asserted any claim or title whatever to the property. It was used as the exigencies of the times demanded, and then abandoned to the lawful owner": Speed v. St. Louis Co. Court, 42 Mo. 382.

But it has been held in Massachusetts that where an easement in land taken for a public use involves practically the exclusive possession and control of the property by the public, and leaves the original owner with no right of substantial value, the property is exempt from taxation, although he remains the owner of the fee: Lancy v. Boston, 186 Mass. 128, 71 N. E. 302.

g. **Where Governmental Body has been Devested of the Beneficial Title but Still Retains Legal Title.**—One of the well-settled rules respecting the exemption of public lands from taxation is that they are not subject to taxation as long as the equitable title thereto remains in the government. Where, however, any person becomes vested with a complete right to a patent, and the equitable title is fully vested in such person without anything more to be paid or any further acts done going to the foundation of the right, such lands become taxable, although no patent has yet been issued and the government still holds the legal title: Witherspoon v. Duncan, 21 Ark. 240; Diver v. Friedheim, 43 Ark. 203; Smith v. Hollis, 46 Ark. 17; Robinson v. Gaar, 6 Cal. 273; Hall v. Dowling, 18 Cal. 619; Central Pac. R. Co. v. Howard, 52 Cal. 227; Stryker v. Polk Co., 22 Iowa, 131; Goodnow v. Wells, 67 Iowa, 654, 25 N. W. 864; Kansas

Pac. Ry. Co. v. Culp, 9 Kan. 38; Baltimore etc. Dock Co. v. Baltimore, 97 Md. 97, 54 Atl. 623; State v. Itasca Lumber Co., 100 Minn. 355, 111 N. W. 276; Bellinger v. White, 5 Neb. 399; Donovan v. Kloke, 6 Neb. 124; Graff v. Ackerman, 38 Neb. 720, 57 N. W. 512; Wright v. Cradlebaugh, 3 Nev. 341; Johnson v. Crook Co., 53 Or. 329, 100 Pac. 294; Troutman v. May, 33 Pa. 455; Green v. Watson, 34 Pa. 332; Puget Sound etc. Co. v. Pierce Co., 1 Wash. Ter. 159; Ross v. Outagamie Co., 12 Wis. 26; Farnham v. Sherry, 71 Wis. 568, 37 N. W. 577; Carroll v. Safford, 44 U. S. (3 How.) 441, 11 L. ed. 671; Witherspoon v. Duncan, 71 U. S. (4 Wall.) 210, 18 L. ed. 339; Kansas Pac. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Union Pac. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; Northern Pac. R. Co. v. Traill Co., 115 U. S. 600, 6 Sup. Ct. Rep. 201, 29 L. ed. 477; Hussman v. Durham, 165 U. S. 144, 17 Sup. Ct. Rep. 253, 41 L. ed. 664.

In Witherspoon v. Duncan, 71 U. S. 210, 18 L. ed. 339, the court said: "The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. As the patent emanates directly from the President, it necessarily happens that years elapse before, in the regular course of business in the general land office, it can issue; and if the right to tax was in abeyance during this time, it would work a great hardship to the state; for the purchaser, as soon as he gets his certificate of entry, is protected in his proprietary interest, can take possession, and make valuable and lasting improvements, which it would be difficult to separate from the freehold for the purpose of taxation. If it was the purpose of the acts of Congress, by which the new states were admitted into the Union, to prohibit taxation until the patent was granted, the national authority would never have suffered, without questioning it, the universal exercise of the power to tax on the basis of the original entry."

In the leading case on this subject (Carroll v. Safford, 44 U. S. 441, 11 L. ed. 671), Mr. Justice McLean said: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee. It is supposed that taxation of such lands is 'an interference with the primary disposition of the soil by Congress,' in violation of the ordinance of 1787; and that it is 'a tax on the lands of the United States,' which is inhibited by the ordinance. Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights

of the purchaser are considered, they are protected under the patent certificate as fully as under the patent."

h. What Constitutes a Public Land Entry or Grant Sufficiently Inchoate to Exempt It from Taxation.

1. **In General.**—The question whether the circumstances are such as to invest one with the beneficial title, or whether they are such as render that title still inchoate in that respect is the one upon which the question of exemption must be determined. The question naturally has arisen most frequently in respect to grants to railroads of large portions of the public domain, but the disposition of people in general to evade taxation is not confined to corporations of the class mentioned.

Where public land is purchased from the government, it is generally exempt from taxation until fully paid for. When, however, such land has been fully paid for and a final receipt or certificate therefor has been issued by the government, it is taxable, even though the patent therefor has not been issued, since under such circumstances the land no longer belongs to the government. The legal title is merely held by it in trust for the purchaser: Smith v. Hollis, 46 Ark. 17; People v. Shearer, 30 Cal. 645; Willey v. Koons, 49 Ind. 272; Donovan v. Kloke, 6 Neb. 124; Johnson v. Crook Co., 53 Or. 329, 100 Pac. 294; Astrom v. Hammon, 3 McLean, 107, Fed. Cas. No. 596; Carroll v. Safford, 44 U. S. 441, 11 L. ed. 671; Hussman v. Durham, 165 U. S. 144, 17 Sup. Ct. Rep. 253, 41 L. ed. 664.

So, also, if any condition precedent remains to be fulfilled before a patent can be issued for the lands, they are exempt from taxation: Sioux City etc. R. Co. v. Osceola Co., 50 Iowa, 177; Hardy v. Hartman, 65 Miss. 504, 4 South. 545; Pitts v. Booth, 15 Tex. 453; Upshur v. Pace, 15 Tex. 531; Denniston v. Unknown Owners, 29 Wis. 351; Whitney v. Gunderson, 31 Wis. 359.

In State v. Itasca Lumber Co., 100 Minn. 355, 111 N. W. 276, the court in a well-reasoned opinion said: "When Congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that upon the performance of the conditions the United States shall issue a patent to the purchaser, and all the conditions are complied with, it only remains for the United States to issue the patent, and in the meantime it holds the legal title in trust for the purchaser. When the government has no longer any right or interest in the property which would justify it in withholding the patent, and the purchaser is in possession, the latter will be treated as the beneficial owner. This exception rests upon the principle that he who has the right to property and is not excluded from its enjoyment shall not be permitted to use the legal title of the government to escape his just share of taxation. But, before the land can be taxed by the state as the property of the beneficial owner, a perfect equitable title must be vested, and the consideration fully paid to the United States. As long as the government retains the legal title as security for the payment of any part of the purchase money, the land is not subject to taxation: United States v. Milwaukee (C. C.),

100 Fed. 829. This perfect equity is acquired when the certificate of entry or receiver's final receipt is issued: Kansas Pac. Ry. Co. v. Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373; Union Pac. Ry. Co. v. McShane, 22 Wall. (U. S.) 446, 22 L. ed. 747; Northern Pac. Ry. Co. v. Traill County, 115 U. S. 600, 6 Sup. Ct. Rep. 201, 29 L. ed. 477; Wisconsin Cent. Ry. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687; Hussman v. Durham, 165 U. S. 144, 17 Sup. Ct. Rep. 253, 41 L. ed. 664. It is suggested that the title or interest of the purchase should, by the application of the doctrine of relation, be carried back to the date of the presentation of the scrip. But this doctrine is never applied, except when necessary to give effect to an act or instrument the operation of which would otherwise be defeated: Butler's Case, 3 Coke, 23; Merril's Case, 13 Coke, 19; Hammond v. Warfield, 2 Har. & J. (Md.) 151; note to Jackson v. Ramsey, 15 Am. Dec. 246. It is a fiction of law which the courts apply in furtherance of justice and upon broad equitable principles. In Gilbert v. McDonald, 94 Minn. 289, 110 Am. St. Rep. 368, 102 N. W. 712, it was applied for the protection of a purchaser of public land against a trespasser, and in Nicholson v. Congdon, 95 Minn. 188, 103 N. W. 1034, for the purpose of giving effect to a power of attorney. The doctrine has no application to a case of this character. The holder of this scrip did not acquire a complete equitable interest in the land as against the United States until the scrip was approved and its location authorized by the commissioner."

These rules are illustrated by numerous cases. Thus, if occupants of public lands have complied with all of the provisions of a preemption act requiring occupants to present their claims within a certain time and make certain payments, the equitable title vests in them, and the lands are taxable: People v. Shearer, 30 Cal. 645. But where a settler on land in Peters colony in Texas procured no certificate of title and did not have the lands surveyed, he was not such an owner as to be subject to taxation: Smith v. State, 4 Tex. 297. Where, under a treaty, certain lands were to be confirmed to a certain company which claimed to own them, they are not exempt from taxation after such confirmation: Puget Sound etc. Co. v. Pierce Co., 1 Wash. Ter. 159. So, also, where an Indian treaty provided that certain lands which were to be sold were not to be taxed "until patents have been issued therefor," they are exempt from taxation after forfeiture to the government for nonpayment: Parker v. Winsor, 5 Kan. 362. In Florida the internal improvement fund lands cease to be public lands upon being entered by a person in the proper office and are not exempt thereafter from taxation: Mundee v. Freeman, 23 Fla. 529, 3 South. 153. Where a person settled upon land which had been granted by the state to an improvement company, subject to approval by the general government, and he complied with all the requirements, upon the confirmation of the grant by Congress he obtains such an estate in the lands as is liable to taxation: Ross v. Outagamie Co., 12 Wis. 26. And where a claim to land was confirmed by the state, the subsequent confirmation of the grant by

legal title need not of necessity vest in one before he becomes liable for taxes. But he must have a more tangible interest than one dependent upon continued occupancy for its existence, and liable to annihilation by an absence of six months. No case can be found in this state in which such an interest as the one under consideration has been held liable to taxation. All of them will be found to be cases where some corporation or individual, although not possessed of the legal title, yet is in a position to be entitled to a patent from the United States."

The case of Hoskins v. Illinois Cent. R. Co., 78 Miss. 768, 84 Am. St. Rep. 644, 29 South. 518, is also to the same effect.

But it has been held that land entered as a homestead is only exempt up to the time that the entryman is entitled to make his final proofs, regardless of the fact whether he makes them at that time or not. That after that period the lands are taxable: Bellinger v. White, 5 Neb. 399. In the case cited the court said: "Was the plaintiff the owner of these lands at the time of the assessment complained of? We think he was. It is true he did not have the legal title. But from his own statement of the facts he had so far complied with the provisions of the homestead law, by residing upon and cultivating the land for more than five years, that he could complete his title at any time by making final proof and paying the fees required by law. The United States did not own these lands, but held them simply as trustee, having no interest therein, except a mere special interest for the amount of unpaid fees. The plaintiff was the real owner, and could not be deprived of the title, except through his own neglect. All lands owned by individuals or private corporations, not specifically exempted, are taxable. He who seeks the interposition of a court of equity to restrain the collection of a tax on his real estate on account of its alleged illegality, must bring himself clearly within some recognized rule of equity jurisdiction; and he cannot be permitted to allege his own failure to perfect his title in a case like this, as a ground on which to base a claim for relief.

"In our view of the law, a homestead is liable to taxation as soon as the owner has the right to make his final proof and complete his title."

But where a homestead entry was changed to a cash entry, which was suspended and proof of residence rejected by the land office, the land is not taxable until after the proof was again made upon which patent finally issued: Duncan v. Newcomer, 9 S. D. 375, 69 N. W. 580.

A timber culture claim after issuance of a final certificate is subject to a levy for prior personal property taxes due from the settler: Danforth v. McCook Co., 11 S. D. 258, 74 Am. St. Rep. 808, 76 N. W. 940.

4. Selection and Survey of Lands Comprised Within Railroad or Other Grants.—Grants in aid of railroads are not generally of any specific parcels of land, but usually of the odd-numbered sections

within certain limits of the projected road. Such grants do not attach to any particular land until identified by a government survey. When the route of the road is definitely fixed, the sections granted become susceptible of identification. Until such lands become capable of identification, they are not segregated from the general mass of public lands, and consequently are exempt from taxation. But when selected by the railroad with the approval of the proper government officials, or set apart to it, so as to be capable of identification, they become taxable, even though the patent be not issued: Cedar Rapids etc. R. Co. v. Woodbury Co., 29 Iowa, 247; Iowa etc. Land Co. v. Story Co., 36 Iowa, 48; Cedar Rapids etc. R. Co. v. Carroll Co., 41 Iowa, 153; Chicago etc. Ry. Co. v. Hemenway, 117 Iowa, 598, 91 N. W. 910; New Orleans Pac. Ry. Co. v. Kelly, 52 La. Ann. 1741, 28 South. 212; State v. Sage, 75 Minn. 448, 78 N. W. 14; Jackson v. La Moure Co., 1 N. D. 238, 46 N. W. 449; Wells Co. v. McHenry, 7 N. D. 246, 74 N. W. 241; Oregon etc. R. Co. v. Lane County, 23 Or. 386, 31 Pac. 964; Northern Pac. R. Co. v. Walker, 47 Fed. 681; Northern Pac. R. Co. v. Wright, 51 Fed. 68; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687.

So, also, until a Spanish grant has been segregated from the public domain by an approved survey, it is not subject to taxation by the state: Robertson v. Sewell, 87 Fed. 536, 31 C. C. A. 107. And under the Texas law granting Confederate land certificates, until the selection made by the locator has been approved by the commissioner of the state land office, the land belongs to the state and is exempt from taxation: Abney v. State, 20 Tex. Civ. 101, 47 S. W. 1043. Where the lands comprised within a Mexican grant are ascertained and the land segregated by a survey, they are taxable: Palmer v. Boling, 8 Cal. 384. But in a later case in California the court, in holding land described in a Mexican grant taxable though not surveyed, said: "The point made is, that the defendants had no title or claim to, or possession of, any specific tract of land; that there was a mere floating claim to a certain quantity of land—three leagues—which they were authorized to locate within certain designated boundaries embracing about eleven leagues, after two other contiguous grants, containing in the aggregate seven leagues, should be located; that until finally located, it could not be known what specific land is owned or claimed by them; that there is nothing to serve as a basis of assessment or valuation, and nothing having the quantity of taxable property, or liable to be taxed, under the statutes of the state.

"There can be no doubt that the defendants have a present vested interest in three leagues of land within the designated boundaries. It is uncertain, as yet, to which specific three leagues the rights of the parties will ultimately attach, but the interest is no less a vested interest in land: United States v. Fremont, 17 How. 558, 15 L. ed. 256; Higgins v. Houghton, 25 Cal. 256. It is undoubtedly property, and valuable property; and it must be, in fact, real estate. As such it may be sold and conveyed, for defendants claim under the grantee,

Flodora Soto. It would be difficult in a conveyance to describe the property more specifically than it is described in the assessment. It could, doubtless, be sold under execution. The parties have a title in equity at least: People v. Shearer, 30 Cal. 645, and cases cited. The worst that can be said is, that the legal title remains in the United States, but in trust for the grantee; and that the precise land within the larger tract to which the title will ultimately attach itself has not yet been ascertained. But it is still property, and as such clearly capable of taxation. If there is no property interest capable of taxation in the defendants, then there is none in the owners of the 'El Pinole' and 'Las Juntas' ranches, for the same reason, nor in the proprietors of any of the numerous grants in this state of a specific quantity of land within larger external boundaries": People v. Crockett, 33 Cal. 150.

But where the grantee under a Mexican grant, upon it being confirmed by Congress, was required to have the land surveyed, and it was provided that the confirmation should not become effective until the grantee had paid the cost of the survey, the land is not taxable until the survey fees have been paid to the United States, since until then the government still retains an interest: Central Colorado Imp. Co. v. Pueblo Co., 95 U. S. 259, 24 L. ed. 495. But where a Mexican land grant has been confirmed by the court of private land claims, with the proviso that the costs of surveying shall be a paramount lien upon the land, enforceable by a sale of so much of the land as may be necessary to meet the cost of the survey, the land becomes taxable at once, since the lien is indefeasible by a tax sale, and there is no necessity for the government to retain the title to protect itself for the cost of the survey: Territory of New Mexico v. Delinquent Tax List. etc., 12 N. M. 62, 73 Pac. 621.

In perhaps the majority of grants in aid of the railroads there were conditions requiring the payment by the railroad of the cost of surveying, selecting and conveying the land before they would be entitled to a patent. The legal title under these circumstances was retained by the general government as security for these costs, and where they were not paid and no patent had been issued, the lands were held exempt from taxation, notwithstanding that the road may have been built and the land earned in accordance with the terms of the grant. It was deemed that the railroad company had not, under such circumstances, become entitled to a patent, and hence that the government still owned both the beneficial and legal titles: Tyler v. Cass Co., 1 N. D. 382, 48 N. W. 232; Wisconsin etc. R. Co. v. Taylor Co., 52 Wis. 37, 8 N. W. 833; Kansas Pac. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Northern Pac. R. Co. v. Rockue, 115 U. S. 600, 6 Sup. Ct. Rep. 201, 29 L. ed. 477; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. Rep. 158, 35 L. ed. 999. But if the government issues patent without requiring such payment of costs of survey, the lands are taxable notwithstanding that they have not been paid: Union Pac. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747.

But the practical effect of the line of cases holding such railroad grant lands exempt from taxation, where the railroad has failed to pay the costs of the surveying of the lands, was removed by act of Congress of July 10, 1886, which made such lands subject to taxation, though preserving a lien for the costs of the surveying: State v. Central Pac. R. Co., 20 Nev. 372, 22 Pac. 237. This act of Congress, though applicable to surveyed lands, does not apply to the unsurveyed lands of the United States: State v. Central Pac. Ry. Co., 21 Nev. 94, 25 Pac. 442; State v. Central Pac. Ry. Co., 21 Nev. 247, 30 Pac. 686. The act of Congress modifying the former rule is liberally construed with the idea of compelling the payment of taxes, and in accordance with that construction it was held in North Dakota that after land had been surveyed in the field, it was surveyed land within the act of Congress, although the plat of such survey had not at the time of the tax assessment been filed: Wells Co. v. McHenry, 7 N. D. 246, 74 N. W. 241. But, as a general rule, land which has not been officially surveyed by the government is not taxable. And a survey is not regarded as completed until it has been accepted by the land department: Clearwater Timber Co. v. Shoshone Co., 155 Fed. 612.

But before the passage of the act of Congress of July 10, 1886, it was held in Minnesota that where a railroad grant did not require the prepayment of the cost of surveying, selecting and conveying the lands, a subsequent act by which such costs were imposed as a condition precedent to a patent was not sufficient to withhold the right to a patent and render the land exempt from taxation, since it was impairing the original contract with the railroad company by requiring them to do something more than the original act required it to do to earn the lands: County of Cass v. Morrison, 28 Minn. 257, 9 N. W. 761.

5. **Conditions Relative to Completion of Road or Earning of Lands in Railroad Grants.**—"In equity there is a maxim that equity will consider as done that which ought to be done, and that it will look upon things agreed to be done as actually performed. As an application of this maxim, equity generally considers that when land is sold on credit, and the deed is to be made when the purchase money is paid, that the land at the time the sale is made becomes the vendee's, and the purchase money the vendor's; that the vendor becomes at once the trustee of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money. But this maxim never applies where time is of the essence of the contract, and where the land is subject to absolute forfeiture on failure of some condition of the sale being performed; for there is no necessity in such a case for courts of equity to resort to any such fiction, and equity never looks upon such a thing as done which ought not to be done, nor in favor of any party except one that has a right to pray that it may be done. In such a case no title, legal or equitable, passes until every condition of the sale is performed; and if such condition is not performed at the exact time that it should

be performed, no title ever passes: Benedict v. Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484; Wells v. Smith, 7 Paige Ch. 22, 31 Am. Dec. 274. The legal title to land never passes until the legal evidence of such title is executed, and the equitable title probably never passes until everything has been done so that the land cannot be forfeited; so that the person claiming to hold the equitable title could, even after failure on his part, still tender performance within a reasonable time, if he should so choose, and compel the conveyance of the legal title by a suit in equity if the adverse party be an individual, or by a writ of mandamus against the officers of the government, if the government be the adverse party.

"In this case the conditions upon which the land was sold had not all been performed when the land was assessed. In 1866 and 1867 the purchase money had not been paid, and therefore the patent had not been issued. Hence, in 1866 and 1867, we think the railroad company had no title to the land, legal or equitable. It is undoubtedly true, when the parties so agree, that title, both legal and equitable, may pass before the purchase money or any part of it is paid, but it can hardly be supposed that such title will pass against the consent of the parties in violation of their contract, and in violation of equity and good conscience": Douglas Co. v. Union Pac. Ry. Co., 5 Kan. 615.

Hence where a grant to aid in the construction of a railroad contains conditions requiring the completion of certain portions of the road before it shall become entitled to a patent to a pro tanto portion of the land granted to it, the land is exempt from taxation until it has been earned by the company by a complete compliance with the conditions of the grant. But where all such conditions have been complied with by the company and it is entitled to a patent to the lands, they become taxable, even though no patent has been issued by the government: Central Pac. R. Co. v. Howard, 51 Cal. 229; Iowa Homestead Co. v. Webster Co., 21 Iowa, 221; Goodrich v. Beaman, 37 Iowa, 563; Kansas Pac. Ry. Co. v. Culp, 9 Kan. 38; Missouri River etc. R. Co. v. Morris, 13 Kan. 302; County of Cass v. Morrison, 28 Minn. 257, 9 N. W. 761; Wisconsin Cent. R. Co. v. Taylor Co., 52 Wis. 37, 8 N. W. 833; Wisconsin Cent. R. Co. v. Comstock, 71 Wis. 88, 36 N. W. 843; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687. And where one of the conditions of the grant requires the appointment of commissioners by the United States to report as to the amount of construction work done by the road, and that such commissioners shall be paid by the railroad company, the lands are not taxable until such conditions have been complied with: Central Pac. R. Co. v. Howard, 51 Cal. 229; Kansas Pac. Ry. Co. v. Prescott, 16 Wall. 604, 21 L. ed. 373. But where the grant is in praesenti and the company has completed the road, the lands granted to it are not exempt merely because they have never been "selected by, set off, certified or listed" to it by the government: State v. Central Pac. R. Co., 20 Nev. 372, 22 Pac. 237. Though where the grant provides that patent shall issue

to the railroad company only when shown to the President of the United States by the certificate of commissioners, who are to examine and report, that twenty miles of the road have been completed, the lands are exempt until the certificate is issued: White v. Burlington etc. R. Co., 5 Neb. 393. Lands conveyed by the state to a railroad as earned by it under an act granting it a certain amount of land for every ten miles of road completed by it are taxable, even though the land conveyed by the state was not confirmed to the state by Congress until after the tax levy: Elkhorn Land etc. Co. v. Dixon Co., 35 Neb. 426, 53 N. W. 382. And where a railroad company has earned land granted to it by the completion and acceptance of the road, it cannot claim that the lands are exempt as belonging to the government merely because it has failed to pay the fees required for the entry of its patent: Price v. Lancaster Co., 20 Neb. 252, 29 N. W. 931. Where title to lands granted to a railroad for the improvement of navigation is to remain in the state until issuance of a patent, they are not taxable after issuance of a certificate by the register of the Des Moines River Improvement certifying the lands to the railroad: Des Moines Nav. etc. Co. v. Polk Co., 10 Iowa, 1.

6. **Liability of Lands in Railroad Grant being Finally Declared Mineral in Character.**—It has been strenuously urged that lands comprised within a grant to a railroad should be exempted from taxation because of the liability of some portions of the grant being finally declared to be mineral in character and thus excluded from the operation of the grant. But it has been held by the supreme court of the United States that land included within the grant to the Northern Pacific Railroad Company are subject to state taxation for their value as agricultural lands, although not patented to the railroad and notwithstanding that the question of whether they were mineral in character was under investigation by the land department: Northern Pacific R. Co. v. Myers, 172 U. S. 589, 19 Sup. Ct. Rep. 276, 43 L. ed. 564. An intimation of the above decision is to be found in Northern Pac. R. Co. v. Patterson, 154 U. S. 130, 14 Sup. Ct. Rep. 977, 38 L. ed. 934. The possessory claim of the Central Pacific Railroad Company under its grant was held subject to state taxation, regardless of this possibility of the lands being determined mineral in character, in the case of Central Pac. R. Co. v. Nevada, 162 U. S. 512, 16 Sup. Ct. Rep. 885, 40 L. ed. 1057, the court saying: "But if the railroad has a possessory claim to these lands, they are taxable under the statute of Nevada, and it is this, and this only, which the state has assumed to tax. If it has no possessory claim, because the lands are mineral, it certainly cannot be injured by a sale of the lands to pay the tax, and whether the sale of such lands would pass the title or not is a question in which the railroad company is not interested. The company has an enormous land grant, embracing every alternate section of land within twenty miles on each side of the road, with a reservation of mineral lands from the operation of the act. Can it possibly have been intended that these lands should remain wholly untaxed, until the mineral lands, which it

may be assumed represent but a very small portion of the total grant, have been identified and excepted? Clearly not. There is no presumption that the land is mineral, and if it be so, and the railroad company disclaims title to it for that reason, it would probably be a good defense to a suit for taxes. But the possibility that certain lands may turn out to be mineral lands surely cannot be a defense to a claim for taxes applicable to the entire grant, so long as the railroad company lays claim to the right of possession of such lands."

The supreme court of North Dakota, in Northern Pac. R. Co. v. McGinnis, 4 N. D. 494, 61 N. W. 1032, in a very able opinion, also declared that the land grant was not exempt from taxation because the question of its nonmineral character had not been finally determined, the court saying: "The contention thus made leads inevitably to the conclusion that no portion of plaintiff's vast land grant is taxable until after patent has issued, as the question whether the land has passed under the grant because of its nonmineral character is never definitely settled until the land department has lost jurisdiction by the issue of patent: Barden v. Northern Pac. R. R. Co., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992. As a result of this doctrine, millions of acres of land to which the plaintiff unquestionably has title might remain untaxable for a quarter of a century. When once it is determined that a given section is nonmineral, the title to it is not then for the first time vested in the plaintiff. It is elementary that the title relates back to the date of the granting act so far as place lands are concerned (Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687); and it is such lands, and not indemnity lands, that we have to deal with in this case. The title is as much in the plaintiff before this question is settled as after: Barden v. Northern Pac. R. R. Co., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. Rep. 158, 35 L. ed. 999. There is no allegation in the complaint that the lands are mineral; neither is there an averment that the land department claims that they may be mineral, and is withholding patents on that account. This fact appeared in the complaint in the case of Northern Pac. R. R. Co. v. Clark, 153 U. S. 252, 14 Sup. Ct. Rep. 809, 38 L. ed. 706; and yet the federal supreme court in that case appears to have regarded the question now under discussion as so utterly untenable that it barely touches it in its opinion. The question was necessarily decided; for had the contention of the plaintiff in that case been well founded, the court must have sustained its bill to enjoin the tax proceedings, as they would have been utterly without foundation."

Similar rulings were made in other federal cases where the question also received exhaustive consideration: Northern Pac. R. Co. v. Walker, 47 Fed. 681; Northern Pac. R. Co. v. Wright, 51 Fed. 68; Myers v. Northern Pac. R. Co., 83 Fed. 358, 28 C. C. A. 412. A different view was, however, taken in Oakes v. Myers, 68 Fed. 807.

7. **Contingent Right of Pre-emption in Lands Granted to Railroads.**—The fact that a railroad grant contains a provision that all

lands so granted which shall not be disposed of by the company within three years after the completion of the road shall be subject to settlement and pre-emption like other lands, the money to be paid to the company, does not leave such an interest in the government as to render the lands exempt from taxation until after the issuance of patent: Kansas Pac. Ry. Co. v. Culp, 9 Kan. 38; Union Pac. R. Co. v. McShane, 89 U. S. (22 Wall.) 444, 22 L. ed. 747.

i. **Effect of Failure to Formally Complete Beneficial Title Though Entitled to do so.**—Where one is entitled to make final proof under a homestead entry, his failure to do so is no reason why the land should be exempt from taxation: Bellinger v. White, 5 Neb. 399. And where a corporation is entitled to have certain lands certified to it under a land grant, it cannot escape taxation by negligently failing to have such certification made: Iowa R. Land Co. v. Fitzpatrick, 52 Iowa, 244, 3 N. W. 40. Parol evidence is admissible to show that a railroad company had fraudulently prevented the issuance of a patent at the proper time in order to evade paying taxes on land earned under its grant: McGregor etc. R. Co. v. Brown, 39 Iowa, 655. But where the officers of a railroad company repeatedly urge that lands be certified to it notwithstanding the existence of an injunction restraining the governor from doing so, sued out by a claimant of the lands, it does not show that certification was not desired: Sioux City etc. R. Co. v. Osceola Co., 50 Iowa, 177. And in Iowa Falls etc. R. Co. v. Woodbury Co., 38 Iowa, 498, where this question was raised, the court observed: "The statute did not expressly require that the plaintiff should apply to the governor for patents for lands as they were earned, nor did it authorize the governor to issue patents only on such application. On the contrary, the governor could at any time, on being satisfied that any of the lands included in the grant were earned by the company, have conveyed the same to it without any application therefor, so that mere failure on the part of the company to apply to the governor for such conveyance would not necessarily prevent its issuance. Unless the plaintiff by some fraudulent act or representation prevented the earlier issuance of the patent, which is not shown, its right to the land dates from the time the patent was made. Previous to that time the land belonged to the state, and was not taxable."

j. **Exemption of Base and Lieu Lands Pending the Surrender of the Former for Lands Outside of Forest Reserve.**—On an application to surrender lands within a national forest reserve for lieu lands outside of such reserve, in accordance with the several acts allowing such exchanges, it is contemplated that the Interior Department shall, through its proper officers, consider all questions of law and fact affecting the title of the base lands offered and the lieu lands selected, and also the validity of the conveyance offered by the applicant, and pending the consideration of such questions by the government officers the equitable title to the lieu lands selected does not pass to the applicant, and hence the lands are not subject to taxation until after the application to make the exchange has been formally

approved by the proper government officials: Johnson v. Crook Co., 53 Or. 329, 100 Pac. 294; Clearwater Timber Co. v. Shoshone Co., 155 Fed. 612.

In the case last cited it was also held that where the base lands offered by the applicant were taxable, they continued to be so until after the selection of lieu lands was formally approved by the proper officials of the Interior Department, and the exchange consummated.

k. Pending Contests or Investigations Respecting the Right to a Patent.—The fact that the patent to land was suspended during some investigation or controversy concerning the rights of the person claiming such patent does not necessarily prevent the land from being taxed under a location certificate which apparently vested the equitable title in the locator: Herrick v. Sargent, 140 Iowa, 590, ante, p. 281, 117 N. W. 751. The fact that the issuance of a patent is delayed or suspended for some supposed defect does not exempt the land from taxation where the beneficial ownership was devested from the government at the time and the patent was finally issued to the beneficial owner: Witherspoon v. Duncan, 21 Ark. 240, affirmed in 71 U. S. 210, 18 L. ed. 339; State v. Hunter, 42 Minn. 312, 44 N. W. 201; Farnham v. Sherry, 71 Wis. 568, 37 N. W. 577. The fact that the title to land is in litigation between the United States and claimants under a Mexican grant does not exempt it from taxation if not owned by the United States, the court saying: "The plaintiffs, I apprehend, are the best judges of their own title, and must determine, at their own risk, whether it is worth paying taxes on or not. They cannot assert their ownership of the lands and deny the legal consequences of such right": Robinson v. Gaar, 6 Cal. 273. Where a railroad company has done everything essential to demand a patent from the land department under its land grant, the land is not exempt from taxation because of the erroneous refusal of that department to issue the patent: Wisconsin Cent. R. Co. v. Price Co., 64 Wis. 579, 26 N. W. 93. But it has been held that while contests are pending between a railroad company and pre-emption, homestead or other claimants, that inasmuch as it is the duty of the government officers to withhold patents from the railroad, their right to a patent is not so perfect and complete as to exempt the land from taxation: Central Pac. R. Co. v. Howard, 52 Cal. 227; Dickerson v. Yetzer, 53 Iowa, 681, 6 N. W. 41; Grant v. Iowa R. Land Co., 54 Iowa, 673, 7 N. W. 113; Doe v. Iowa R. Land Co., 54 Iowa, 657, 7 N. W. 118; Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126. So, also, where a contest was pending in the land office between claimants to townsite lots in a government town, before the issuance of a deed to the townsite trustees, there was no such right existing under the townsite laws as subjected the lots to taxation: Topeka Com. Security Co. v. McPherson, 7 Okl. 332, 54 Pac. 489.

l. Spurious Land Warrants, Scrip or Certificates, or Forged Assignments Thereof.—Where the land warrant, scrip or certificate upon which the land is located is spurious or the assignment thereof is forged, the locator obtains no such equitable title to the land as will

subject the land to taxation. In other words, the government retains such an interest in the land as exempts it from taxation: Reynolds v. Plymouth Co., 55 Iowa, 90, 7 N. W. 468; Durham v. Hussman, 88 Iowa, 29, 55 N. W. 11; Kohn v. Barr, 52 Kan. 269, 34 Pac. 880; Calder v. Keegan, 30 Wis. 126; Bronson v. Kukuk, 3 Dill. 490, Fed. Cas. No. 1929; Pitts v. Clay, 27 Fed. 635; Hussman v. Durham, 165 U. S. 144, 17 Sup. Ct. Rep. 253, 41 L. ed. 664.

But where the land office, upon discovering the location of such a warrant, suspends the patent and allows the locator to substitute money for the original warrant, and then issues a patent which recites the substitution for the original warrant, it has been held in several cases that for purposes of taxation the patent relates back to the original warrant and validates a tax sale theretofore made: Vinton v. County of Cerro Gordo, 72 Iowa, 155, 33 N. W. 618; Wheeler v. Merriman, 30 Minn. 372, 15 N. W. 665.

m. Where the Government has Contracted to Sell the Land.—The question of taxation of lands held under contract of sale from the government most frequently deals with the sale of state land, especially school lands, on credit, the payments occurring in regular installments. There is some apparent want of harmony in respect to the cases involving this question, but it is due to the variant statutes in the different states relative to exemption from taxation. In most of the states, statutes exist which permit the taxation of lands sold by the state, but protecting the lien of the state for the unpaid purchase price. Hence the rule may be summarized as follows: If the lands have been fully paid for, and the state merely holds the legal title in trust, a purchaser at a tax sale acquires the beneficial title to the property, but if payments are still to be made upon the land, then the purchaser merely acquires whatever rights the purchaser has under his contract of purchase. It is quite obvious that a tax upon the possessory right or imperfect interest acquired by such a purchaser from the state is not a tax upon the land itself: People v. Donnelly, 58 Cal. 144; Dorn v. Baker, 96 Cal. 206, 31 Pac. 37; Wells v. Savannah, 87 Ga. 397, 13 S. E. 442; Henderson v. State, 53 Ind. 60; Prescott v. Beebe, 17 Kan. 320; Morgan v. Clay Co., 27 Kan. 229; Larabee v. Prather, 51 Kan. 743, 33 Pac. 608; Robertson v. State Land Office Commr., 44 Mich. 274, 6 N. W. 659; Courtney v. Missoula Co., 21 Mont. 591, 55 Pac. 359; Hagenbuck v. Reed, 3 Neb. 17; Edgington v. Cook, 32 Neb. 551, 49 N. W. 369; State v. Tucker, 38 Neb. 56, 56 N. W. 718; Hindes v. State, 28 Tex. Civ. 531, 67 S. W. 467; State v. Frost, 25 Wash. 134, 64 Pac. 902; Gray's Harbor Co. v. Chehalis Co., 23 Wash. 369, 63 Pac. 233; Taylor v. Robinson, 34 Fed. 678.

In Robertson v. State Land Office Commr., 44 Mich. 274, 6 N. W. 659, Mr. Justice Cooley, in referring to this subject, said: "The state, in respect to these lands, has been acting in two distinct and quite dissimilar capacities; that is to say, as proprietor in selling them, and as sovereign in taxing them. In the first capacity it treats with a purchaser precisely as any other proprietor might, offering,

agreeing upon, and accepting terms, and entering into stipulations from which it is not at liberty to depart, and to which it cannot add in the smallest particular except with the assent of the person with whom it is dealing: New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; Piqua Branch Bank v. Knoop, 16 How. 369, 14 L. ed. 977. The contract it makes must stand, and the other contracting party is entitled to all suitable remedies upon it. The state, as a sovereign, cannot deal with it otherwise than as it might with a contract between two private citizens. But the state, as a sovereign, may subject the interest acquired by the contract to the taxing power and the police power precisely as it might the interest acquired under any contract between the individuals, and not otherwise."

In those states where the tax is permitted to be levied upon the land itself, after a sale on credit, the interest of the state in the unpaid installments is protected by statutory provisions to the effect that the purchaser at the tax sale takes the land subject to all claims, liens or encumbrances which the state may have thereon: Hagenbuck v. Reed, 3 Neb. 17.

In Pennsylvania, however, a vendee of land purchased by articles of agreement may be assessed for the full taxable value of the land, although he has only paid a portion of the purchase price. The rem is taxed, and if a tax sale results from the default in the payment of the taxes levied, the title to the rem is sold. Under that rule it was held in that state that where the United States sells real estate, reserving title to itself until all of the payments are made and conditions performed, the real estate is not taxable until all payments are made and conditions performed: Mint Realty Co. v. Philadelphia, 218 Pa. 104, 66 Atl. 1130, 11 Ann. Cas. 388.

n. **Mining Claims.**—Until a patent has been obtained upon the location of a mining, claim the United States is still the owner of the soil. But it is well settled that the possession or claim to mines on lands belonging to the United States and the possessory right to a mining claim is property which is subject to taxation. Such taxation does not infringe the title of the United States, nor is it a tax upon lands of the United States: State v. Moore, 12 Cal. 56; People v. Shearer, 30 Cal. 645; People v. Black Diamond Coal M. Co., 37 Cal. 54; Bakersfield etc. Oil Co. v. Kern Co., 144 Cal. 148, 77 Pac. 892; Wood v. McCombe, 37 Colo. 174, 119 Am. St. Rep. 269, 86 Pac. 319; Salisbury v. Lane, 7 Idaho, 370, 63 Pac. 383; Hale & Norcross etc. Min. Co. v. Storey Co., 1 Nev. 104; Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313; Elder v. Wood, 208 U. S. 226, 28 Sup. Ct. Rep. 263, 52 L. ed. 464.

o. **Where the Governmental Body has Leased the Land.**—In the consideration of whether lands leased by a governmental body are subject to taxation, reference must be had to the statutes of the state, inasmuch as under some statutes all property belonging to a certain political body is exempted from taxation, while under other statutes only such property as is devoted to a public use is made exempt. But when land of a county or city is leased, it is generally regarded

as not devoted to a public use, and hence is not exempt from taxation: People v. Chicago, 124 Ill. 636, 17 N. E. 56; Sanitary Dist. v. Hanbery, 226 Ill. 480, 80 N. E. 1012; Essex Co. v. Assessors of Salem, 153 Mass. 141, 26 N. E. 431; Sexton v. Board of Supervisors, 86 Miss. 380, 38 South. 636. Of course a lease of such lands may require the lessee to pay the taxes on the property: Moss Point etc. Co. v. Harrison Co., 89 Miss. 448, 42 South. 290, 873. And where property belonging to a municipality is leased under a perpetual lease, the lessee, for the purposes of taxation, is regarded as the owner of the property: Norfolk v. Perry Co., 108 Va. 28, 128 Am. St. Rep. 940, 61 S. E. 866.

The leasehold interest of the lessee is, of course, a proper subject for taxation: Carrington v. People, 195 Ill. 484, 63 N. E. 163; State v. Tucker, 38 Neb. 56, 56 N. W. 718; Moeller v. Gormley, 44 Wash. 465, 87 Pac. 507.

IX. Force and Effect of Tax Deeds to Land Belonging to the Public.—In determining the rights of a purchaser under a tax sale, the maxim, "Caveat emptor," is rigidly applied as against the purchaser at such a sale: Holt's Heirs' Lessee v. Hemphill's Heirs, 3 Ohio, 232. A tax sale of public land which is exempt from taxation conveys no title to the purchaser: Bonner v. Phillips, 77 Ala. 427; Hall v. Dowling, 18 Cal. 619; Central Pac. R. Co. v. Howard, 52 Cal. 227; Low v. Lewis, 46 Cal. 549; Quivey v. Lawrence, 1 Idaho, 313; People v. United States, 93 Ill. 30, 34 Am. Rep. 155; McCaslin v. State, 99 Ind. 428; Young v. Charmquist, 114 Iowa, 116, 86 N. W. 205; Richard v. Perrodin, 116 La. 440, 40 South. 789; Dixon v. Porter, 23 Miss. 84; Meridian v. Phillips, 65 Miss. 362, 4 South. 119; Ricks v. Baskett, 68 Miss. 250, 8 South. 514; Wright v. Cradlebaugh, 3 Nev. 341; Totten v. Nighbert, 41 W. Va. 800, 24 S. E. 627; Wisconsin Cent. R. Co. v. Taylor Co., 52 Wis. 37, 8 N. W. 833; Ivinson v. Hance, 1 Wyo. 270; Braxton v. Rich, 47 Fed. 178; McGoon v. Scales, 76 U. S. 23, 19 L. ed. 545; Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670, 29 L. ed. 845. And nothing passes by a tax sale of public property of the state, assessed in the name of one without any interest therein: Slattery v. Heilperin, 110 La. 86, 34 South. 139.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

ANTONINI v. STRAUB.

[130 Ky. 10, 112 S. W. 1092.]

A MARRIED WOMAN Holding Realty as Trustee, with a power of sale, may convey it without her husband joining in the deed, notwithstanding section 506 of Kentucky Statutes of 1903, which provides that a conveyance by a married woman may be by the joint deed of her and her husband. (p. 352.)

SPECIFIC PERFORMANCE — Contract — Married Woman Trustee.—Specific performance will be decreed of a contract for the sale of land as against the purchaser from a married woman as trustee under a deed containing a power of sale independently of her husband, the objection of such purchaser to accept a conveyance executed under the power by reason of Kentucky Statutes 1903, section 506, not being tenable. (pp. 352, 354.)

E. L. McDonald, for the appellant.

Burwell K. Marshall, for the appellee.

12 SETTLE, J. This is an appeal from a judgment specifically enforcing a written contract between appellant and appellee, whereby the former purchased a parcel of real estate in the city of Louisville at an agreed price. Appellee tendered appellant a deed of conveyance to the property which she as trustee had duly signed and acknowledged. The deed accurately expressed the terms of the sale, and contained a covenant of general warranty. Appellant, though able to pay for the property, refused to do so or to accept the deed. Appellee is a married woman, and her husband did not sign or acknowledge the deed, nor was he named therein as a grantor, and for that reason alone appellant rejected the deed and refused to perform the contract. The only question presented by the record is: Did the deed tendered convey to appellant a marketable title to the property therein described?

It was claimed by appellee, and adjudged by the lower court, that she, although a married woman, could by the deed tendered, without joining her husband, convey the real estate under the power given her by the deed by which she derived title, and which is copied in full in the petition. By that deed Henry Loemker, her father, in consideration of love and affection for his daughter, the appellee, conveyed her the property in trust for her child, and until her youngest child should reach the age of twenty-one years, for [13] the benefit of the child she then had and any other children she might have, with certain provisions as to remainders in the event of the death of her children. Other clauses of the deed are as follows: "Provided, further, that the said Amelia Straub shall have the privilege or license of occupying said property as long as she lives, but she shall not have any interest in or to said property, or any part thereof, it being the intention of the grantor that said Amelia Straub shall not by this deed have or acquire any interest whatsoever in said property, or in the rents or income thereof; but shall simply have a license or privilege of living thereon and nothing else. Provided, further, that said trustee and her successor and successors in office may sell and convey said property herein conveyed by deed of general warranty, and either invest the proceeds of sale in other real estate, title to which shall be held upon the same trusts and subject to the same license and restrictions and with the same powers that the property herein conveyed is held; or said trustee or her successor or successors in office may expend the proceeds of sale for the use and benefit of her said children in such manner, in such amounts and for such purposes as said trustee and her successor and successors in office may deem for the best interest of her said children and having full faith and confidence in the judgment and honesty of my said daughter, Amelia, if she shall expend said proceeds of sale as above set forth, she shall not be held accountable for such proceeds or required to account to her said children or to any of them, or to anybody or to any court for such proceeds, or any part thereof, but any other trustee shall be held accountable; but the purchaser shall not be required to look to the necessity of the sale nor to the investment, [14] nor to the expenditure of the proceeds of sale under any state of case." It will be observed that the above deed gives appellee the privilege of occupying the property conveyed so long as it remains unsold, but excludes her from acquiring in her own right any title to or interest therein, or in the rents or profits thereof.

It, however, expressly empowers her as trustee to sell and convey the property by deed of general warranty, makes her unaccountable for the proceeds, if there should be a failure on her part to reinvest them in other property, and relieves the purchaser of all responsibility for any misappropriation by her of such proceeds. It will be further observed that the deed contains no provision requiring appellee's husband to unite with her in the sale or conveyance of the property; indeed, the deed is silent as to the husband, though he was at the time of its execution alive, and is still living. He and appellee have, however, been separated several years, and she has instituted an action for a divorce, which is yet pending.

It is appellant's contention that, though appellee merely holds as a trustee the title to the property in question, the power given her to convey it cannot be exercised, except in conjunction with her husband, who must unite with her in the deed, as provided by section 506 of Kentucky Statutes of 1903. This contention seems to be unsupported by authority. As at common law a married woman could not dispose of her real estate without a fine or recovery, she must since the abrogation of the common law by our statute on conveyances in order to do so convey it by the method substituted by the statute; that is, by deed in which the husband joins. But the statute does not interfere with the right of a married woman to convey, in pursuance of a power duly conferred upon her, real estate, the title [15] to which she holds as a mere trustee, without the concurrence or intervention of her husband. As to the last question, all the authorities seem to agree. In 4 Kent's Commentaries, twelfth edition, page 338, it is said: "Every person capable of disposing of an estate actually vested in himself may exercise a power, or direct a conveyance of the land. The rule goes further and even allows an infant to execute a power simply collateral, and that only; and a feme covert may execute any kind of power, whether simply collateral, appendant or in gross, and it is immaterial whether it was given to her while sole or married. The concurrence of the husband in no case is necessary." In 2 Washburn on Real Property, section 1685, the same conclusion is expressed: "Any person who is competent to dispose of an estate of his own may execute a power over land. If a power is simply collateral, an infant may execute it. And a feme covert may execute a power, whether collateral, appendant, or in gross, the concurrence of her husband being in no case necessary. She may even execute it in favor of her husband. It makes

no difference whether the power was granted to her before or after she became a married woman. The consent of her husband is unnecessary in either case. And the power may be coupled with an interest, as where an interest in land with a power of appointment is given to a married woman to her sole and separate use, or is given so that by statute it is her separate property. But the power must be exercised by her in the mode appointed by the instrument giving the power. The statutes enabling women to hold their separate estate with full power of disposal do not alter this rule." In this state in the case of Tyree v. Williams, 3 Bibb, 365, 6 Am. Dec. 663, the same doctrine is thus stated: "The [16] fourth and last objection we shall notice questions the sufficiency of Jordan's title to one of the lots in Standford. This lot was conveyed to Jordan by Samuel Baird and Mary M. Bell, surviving executor and executrix of William Henderson, deceased. Henderson, being possessed of the legal title to this lot, made his will, by which, after devising all his real estate and personal estate to his wife, he directed all his possessions in the town of Standford to be sold at public auction by his executors at twelve months' credit. The lot in question was advertised and exposed to public sale. A few days before the sale, Jordan by letter informed the executors what price he would give, and, no person having bid as much on the day of sale, the lot was afterward conveyed to him at the price he had offered. It is admitted that Mrs. Henderson, now Mrs. Bell, had intermarried with her present husband before she executed the deed of conveyance to Jordan, and that she was at that time a feme covert. But it is contended in the second place that Mrs. Bell could not legally execute the conveyance without joining her husband and being privily examined, as the law concerning conveyances directs. There is no doubt that a feme covert may act en autre droit, without her husband. It is said: 'If cestui que use had devised that his wife should sell his land, and made her executrix and died, and she took another husband, that she might sell the land to her husband, for she did it en autre droit, and her husband should be in by the devisor': Coke on Littleton, 112a. Mr. Hargrave in his annotation upon this passage in Coke says: 'It is agreed in the books that a wife may without her husband execute a naked authority, whether given before or after coverture; and the rule (he observes) is the same where both an interest and an authority pass to [17] the wife, if the authority is collateral to, and doth not flow from, the in-

terest, because then the two are as unconnected as if they were vested in different persons': Note 6, Coke on Littleton, 112a. In this case there is no doubt that Mrs. Bell had an interest in the lot conveyed to Jordan; for all the estate, both real and personal, was devised to her. But the interest vested in her individual right, and the authority to sell was given to her in the capacity of executrix. The latter, therefore, did not flow from the former, but was collateral thereto; and consequently they were as unconnected as if they had been vested in different persons. Upon the principles of the common law, then, it is evident Mrs. Bell might, without her husband joining, execute the conveyance; and it is clear that the statute concerning conveyances can have no effect upon the case, for that statute only enables a feme covert to convey her interest or estate by observing the requisites prescribed in cases where she could not do so before, but does not disable her from executing an authority which she might do according to the principles of the common law." An examination has not enabled us to find a more recent decision than Tyree v. Williams, 3 Bibb, 365, 6 Am. Dec. 663, which in any way changes or modifies the doctrine therein expressed. We find, however, that the courts of last resort in many states outside of Kentucky adhere to the same doctrine: Pullam v. State, 78 Ala. 31, 56 Am. Rep. 21; Huls v. Buntin, 47 Ill. 396; Armstrong v. Kerns, 61 Md. 364; Gridley v. Wynant, 23 How. 500, 16 L. ed. 411.

The cases cited by counsel for appellant are not in point. In each of them the wife under a power conferred attempted to convey real estate of which she was the sole owner without having the husband to join in the deed. This, it was held, she could not do. [18] But in the instant case the conveyance by the married woman was made in the execution of an express trust, and the property conveyed an estate in which she owned no interest other than the mere right of occupancy as trustee.

Being of opinion that the deed tendered by appellee to appellant will convey him a good title to the realty therein described, the judgment of the lower court specifically enforcing the contract is hereby affirmed.

Powers.—A Married Woman may, Without the Assent or Concurrence of Her Husband, execute a power conferred upon her to dispose of lands in fee by executing her sole deed thereof: Young v. Sheldon, 139 Ala. 444, 101 Am. St. Rep. 44.

CRAIN v. MALLONE.

[130 Ky. 125, 113 S. W. 67.]

ADVANCEMENTS—Intention of Donor Ineffectual to Defeat Statute.—Kentucky Statutes of 1903, section 1407, provides that any advancement to a descendant, excluding maintenance and education, shall be charged to the donee on the distribution of the ancestor's estate, and no intention of the donor will interfere with the operation of the statute or relieve the children who received advancements from accounting for them. (p. 356.)

PARENT AND CHILD—Helpless Offspring—Maintenance After Majority.—The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child becomes an adult, but his obligation, moral and legal, is continued in the case of an adult child rendered helpless by accident or disease. (p. 357.)

ADVANCEMENTS — Helpless Offspring. — Kentucky Statutes of 1903, section 1407, providing that any advancement to a descendant, excluding maintenance and education, shall be charged to the donee on the distribution of the ancestor's estate, does not warrant some of the descendants in claiming that a charge for the maintenance of a helpless adult descendant since coming of age should be allowed against his share of the estate. (pp. 358, 359.)

McCandless & Lorimore, for the appellants.

C. B. Dowling, guardian ad litem, for the appellee, J. C. Mallone.

[126] CARROLL, J. Mrs. Susan Mallone died intestate, leaving surviving her three children—the appellant Annie Lee Crain, wife of L. F. Crain, and J. C. and W. S. Mallone. This action was brought to settle her estate and distribute the proceeds between her children. J. C. Mallone was a person of unsound mind, and the guardian ad litem appointed to defend for him sought to charge Mrs. Crain and W. S. Mallone with advancements made to them by Mrs. Mallone. Mrs. Crain and W. S. Mallone admitted in a pleading that they had received from their mother advancements [127] in land and money, amounting to the value of about two thousand dollars each; but they denied that they should be charged with these advancements for the benefit of J. C. Mallone, because, as they averred, he was some forty-five years of age when his mother died, and had been destitute of mind since his infancy, and an idiot, and was supported and cared for all of his life by his mother; and that this care and attention for the years after he reached his majority was worth at least two hundred dollars per year, and that their mother, recognizing that she had in this way advanced to J. C. Mallone

largely more than two thousand dollars, for the purpose of making her other children equal with him, advanced to them two thousand dollars each. After this pleading was filed, W. S. Mallone, not desiring to further contest the fact that he should be charged with two thousand dollars, advanced to him, his name was stricken from the pleading denying that J. C. Mallone was not entitled to charge the other children with the advancements. Thereupon the demurrer filed by the guardian ad litem of J. C. Mallone to the answer of Mrs. Crain, setting up the reasons why she should not be charged in the settlement of the estate with the two thousand dollars advanced to her, was sustained; and, declining to amend, she prosecutes this appeal. So that the only question in the case is whether or not her answer presented a good defense.

Kentucky Statutes of 1903, section 1407, provides that: "Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant of those claiming through him in the division and distribution of the undevised estate of the parent or grandparent; and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributable [128] share of the whole estate, real and personal, devised and undevised. The advancement shall be estimated according to the value of the property when given. The maintaining or educating, or the giving of money to a child or grandchild, without any view to a portion or settlement in life, shall not be deemed an advancement." Therefore, unless the value of the services, attention, and care rendered by his mother to the idiot, J. C. Mallone, after he arrived at the age of twenty-one years, should be charged to him as an advancement, there is no escape from the conclusion that, under the statute, the appellant Mrs. Crain must in the settlement of the estate, as between herself and J. C. Mallone, be charged with the two thousand dollars advanced to her. The intention of Mrs. Mallone in making the advancements will not be allowed to defeat the statute, or to relieve the children who receive the advancements from accounting for them: Bowles v. Winchester, 13 Bush, 1. Indeed, counsel for the appellant concede that, unless the answer of Mrs. Crain presented a defense, she must be charged with this sum. Their only contention is that, admitting as true the averments of their pleading, J. C. Mallone received in the way of advancements more than Mrs. Crain, and hence no ac-

count as between them should be taken of advancements in the settlement and distribution of the estate. In other words, their argument is that an idiotic and helpless adult child who is taken care of by his parents must in the settlement of the parent's estate be charged as an advancement with the value of the services, attention, and care rendered to him by the parent. It does not appear that J. C. Mallone had any estate aside from that received from his mother; so that whether or not his mother might under any circumstances have charged [129] him with and collected from his estate a reasonable sum for caring for him is not before us. Hence it is not necessary to particularly consider section 2178 of the Kentucky Statutes of 1903, providing that "any person other than the keeper of a tavern or house of private entertainment, who shall entertain in his house, or furnish him with diet or storage for his goods, not making an agreement for compensation therefor, shall not recover anything against the person so entertained or furnished with diet or storage, or against his estate, but the person so furnishing another shall be considered as doing the same of courtesy," or the cases construing it, that hold that this statute does not apply to boarding, lodging, and attention bestowed upon an idiot or a person incapable of entering into a contract: Combs v. Beatty, 3 Bush, 613. The effort here is not to require a helpless adult child to contribute to or pay for his maintenance, but to permit the parent to charge the cost of maintaining as an advancement, and have the same deducted from the child's part of the estate. It is conceded that it is the duty of a parent to care for its infant child, and admitted that, except in rare cases, he will not be permitted to charge for such services (Hedges v. Hedges, 24 Ky. Law Rep. 2220, 73 S. W. 1112); but insisted that, when the child arrives at the age of twenty-one, the obligation and duty of the parent ends, and thereafter the child may be charged for the care and attention necessarily bestowed upon him. Based upon this premise is the argument of counsel that Mrs. Mallone had the right to charge J. C. Mallone as an advancement with the value of the services rendered him by her; but the premise is not sound. The duty and obligation of a parent to care for his offspring does not necessarily terminate when the [130] child arrives at age or becomes an adult; nor is it limited to infants and children of tender years. An adult child may from accident or disease be as helpless and incapable of making his support as an infant, and we see no

difference in principle between the duty imposed upon the parent to support the infant and the obligation to care for the adult, who is equally, if not more, dependent upon the parent. In either case the natural as well as the legal obligation is the same, if the parent is financially able to furnish the necessary assistance. If the parent has no estate, or is indigent or otherwise unable to support his infant child, who is possessed with ample means, the chancellor when appealed to might make an allowance out of the child's estate; and in the case of an unfortunate adult, the court under similar circumstances would grant relief. But this is not the case we are considering. Here the mother had ample estate. The adult child had none. The charge was not made by the mother to enable her to support her son, or because she was unable to render him freely and without charge the services performed. But her other children for their own benefit are seeking to have the interest inherited by the child charged by the amount expended in his support by his mother. This they cannot do. Certainly they do not occupy any better position in this particular than their mother. She could not have exacted from J. C. Mallone compensation because he had no estate, and she was financially able to care for him. Nor was the maintaining of J. C. Mallone by his mother with any view to a portion or settlement in life within the meaning of section 1407 of the statute, supra. It was done in the discharge of a filial duty that a mother owed to her helpless child. The advancements made [131] were only those necessary to sustain him from day to day, and can in no sense be considered as an advancement made with a view to a portion or settlement in life.

Nor are the views herein expressed in conflict with the opinion in Central Kentucky Asylum v. Knighton, 113 Ky. 156, 23 Ky. Law Rep. 2380, 67 S. W. 366. In that case the court was considering the meaning and effect of a statutory provision authorizing the state, under certain conditions, to recover from the parent the board of the child while an inmate of an asylum; and it was said that the statute only applied to infants, and not an adult child. It is true the court in the course of the opinion said: "Being entitled to the services of the child until of age, there is some reason for holding the parent to a legal liability when the necessities of the child require that he should be supplied with food and clothing. But when of full age, the parent being entitled to no control over the child, and having no right to his custody or

services, no such legal obligation exists and none can be created by statute unless by consent of the parent. He may contract to support the child, and it would be binding, but not otherwise." This rule might be invoked in this case if it was sought by strangers to charge Mrs. Mallone with care and attention to her son—a question, however, it is not necessary to decide in this case. But the fact that the parent might not be liable to third persons for the support of adult children is a long step from proving that the parent may himself charge them under facts like the ones shown by this record. It does not follow from the proposition that the parent may be exempt from liability at the hands of third persons that he [132] is thereby permitted to charge for services and attention rendered by him.

Looking at the question as it is presented by the record, we cannot find any authority, statutory or otherwise, that would warrant us in holding that J. C. Mallone should be charged as an advancement with his maintenance; and the judgment of the lower court is affirmed.

Advancements are discussed in the note to Miller's Appeal, 80 Am. Dec. 559. Advancement is giving, by anticipation, whole or part of what it is supposed a child will be entitled to on the death of the party making it intestate. The definition embraces the idea that the party has irrevocably parted with his title in the subject advanced: Darne v. Lloyd, 82 Va. 859, 3 Am. St. Rep. 123; Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532; Headrick v. McDowell, 102 Va. 124, 102 Am. St. Rep. 843. If a parent furnishes the purchase money and takes a conveyance in the name of his child, the rule which presumes an advancement does not apply: Moore v. Scruggs, 131 Iowa, 692, 117 Am. St. Rep. 437.

TILTON v. TILTON.

[130 Ky. 281, 113 S. W. 134.]

ANTENUPTIAL CONTRACT—Validity of.—A woman may release her rights in her intended husband's property, but such a contract must be free from fraud or misrepresentation or the practice of deceit on the part of the man, and must be reasonable and entered into with the best of good faith on the part of both. (p. 365.)

ANTENUPTIAL CONTRACT—Onus of Proof.—Where an antenuptial contract shows upon its face that it is unjust or unfair, the burden is upon the husband or his representatives to show that it was fairly procured, and that the wife was not overreached or deceived in the execution thereof. (p. 335.)

ANTENUPTIAL CONTRACT — When Unconscionable. — An antenuptial contract which provides that the intended wife shall release all rights to the intended husband's present and future property, covenants to keep him free from postnuptial debts except authorized in writing by him, that if there shall be no issue of the union all her estate shall go to him or his heirs on her death, that he will clothe and keep her, and as a further consideration gives her a sewing machine and a horse, is both unconscionable and unjust to the wife and could only be sustained by evidence of the most positive character that its terms were fully comprehended, understood and acquiesced in. (pp. 365–367.)

ANTENUPTIAL CONTRACT.—To Determine the Fairness and Reasonableness of an Antenuptial Contract, the court will inquire into all the circumstances, such as the means of both parties, their ages and the woman's full and clear knowledge of the nature of the deed she is signing. (p. 365.)

ANTENUPTIAL CONTRACT—Test of Fairness.—If the provision made for the intended wife in an antenuptial contract is unreasonably disproportionate to the means of the husband, the presumption of designed concealment is raised and the burden of disproving the same is on him. (p. 365.)

ANTENUPTIAL CONTRACT—Comprehension by Woman.—Where a woman had been a domestic and her mistress having died she stayed on with the master and his family and gossip arose about them, and as a "peace offering to the neighborhood" he proposed to marry her, and thereupon an agreement was prepared by his lawyers and she was taken by him to the hotel where they were and the contract was read and its terms explained to her, but their effect was not, some of them being merely a statement of a man's legal obligations with regard to his wife and others providing that she yielded all her claims to his estate, and the general tenor of the agreement being of a business nature and not bottomed on sentimental grounds, the court set it aside on the ground that the woman regarded it, in the absence of explanation of its effect, simply as the "peace offering to the neighborhood," and not as a barter away of her rights. (pp. 366, 367.)

ACQUIESCENCE—Unconscionable Contract.—Where an unconscionable antenuptial contract was signed and the wife applied to have it canceled thirty-two years after its execution, the doctrine of acquiescence cannot be used to defeat her claim, when the same improper influence which induced her to sign it operated to lull her into silence during those years, and it was only after the death of her husband that she understood that she had been imposed upon and that she was left helpless and poverty stricken in her old age after a life of service and devotion. (p. 367.)

R. Buckner and J. P. McCartney, for the appellant.

J. J. Osborne, Samuel Holmes and W. J. Osborne, for the appellees.

283 LASSING, J. In 1875 Nimrod A. Tilton, a widower, and Nancy F. Morand, a widow, both residents of Robertson county, Kentucky, entered into the following contract: "This indenture made and entered into this third day of July, 1875, by and between Nimrod A. Tilton and Mrs. Nancy F. Morand,

both of the county of Robertson and state of Kentucky: Witnesseth, that for and in consideration of the said Tilton to lawfully marry the said Nancy F. Morand, said marriage as aforesaid to take place during the year 1875, and the further consideration that the said Tilton has this day given to the said Mrs. Nancy F. Morand one Singer sewing machine, of the value of $80.00 (eighty dollars) and one black mare, of the value of one hundred and fifty dollars ($150.00). Now, in consideration of said marriage to take place or happen as aforesaid, and the consideration of said sewing machine and said mare, the receipt of which, that is, said machine and said mare, is hereby acknowledged by the said Mrs. Nancy F. Morand. The said Mrs. Nancy F. Morand for and in consideration of the premises aforesaid, does by these presents release, confirm and forever release [284] and confirm unto said N. A. Tilton, his heirs and assigns, any dower interest or any other interest whatsoever she may acquire in and to the land or personal property or any insurance policy which the said Tilton may now have upon his life, or any property which he may hereafter acquire in and to which the said Mrs. Nancy F. Morand might be entitled to by reason of said marriage, and it is further understood by the parties hereto that the said N. A. Tilton is in no wise to be responsible for any debts contracted by the said Mrs. Nancy F. Morand after their said marriage or proposed marriage shall have taken place, without the written consent or order of the said Tilton. It is further understood by the parties hereto that in case there should be no heirs born to the said N. A. Tilton and Mrs. Nancy F. Morand, by reason of said proposed marriage, then whatever property shall remain at the death of Mrs. Nancy F. Morand shall inure to the said Tilton or his heirs. It is further understood by the parties hereto that the said Tilton, whenever said marriage shall take place, is to clothe and furnish the necessaries of life to the said Mrs. Nancy F. Morand. In testimony whereof the parties hereto have hereunto set their hands, the day and year first above written." At the date of the execution of this contract Nimrod A. Tilton was living on a farm of some one hundred and sixty or one hundred and seventy acres with his four children, the oldest a boy some seventeen or eighteen years of age, the youngest a girl, possibly eight or nine years of age. His wife had died some three months before. Nancy F. Morand had been a widow for some three or four years. She had no children. She had lived in the home of Nimrod A. Tilton, commonly

called "Judge" Tilton, for a year or more before the death of his wife, who was quite an invalid. During this time she had attended [285] to the general household duties, in addition to doing the cooking and washing, on a salary of one dollar and fifty cents per week. After the death of Mrs. Tilton she continued to live in his home and look after the household duties, etc., as she had done before. In the early part of September following she and Judge Tilton were married. They lived together on his farm from that time until his death in 1906. The marriage contract was recorded in the county court clerk's office in October following their marriage. He left a will by the terms of which he gave to his wife the household goods, kitchen furniture, and about two hundred dollars in money. By another clause of the will provision is made that, if it is contested, the devisee contesting forfeits all right to any portion of his estate. She renounced the will, and filed a suit in the Robertson circuit court, in which she sought to have canceled and set aside the antenuptial contract above set out, on the ground that it was obtained from her through fraud and misrepresentation, and that it was unjust, inequitable, and a fraud upon her rights as a married woman. She asked that she be adjudged the owner of a widow's share in her husband's estate. Issue was joined upon the allegations of the petition, much proof taken, and upon final hearing the chancellor found against her contention, and dismissed her petition. From that finding and judgment she prosecutes this appeal.

Most all of the proof that has been taken relates to the home life of Judge Tilton, especially during the last few years thereof, when he was sick, afflicted with a cancer, and a good part of the time confined to his bed, almost helpless. Further than to show the devoted, untiring, and constant service which Mrs. Tilton rendered her husband in his sad affliction, this evidence has little bearing on the question before us. [286] Mrs. Tilton and Dr. M. S. Brown are the only witnesses who have testified concerning the execution of this marriage contract. The testimony of Mrs. Tilton, under the well-recognized rule, was incompetent, and the trial judge did not err in excluding it from his consideration. The question in issue must therefore be determined by the contract itself, as read in the light of the testimony of Dr. Brown. At the time of the execution of this contract Dr. Brown was engaged in the practice of law at Mt. Olivet, and Judge Kimbrough was associated with him. He testifies that Judge Tilton came to see him

about the preparation of this contract, and talked the matter over with him, and told him how he wanted it drawn; that he in turn discussed the matter with Judge Kimbrough, his law partner, and had Judge Kimbrough draw up the contract as it now is. After it was prepared, Judge Tilton came to town with Nancy F. Morand, and brought her to his (Brown's) room in the hotel, and there he (Brown) read over the contract to her, and explained it to her, and after this was done, it was signed by Judge Tilton and Nancy F. Morand in his presence. The clerk was caused to come to his room and take their acknowledgments. This done, Judge Tilton and Nancy F. Morand left, and returned to his home. Dr. Brown further testifies that he was at that time a friend of her family. That they were poor people, and he took an interest in her, and on this account was careful to see that she understood what she was doing. That both she and Judge Tilton were, at that time, being criticised in the neighborhood because of her staying at his house and taking care of his home and his children for him after the death of his wife, and in the course of his testimony he said: "There was some necessity for the [287] peace offering in the neighborhood on account of the young people living there, and that she knew of this arrangement. She was going to have a permanent home and he got a housekeeper, and Mrs. Morand understood these facts from him, and I did from her, and she could not have been mistaken about it." From this testimony of the doctor it is plain that he was undertaking to satisfy Mrs. Morand of the necessity for the execution of the contract. What he meant by "there being some necessity for the peace offering in the neighborhood" is unexplained and unintelligible, unless it is construed to mean that the execution of this contract was to bring about peace and harmony between Mrs. Morand and the children of Judge Tilton. She pleads that she did not comprehend its terms or the effect thereof; that she was overreached and imposed upon.

It is not difficult to understand how, under the circumstances, this could be done. She was a poor, uneducated woman, dealing with a man whom she was shortly to marry. Recognizing that from the force of circumstances by which she was compelled to labor for a living she had been placed in a position where she was being subjected to severe criticism, and, perhaps, more to avoid this criticism than from any sentimental motive, she had agreed to marry Judge Tilton as the only feasible solution of the difficulty in which

the situation had placed them. In this way only could the tongue of the scandal monger be silenced. There then arose, as may be inferred from the testimony of Dr. Brown, the objection to the marriage on the part of the children of Judge Tilton. This objection could only be overcome by the execution of a marriage contract. Under these circumstances we find the judge arranging for a draft of this [288] contract, and when it is completed, taking the woman with him to a room in the hotel, and there, away from her friends or anyone to advise her, in the presence of a lawyer of his own choosing, he had it explained to her from his standpoint by his lawyer in his presence, and after its execution, he has the clerk come to this room in the hotel to take her acknowledgment. What had passed between her and Judge Tilton is not known, but one thing is certain, so far as the record shows, she was not advised in the slightest at or before the time of the execution of this contract, as to what property he owned, or what her property rights were, or what was the real effect of the execution of this paper. Considering the ages and past experience of the contracting parties, together with the short time since the death of Judge Tilton's first wife, we must conclude that their marriage was not bottomed upon sentimental grounds, and this is especially true when considered in the light of the contract before us, for we find in it no single expression of love, affection, or other kindred sentiment. On the contrary, it contains propositions so cold in their terms as to be almost cruel. The gift of the mare and sewing machine cited therein need not be considered, for the reason that upon the consummation of their marriage these articles of personalty, under the then existing law, became at once the property of her husband. Nor need we consider those clauses of the contract which expressly provided that he would not be responsible for any debt which she might contract without his written consent, and that he would clothe and supply her with the necessaries of life after their marriage; for the one is but a limitation upon the privilege and freedom which his future wife might enjoy as to purchases for herself, and the other was a [289] recitation of the assumption by himself of a liability which the law imposed upon him. Had the import of either of these provisions in the contract been understood by his prospective wife, it must have been both embarrassing and humiliating to her. Of neither of these clauses, however, does she complain, but it is of that clause of the contract which provides that she shall have no part in her

husband's estate (either that which he then possessed or might thereafter acquire), upon his death, although it expressly provides that any property she may possess at her death shall pass to her husband, if living, and if not living, to his heirs. In other words, under this contract, all of her estate passed to him or his heirs upon her death, whereas upon his death she is to receive no part of his estate whatever. It has been repeatedly held that a woman may release her rights in her intended husband's property, but such a contract must be free from fraud or misrepresentation or the practice of deceit on the part of the husband, must be reasonable in its provisions, and entered into with the best of good faith on the part of both. Such an agreement, when fairly made, should be upheld, but if there are circumstances which tend to show that the wife has been deceived or overreached, it should be set aside; and where the contract shows upon its face that it is unjust or unfair, the burden has invariably been placed upon the husband or his representatives to show that it was fairly procured, and that the wife was not overreached or deceived in the execution thereof. The rule is thus most admirably stated in 21 Cyc., page 1250: "Courts of equity will take into consideration the adequacy of the provision for the wife, since antenuptial agreements wherein the wife releases her rights in the husband's estate should be reasonable in their terms. [290] To determine the fairness and reasonableness of the agreement, all of the circumstances, such as the wealth of the husband, the existing means of the wife, the age of the parties, and the prospective wife's full and clear knowledge and understanding of the nature and meaning of the terms of the contract are properly regarded. Good faith is the cardinal principle in such contracts. If the provision made for the wife is unreasonably disproportionate to the means of the husband, the presumption of designed concealment is raised, and the burden of disproving the same is upon him."

This principle is in perfect accord with the reported decisions of our courts. In the case of Maze's Exr. v. Maze, 30 Ky. Law Rep. 679, 99 S. W. 336, the marriage contract, unfair to the wife in its terms, was set aside because of the failure of the representatives of the husband to show that it was understood by the wife at the time she signed it. In Brooks v. Brooks, 22 Ky. Law Rep. 555, 58 S. W. 450, the contract was set aside because the wife had been induced to sign it to pacify the opposition of her husband's children by a former

marriage, and that it was executed for such a purpose. In Simpson v. Simpson's Exr., 94 Ky. 586, 15 Ky. Law Rep. 353, 23 S. W. 361, the antenuptial contract, which made some slight provisions for the wife, was set aside because, judging from the contract itself and the circumstances under which it had been executed, the wife was overreached. The principles announced in these three foregoing cases are in harmony and accord with the opinions of courts of last resort in other states, notably New York and Pennsylvania. The contract under consideration is very unreasonable, inequitable, and unfair in dealing with the wife. In fact, it is more unconscionable and [291] unjust to the wife than any marriage contract to which our attention has been called; and, being such, the law casts upon the representatives of Judge Tilton the burden of showing that at the time of its execution appellee understood the nature and extent of her prospective husband's estate, and the value of her marital rights therein, which she was, by its terms, surrendering. Dr. Brown testifies that he did not know the nature and value of Judge Tilton's estate, although he considered him a man in good circumstances for a Robertson county farmer, yet he did not, according to his testimony, discuss this view of the contract or transaction with Mrs. Tilton. But it is argued that it must be presumed that, having lived in that locality for some time before her marriage, and in his immediate family for more than a year before her marriage, she was bound to know, at least to some extent, the nature and value of the estate. To this we answer that presumptions will not be indulged in order to establish a state of facts that would cast a wife, after more than thirty years' faithful service, penniless upon the world. Neither does the doctor pretend to say that he explained to her what her marital rights were in the property of her prospective husband, and of which this contract was totally depriving her. On the contrary, his whole aim seemed to be to explain to and satisfy her, to use his own language, "of the necessity for the peace offering in the neighborhood on account of the young people living there." When this contract is considered in the light of the circumstances under which it was executed, and the relation in which the parties were situated at the time, their station in life, education, and advantages, we are constrained to the belief that appellee did not understand its terms, but executed same under the mistaken [292] belief that it was a "peace offering," prepared for the express purpose of preventing trouble between herself and

the children of Judge Tilton. Such a contract could only be sustained by evidence of the most positive character, to the effect that its terms were fully comprehended, understood, and acquiesced in. No testimony of such a character is introduced in this case.

Lastly it is urged in argument that, after the execution of the contract, appellee had more than two months within which to advise herself as to her rights before she entered into her marriage with the judge, and that therefore she must have been satisfied, else she would have made complaint. This argument is without force. The contract had been signed, and passed from her, and undoubtedly the same influence which induced her to sign it operated to lull her into silence and acquiescence, not only during the two succeeding months, but during the thirty-two years which followed. The question is not, Was she satisfied? but, Was she deceived? It was not until after her husband's death that she realized and understood how cruelly she had been imposed upon and deceived in the execution of this contract, and how helpless and poverty stricken it left her in her old age, after a life of service and devotion. Equity to the wife demands that this contract be canceled and held for naught, and appellee awarded that interest in the estate of her husband to which, under the law, she is entitled.

The judgment is reversed and cause remanded, with instruction to the trial court to enter judgment in conformity with this opinion.

Antenuptial Contracts in Anticipation of Marriage, equitably and fairly entered into, exclude the operation of law in respect to the property rights, so that, so far as the contract extends, it, and not the law, furnishes the measure of such rights: Appleby v. Appleby, 100 Minn. 408, 117 Am. St. Rep. 709; O'Day v. Meadows, 194 Mo. 588, 112 Am. St. Rep. 542. Such contracts, however, are closely scrutinized by the courts. If a man possessed of a competence, by an antenuptial agreement, cuts off the woman he is about to and does marry, without anything for her support from his estate after his death, it must be presumed that he designedly concealed from her the value of his estate at the time the agreement was executed, and she is not bound thereby, in the absence of other proof: Warner's Estate, 207 Pa. 580, 99 Am. St. Rep. 804. But if a husband and wife execute an agreement of separation whereby each releases all claim to the property of the other and all right of inheritance thereto, and the agreement is lived up to by both during her lifetime, he will not be heard to say, after her death, that the contract is unfair: Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231. See, also, Appleby v. Appleby, 100 Minn. 408, 117 Am. St. Rep. 709.

ROBERTSON v. ROBERTSON'S TRUSTEE.

[130 Ky. 293, 113 S. W. 138.]

TRUSTS—Investment of Funds—Trustees' Duties and Liabilities.—Under the rule prevailing in Kentucky prior to the enactment of Kentucky Statutes of 1903, section 4706, a trustee investing trust funds in bank stock was liable for loss sustained by the shrinkage in value thereof, although the investment was made bona fide. (p. 369.)

TRUSTS—Investment of Funds—Trustees' Duties and Liabilities.—Kentucky Statutes of 1903, section 4706, regulates the classes of investments open to trustees and under that section a trustee cannot invest trust funds in bank stock unless the bank has been in operation more than ten years. (pp. 370, 371.)

P. J. Beard, for the appellants.

Beard & Marshall for the appellee.

[295] BARKER, J. The learned trial judge in his opinion in this case makes the following statement of facts, upon which the legal issues turn, which we adopt as our own: "The defendant, S. S. Weakley, as trustee of Mary Ann Robertson, in 1901 invested thirteen hundred dollars of trust funds in his hands in twenty-six shares of the stock of the Bank of Waddy, which began business in January, 1900. In his settlement in the county court he was credited by this investment. The cestui que trust having died, this action in equity is brought by parties interested in the estate to surcharge his settlement, and make him liable for the bank stock investment, it having become worthless. Upon this record there can be no doubt that the trustee made the investment in perfect [296] good faith, and that it was such as a prudent business man would make in his own affairs, and to secure a certain support for himself and family. The evidence shows conclusively that when the trustee invested the money, the stock was generally regarded as worth as much or more than he gave for it. The directors were regarded as good business men, and men of means and fine business standing were interested in the bank as officers and stockholders. It was then a good dividend paying stock, and continued to be until July, 1905. The trustee owned stock in the bank, individually; in fact, purchased some for himself after the trust investment was made, and not long before the bank made an assignment. Other trustees besides the defendant invested trust funds in the stock of the bank, which was finally wrecked by the cunning dishonesty of its cashier." The question

arising for adjudication upon the foregoing statement of fact is whether or not the appellee was liable for the loss of the trust fund in his hands, caused by the investment in the stock of the wrecked Bank of Waddy.

It is clear that the trustee, under the rule prevailing in this state prior to the enactment of the statute which we shall hereafter discuss, would be liable for the loss sustained. In the case of Smith v. Smith, 7 J. J. Marsh. 238, the guardian was held liable for the depreciation of sixteen shares of stock in the Bank of Kentucky, which he had purchased with his ward's money; and in Clark v. Anderson, 13 Bush, 111, it was held that the investment by the trustee of the funds of his cestui que trust in second mortgage bonds of the Louisville, Cincinnati and Lexington Railroad Company was unauthorized and the loss cast upon the trustee. In that case, Chief Justice Lindsay, speaking for the court, said: "In this state trust funds may be [297] loaned on personal security when it is ample and sufficient (Higgins v. McClure, 7 Bush, 379; Clay v. Clay, 3 Met. 548), and may be invested in certain public securities (Myer's Supp. 264; Gen. Stats. 508), with the sanction of a court of equity; but no judicial precedent or statutory regulation will justify their investment in the stock or bonds of private corporations, and bonds secured by a second mortgage on the road-bed and other property of a railway company are peculiarly objectionable." The opinion in Durrett's Guardian v. Commonwealth, 90 Ky. 312, 12 Ky. Law Rep. 207, 14 S. W. 189, does not justify the investment by the guardian of his ward's money in the stock of a bank as an original proposition. It is there held that, inasmuch as the funds were originally invested by the ancestor in bank stock, and in this shape came to the guardian's hands, he was justified in selling the bank stock which had begun to depreciate, and in investing the proceeds in other bank stock which appeared a safer investment. In speaking of the duty of a trustee, in the opinion under consideration, it is said: "Mere good faith, while requisite and commendable, is not all that is required of such a fiduciary. He must be competent also. While it is his duty to make the ward's estate as productive as a prudent use will admit, yet he must do so in conformity to law. He must possess such legal knowledge as is needful to the proper execution of the trust." Again: "It is the duty of the guardian to make the estate productive, and he may therefore, in a prudent manner, loan out the money of the ward, taking solvent personal security. In such a case

he will not be held liable if a loss results without neglect upon his part in preventing it." The case turned upon the right of the guardian to change the security, and there is nothing [298] said by the court which would authorize the assumption that the trustee, as an original proposition, had the right, as the law then stood, to invest the trust fund in the stock of a private banking corporation. From the foregoing authority it is clear that, unless the trustee is authorized by the statute now in force in this state bearing upon the question in hand, he cannot escape liability in the instance before us. The statute relied upon to justify the investment is contained in section 4706 of the Kentucky Statutes of 1903, which is as follows: "That it shall be lawful for persons or corporations holding funds in a fiduciary capacity for loan or investment, to invest the same in real estate, mortgage notes or bonds, or in such other interest-bearing or dividend-paying securities as are regarded by prudent business men as safe investments, and to make loans with such securities as collateral; but such funds shall not be invested in the bonds or securities of any railroad, or other corporation, unless such railroad, or other corporation, has been in operation more than ten years, and, during that time, has not defaulted in the payment of principal or interest on its bonded debt, or be invested in the bonds of a county, district, town or city that, within ten years, has defaulted in the payment of the interest or principal of its bonded debt; and a fiduciary shall account for all interest or profit received."

It is confidently urged that the foregoing statute authorizes the investment by the trustee of the trust fund in the stock of the Bank of Waddy; it being said that this is permitted, in the following general language succeeding the specific enumeration of the property authorized by name, to wit: "Or in such other interest-bearing or dividend-paying securities [299] as are regarded by prudent business men as safe investment, and to make loans with such securities as collateral." It is contended that bank stock is a dividend-paying security, and is included in the general language following the specific enumeration. But the appellant insists that, even admitting this part of appellee's contention to be sound, the investment in question is included in the prohibition of the investment of trust funds in the bonds or securities of any railroad, or other corporation, unless such railroad, or other corporation, has been in operation more than ten years, and during that time has not defaulted in the pay-

ment of principal or interest on its bonded debt. We are inclined to believe that the contention of the appellant is sound, and that, in order that a trustee may be justified in the investment of trust funds in bank stock, the corporation must have been in operation more than ten years. We cannot give our assent to the proposition that the investment of trust funds in bank stock is permitted under the general words "or dividend-paying securities," and yet not included in the inhibition of investing in the securities of other corporations, unless such corporations have been in operation more than ten years. The object of the statute is to render the investment of trust funds as secure as possible on the one hand, and at the same time to widen the field of investment as far as is reasonably consistent with safety. One of the best securities for the integrity of the fund is the fact that the corporation has stood the test of time. This time test is fixed by the legislature at ten years, and this was considered necessary to prove the safety and solvency of the corporation in question. There is every reason for fearing for the safety of funds invested in a newly embarked banking venture; but, [300] after time has demonstrated the capacity of the officials to manage the corporation, their honesty and integrity, and also that the business can be made profitable at a given place for a long period of time, then it is that the law considers that trust funds may, with reasonable safety, be invested therein.

We are not willing, on the one hand, to widen by interpretation the field for the investment of trust funds, without also by interpretation holding fast to the safeguards which the legislature has thrown around such investments. We see no more reason for permitting the investment in bank stock under the general language in the first part of the statute than there is for including it also in the inhibition of the general language following the specific enumeration in the latter part. The doctrine of ejusdem generis applies equally to the two instances. It seems to us that, assuming for the purposes of this case that bank stock is legitimate property for the investment of trust funds under the permissive part of the statute, it is also included in the inhibitory part, and that, before a trustee is permitted to invest the funds of his cestui que trust in stock of private business corporations, these must have fulfilled the requirements of the statute as to the time of their existence. This, it is admitted, the Bank

of Waddy had not done; and therefore it follows that the investment was not justified.

For these reasons the judgment of the trial court is reversed, for further proceedings consistent with this opinion.

Petition for rehearing by appellee overruled.

INVESTMENTS A TRUSTEE MAY NOT MAKE WITHOUT INCURRING LIABILITY IN CASE OF LOSS.*

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I. Scope.

Our discussion in this note is confined strictly to the question indicated by the title, and does not include the question when a trustee may incur liability from any loss or depreciation of the trust funds which arises from his mismanagement of the trust estate, except in so far as such mismanagement consists in making unauthorized investments of the trust funds.

II. General Principles Controlling.

It can hardly be denied that a trustee is bound to follow the express directions given him by the instrument creating the trust, and therefore, when such instrument prescribes a particular mode of investment, that he is protected from any loss that may occur by reason of following the directions and making such investment.

But in a great many cases the choice of investment is left entirely to the judgment of the trustee, either because the instrument creating the trust is silent as to the mode of investment, or expressly authorizes the trustee to invest the funds according "to his best will and judgment," or by words of similar import leaves the mode of investment entirely to the discretion of the trustee.

In such cases it is by no means always easy to determine what investments a trustee may not make in the exercise of this discretion, without incurring personal liability in case of loss.

*REFERENCES TO MONOGRAPHIC NOTES.

Investments which a trustee may make without incurring liability for loss: Nyce's Estate, 40 Am. Dec. 506; Slaughter v. Favorite, 57 Am. Rep. 111.

After a very thorough review of the English cases on the subject of trust investments, it was said by Parker. V. C.. in Ackerman v. Emott, 4 Barb. 626: "It may now be regarded as the well-settled rule of the English court of chancery that the trustee can only protect himself against risk by investing the trust fund in real or governmental securities," and both the text-writers and the courts have uniformly recognized this as a correct statement of the English doctrine.

It is also an ancient principle of English equity that a trustee is held to a rigid accountability in the execution of the trust, and is liable for a loss occasioned by an improper investment, even though it has been made in the utmost good faith and solely for the advancement of the object of the trust; and as was recently said by the supreme court of Ohio in Willis v. Brancher, 79 Ohio St. 290, 87 N. E. 185, so stringent a rule has obtained in the chancery courts of England "that a trustee will be protected only where he invests in such securities as the court would decree on application." The effect of this stringent rule is to require the same degree of diligence and prudence in the trustee as that possessed and exercised by the court of chancery itself, and the grounds for the rule were specifically stated by the lord chancellor in Clough v. Bond, 3 Mylne & C. 496, thus: "It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of duty and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from improper motive."

There are at least two American cases where the English rule as to the character of investment was approved in its rigor. Thus, in Penn v. Folger, 182 Ill. 76, 55 N. E. 192, the supreme court of Illinois said: "A trustee will not be protected from loss in investing trust funds, unless he invests in government or real estate securities, or other securities approved by the court to which he is accountable"; and the same doctrine was upheld by the supreme court of Wisconsin in Simmons v. Oliver, 74 Wis. 633, 43 N. W. 561, the court saying that if this doctrine should be found inconvenient, or on the whole not best adapted to the new condition of things, or the necessity of present business arrangements, the legislature could change it by authorizing the investment of trust funds in other securities, but until that was done it preferred to adhere to the well-established English rule.

But though these two cases sanction the English rule in its rigor, it will plainly appear hereafter that the general rule in the United States is not so stringent or invariable as the one sanctioned by the English courts, and for the very forcible reason given by the court in Gray v. Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508, where the chancellor said: "I should feel some hesitancy in adopting it (the English rule) to the extent to which it is carried in their courts. The situation of the two countries differs very materially in many respects, and especially as it regards the facility of investments; and what may be a prudent rule of policy in one country may not be in another. In England, property can always be invested in the funds. These are recognized by their courts as safe and permanent securities, and it is the policy of every branch of the government to consider them so. In this country the amount of public or government stocks is very small, and in an inland state like our own, there are few opportunities for investing in that kind of security."

The chancellor, however, while refusing, for the reasons given, to adopt the English rule in its rigor, took the opportunity of commending that rule for its safety and of warning those who held property in trust how they dealt with it without securing it on real estate or public securities.

The reasons stated in the language of the New Jersey court just quoted, and the further reason, no doubt, that it is the policy of the state to encourage local enterprises, account for the fact that a trustee in this country is supposed to have the benefit of a somewhat more lenient rule in the investment of trust funds than his English brother; but, as we shall presently see, it is doubtful if those in this country who accept the burdensome and often thankless task of a trustee, are in fact benefited by a departure from the established rule of the English courts of equity.

For, while there has been a diversity of the laws and usages of the several states upon the subject of trust investments, our courts have adhered tenaciously to the principle that safety is the primary object to be secured in an investment of this kind, and many of them have, like the New Jersey chancellor in Gray v. Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508, taken occasion to commend the English rule for its safety, and with great unanimity have recognized the fundamental principle of that rule—at least to the extent that all speculative risks are strictly forbidden. This will clearly appear from subsequent subdivisions showing the particular classes of investments which have been condemned by our courts, but we cite a few cases which pointedly announce the general doctrine that a trustee who invests the trust funds in enterprises of a speculative nature must bear whatever losses may occur by reason of such investment: Sherman v. White, 62 Ill. App. 271, affirmed in White v. Sherman, 168 Ill. 589, 61 Am. St. Rep. 132, 48 N. E. 128; Wood v. Schoolcraft, 145 Mich. 653, 108 N. W. 1075; King v. Talbot, 40 N. Y. 76; Adair v. Brimmer, 74 N. Y. 539; Fellows v. Longyor, 91 N. Y. 324; Warren v. Union Bank of Rochester, 157 N. Y. 259, 68 Am. St. Rep.

777, 51 N. E. 1036, 43 L. R. A. 256; In re Hirsch's Estate, 116 App. Div. 367, 101 N. Y. Supp. 893; Appeal of Pray, 34 Pa. 100; In re Hart's Estate, 203 Pa. 480, 53 Atl. 364.

Of course, under the English rule protecting trustees from loss only when they invested the trust funds in real estate or governmental securities, investments upon mere personal securities were forbidden, and, as we shall presently see, this is also the rule in many of the states, but we shall also see that it is by no means a universal rule.

But while a trustee in this country has not, as in England, the advantage of any precise standing rule as to what securities are to be regarded as safe for the purposes of a trust investment, in the choice of which he will be protected from all losses, but is supposed to have the benefit of a somewhat more lenient rule, still, the English doctrine of holding him to a rigid accountability in the execution of the trust and requiring that he invest only in good security is as strongly supported here as in England; and when he makes an investment in the exercise of his discretion, which is not expressly directed by the instrument creating the trust, or authorized by statute, he is held responsible in case of loss, not only for the utmost good faith, but also for any error of judgment, and this, notwithstanding he acted with apparent caution and prudence, and the investment appeared, at the time it was made, both safe and promising and such as a man of ordinary prudence would make with his own funds. This doctrine was upheld in the principal case, Robertson v. Robertson's Trustee, 130 Ky. 293, ante, p. 368, 113 S. W. 138, and as will presently be seen has been sanctioned by many of the courts, especially when the safety of the investment was involved in the least element of ordinary business risks, and is sustained upon the theory that while the object of the ordinarily prudent, as was said by the supreme court of Pennsylvania, "is to make money," the duty of a trustee "is to take care of it": In re Hart's Estate, 203 Pa. 480, 53 Atl. 364.

The general rule upon this subject was thus stated by the supreme court of Maine: "He [the trustee] must always bear in mind that he is dealing with trust funds, which were not given to him to be used in developing or furthering business enterprises, but to be guarded carefully and invested cautiously, so that principal, as well as interest, may be forthcoming at the appointed time. While he must be as diligent and painstaking in the management of the trust estate as the average prudent man is in managing his own estate, he may not always place the trust funds where he, or the average prudent man, would place his own funds. In measuring the duty of the trustee with the usual conduct of the man of average prudence in the care of his own estate, reference is to be had to the conduct of such a man in making permanent investments of his savings outside of ordinary business risks, rather than to his conduct of taking business chances. There are often occurring good business chances in which a man may invest some of his own money with-

out danger of being called imprudent, whatever the result. But it will be generally conceded that a mere business chance or prospect, however promising, is not a proper place for trust funds": Mattocks v. Moulton, 84 Me. 545, 24 Atl. 1004.

And Woodruff, J., in delivering the opinion of the New York court of appeals in what is regarded the leading case in this country on the subject of trust investments, after stating that the English rule was purely arbitrary, not of the common law, and had no applicability to the condition of this country, said: "But it is not true that there is no underlying principle or rule of conduct in the administration of a trust which calls for obedience. Whether it has been declared by the courts or not, whether it has been enacted into statutes or not, whether it is in familiar recognition of the affairs of life, there appertains to the relation of trustee and cestui que trust a duty to be faithful, to be diligent, to be prudent, in an administration intrusted to the former, in confidence in his fidelity, diligence and prudence. My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance, and the considerations which alone induce men of suitable experience, capacity and responsibility to accept its usually thankless burden, is, that the just and true rule is, that the trustee is bound to employ such diligence and such prudence in the care and management as, in general, prudent men of discretion and intelligence in such matters employ in their own like affairs. This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made. It, therefore, does not follow that, because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded. If it be said that the trustees are selected by the testator, or donor of the trust, from his own knowledge of their capacity, and without any expectation that they will do more than, in good faith, exercise the discretion and judgment they possess, the answer is: First, the rule properly assumes the capacity of trustees to exercise the prudence and diligence of prudent men, in general; and, second, it imposes the duty to observe and know, or learn, what such prudence dictates in the matter in hand": King v. Talbot, 40 N. Y. 76.

And the supreme court of New Hampshire, speaking of the rule to be followed in determining when a trustee should be held liable for the loss arising from an investment made by him in the exercise of a discretion given by the instrument creating the trust, said: "We think that an investment is not to be deemed safe without evidence that it is so, and that the trustee ought to be able to

point out some ruling feature to distinguish it from a mere adventure. If he invests in property, it ought to be property which yields an actual income, and which has a valuation, in the general sense of the community, founded on that income, and not upon remote eventualities and a succession of contingencies": Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333.

While the general principles underlying the duty of a trustee with reference to investment of the trust funds as above given will be found running through all the books, the question as to what are or are not good and proper securities, and consequently what investments a trustee cannot make without incurring personal liability in case of loss, is left a somewhat open question in this country, but we give below the particular classes of investments which have generally been condemned.

III. Investments of a Speculative Character.

a. **Stock Speculations.**—We have already cited a number of authorities upon the general proposition that a trustee cannot escape personal liability in case of loss, if he invests the trust funds in speculative risks. Of course, the purchase of stocks on a margin fall within this rule, and this particular class of investments is prohibited even though the trustee but seeks to protect purchases which the grantor of the trust had himself made, and his discretion as to investments is in no way limited by the instrument creating the trust. Thus, in the comparatively recent case of In re Hirsch's Estate, 116 App. Div. 367, 101 N. Y. Supp. 893 (affirmed in 188 N. Y. 584, 81 N. E. 1165), the executors and trustees were given power to invest the trust funds in any securities or other form of investment which they in their discretion deemed proper and advisable, irrespective of the law governing investments by executors and trustees. The testator before his death had purchased a large amount of stock through several brokers for which he had paid a percentage of the purchase price, and owed the brokers for the balance, leaving the stock with the brokers as security for the unpaid balance. For the purpose of protecting these purchases which had been made by the testator, the executors and trustees continued to keep up the margins on the stock with the trust funds. The trustees had no personal interest in the account, and continued the speculation only because they deemed it advantageous to the trust estate, but a large part of the money thus deposited with the brokers in continuing the speculation was lost.

It was held that the trustees were liable for the loss, and that the fact that they acted in good faith did not excuse them. It was further said by the court, however, that the trustees would possibly have been authorized to pay up the amount due to the brokers by the testator and taken over the stocks which the testator had purchased as investments of the trust estate, but that a continuation of the speculation was unauthorized either by the law in relation to the

administration of trust estates, or by the instrument creating the trust.

b. Investments Involving Business Chances.—The rule prohibiting a trustee from investing the trust fund in speculative risks is not confined to stock gambling, but includes investments which involve ordinary business chances.

The case of Penn v. Fogler, 182 Ill. 76, 55 N. E. 192, presents a very interesting illustration of the rule which forbids a trustee from investing the trust funds in private business enterprises.

In this case a testator at the time of his death owned a large number of shares of stock of the National Bank of Vandalia. This bank afterward surrendered its charter and went out of business, and its stockholders organized a copartnership under the name of the Bank of Vandalia. The trustee invested the stock which the testator had in the former National Bank of Vandalia, in the new copartnership. By agreement of the stockholders the Bank of Vandalia succeeded to the business of the National Bank of Vandalia and assumed its liabilities. The new firm of the Bank of Vandalia not only continued the same banking business at the same stand, but substantially with the same capital and the same stockholders as had been in and connected with the National Bank of Vandalia. The Bank of Vandalia subsequently failed, and the trustee was held liable for the value of the stock of the former National Bank of Vandalia before it went out of business. "A trustee should not invest the money of others in his care in the stock or shares of any private corporation," said the court, "nor has he any right to employ trust funds in a private business, and thereby subject them to the fluctuations of trade, even though such investment is approved of by his own judgment and is made with honest intent." This is the case which further announced that a trustee would not be protected from loss in investing trust funds, unless he invests in government or real estate securities or other securities approved by the court, and which we have already referred to, being one of the two cases which uphold the English rule in its rigor.

The action of our courts with reference to the investment of trust funds in private business enterprises is also well illustrated by the facts in the case of Adair v. Brimmer, 74 N. Y. 539, where the subject of such investments was given the most careful consideration and reviewed in an exhaustive manner. A testator had given an enormous estate to three trustees, with power to sell the lands, and in their discretion to invest the proceeds. Among the lands was a large tract of undeveloped coal land in the state of Pennsylvania worth from $1,000,000 to $1,400,000. Testator owned an undivided one-third of this tract, the other two-thirds being owned by D. and F. The trustees conveyed their one-third to D. and F. for the expressed consideration of $166,667, but the consideration actually received by the trustees for the conveyance was ten thousand shares of the capital stock of a Pennsylvania corporation known as the New Boston Coal Mining Company of the par value of $250,000. It appeared

that the sale by the trustees to D. and F. was really made to enable D. and F. to organize this corporation, and that D. and F. immediately conveyed the lands to this corporation. The company proceeded to develop the mines and issued its bonds to secure money borrowed for this purpose. The stockholders were obliged to take these bonds pro rata, and the trustees took many of them as security for money advanced by them to the company. The stock and bonds became worthless, but the trustees insisted on their final accounting that they were entitled to be credited with the $250,000 in the stock, and with the amount of the company's bonds which they had taken. But it was held that they had no right to sell the lands for such a speculative purpose or to invest the proceeds in such securities, and they were charged with whatever would be a fair value of the testator's interest in the lands at the time they conveyed it.

Two other cases which afford good illustrations of the rule that a trustee cannot escape liability if he invests trust funds in hazardous business chances are those of Pray's Appeal, 34 Pa. 100, and In re Hart's Estate, 203 Pa. 480, 53 Atl. 364. In the former case the trustee was empowered to invest the trust moneys "in any property, real or personal, that he may see fit." The trustee invested several thousand dollars of the funds in the stock at par of a Pennsylvania oil company, established for the manufacturing of rosin oil under a certain patent. He had acted in the utmost good faith in making the investment, and had previously invested some of his own money in the manufacturing company. At the time of the investment, however, the works of the company were not finished, consequently it was not in operation, or paying any dividends, nor was the capital stock paid up. The money was lost and the trustee was held liable. The court, after remarking that it would hardly be asserted that the trustee could invest the trust funds in an ordinary partnership for the purpose of making rosin oil, and that the mere act of incorporating such a partnership could not make the purchase prudent, said: "If such investments are to be countenanced by courts of justice, then the money of infants, married women, deaf and dumb people, idiots and lunatics, will be placed at the mercy of speculative or dishonest trustees, instead of their discretionary action being regulated by sound and well-settled principles of jurisprudence."

Likewise, in Re Hart's Estate, 203 Pa. 480, 53 Atl. 364, the trustee was empowered to invest the trust funds in such securities "as may, in their judgment, be best." The trustees invested $10,000 of the trust funds in mortgage bonds of the Aetna Iron Company at par, and under a reorganization plan forced upon this company by foreclosure proceedings, the trustees accepted for the original investment $10,000 Ironton Coal Company stock and $1,200 Ironton Coal and Iron Company bonds, and these securities depreciated in value so as to be worth but little. In surcharging the trustee with the loss the court said that the power given the trustee to invest the funds according to his "best judgment" did not give him unlimited authority, but his duty was not to be interpreted solely

by this clause. "It was not an unlimited authority to invest the money as an ordinarily prudent man would invest his own. The testator had rightfully exercised that kind of prudence in accumulating the fortune. He took risks in making it which an ordinarily prudent man would take, but the same risks taken by his trustee, in view of his special duty, might be highly imprudent. He must take such risks only as an ordinarily prudent man would take, who is trustee of the money of others. A prudent man, with his own estate, with the object of making money, expecting his investment to largely enhance in value, may take greater risks. It is nobody's business but his own. He calculates probabilities of success or failure, and takes the chances. But with a trustee the case is different. He has all the knowledge, foresight, and judgment of the business man; but the money to invest is not his own, but belongs to others. It is his plain duty, if he would safely keep it, to minimize risks. He is not bound to have more prudence than the other, but he must utilize his in avoiding risks which the one who owes no duty to others is free to take. In the one case, in view of probable favorable results, prudence says 'Take the risk'; in the other, in view of very possible disaster, prudence says, 'Take not the risk.'"

Many other instances showing that a trustee cannot take the risk of an ordinarily prudent man, by investing the trust funds in business chances, will be found in the cases reviewed under the next heading below, showing the actions of the courts with reference to the investment of trust funds in the stocks and bonds of private corporations.

IV. Investments in Personal Securities and the Stocks and Bonds of Private Corporations.

As heretofore stated, there has been a diversity in the laws and usages of the several states upon the subject of trust investments. The subject has been many times before the courts, and has occasioned much discussion as to what investments a trustee may or may not make without incurring liability in case of loss, but no settled rule has been established in this country, except, perhaps, the one that all speculative investments are forbidden.

There are many cases, however, which, like the principal case (ante, p. 368), hold, that in the absence of express directions in the instrument creating the trust, or of statutory permission, an investment in mere personal securities, or in the stocks and bonds of private corporations will not shield the trustee from responsibility in case of loss.

Thus, in Sherman v. White, 62 Ill. App. 271 (affirmed in White v. Sherman, 168 Ill. 589, 61 Am. St. Rep. 132, 47 N. E. 128), the trustee, in the absence of any express direction in the instrument creating the trust, invested nearly $30,000 of the trust funds in the stocks of two different railroads, and in a bill for an accounting filed by the beneficiaries of the trust, the trustee was held liable for the en-

tire amount so invested. It is true that it appeared in this case that at the time the investments were made the stocks were very fluctuating in value and the court spoke of them as "speculative railway stocks," and seemed to base the decision on the ground that it was a speculative investment, but it is to be gathered from the opinion that the court considered that, as a matter of law, a trustee would be held responsible in case of loss for the investment of the trust funds in personal securities or the stocks and bonds of private corporations, for it referred as authority for its decision to 3 Pomeroy's Equity Jurisprudence, third edition, section 1074, where it is said: "It is the settled rule of equity, in the absence of express directions in the instrument creating the trust, or of statutory permission, that trustees or executors cannot invest trust property upon any mere personal security, nor upon the stocks, bonds, or other securities of private business corporations."

So, also, in Tucker v. State, 72 Ind. 242, the trustee invested a portion of the trust funds in the capital stock of a corporation engaged in quarrying and the sale of stone in large quantities, and at great profit. At the time of the investment the stock was in good demand and looked upon by business men as a good and safe investment at par value. The investment was made by the trustee in good faith, but he was held liable for the loss occasioned by its depreciation in value. "In the absence of an order from the proper court authorizing him to do so," said Niblack, C. J., "the investment by Tucker of a portion of the funds in his hands in the stock of the Greensburgh Limestone Company constituted an abuse of his discretionary control over that portion of such funds and involved a breach of his duty as trustee, under the policy of insurance. The facts set up by Tucker in his defense showed that company to be only a private corporation, organized as an ordinary business enterprise, and subject to all the usual vicissitudes incident to the prosecution of merely private business. An investment in the stock of such a corporation placed the money put into it beyond the personal control of Tucker, and in a condition from which no return of the principal sum could have been reasonably expected without the hazard of a sale of the stock, and of a loss which might result from such a sale."

In Gareschi v. Priest, 9 Mo. App. 270, the trustee, without obtaining any order of court, invested a portion of the trust funds in certain church bonds at their par value. At the time of the investment some of the issue of bonds had been paid, and the interest on the entire issue had also been paid. The bonds were secured by a deed of trust, with power of sale, on the church building in the city of St. Louis. The trustee acted in the utmost good faith, and with the purest of motives, and as any ordinarily prudent man might well have done about his own affairs. But the bonds not being paid when due the trustee was held liable, the court saying: "The responsibility of a trustee for an improper investment of trust funds is not to be tested solely by considerations of good faith or purity of

motives. Nor will it be sufficient, to exonerate him, that he acted as any ordinarily prudent man might well have done about his own affairs." It then quoted the language used by Lord Cattenham in Clough v. Bond, 2 Mylne & C. 490, 8 L. J. Ch. 51, 2 Jur. 958, which we have previously given, and intimated its approval of the English rule that a trustee could not safely invest the trust funds in anything but real estate or governmental securities without incurring the danger of personal liability in case of loss.

In King v. Talbot, 40 N. Y. 76, the trustees, in the exercise of a discretionary power given by the instrument creating the trust, invested the trust funds in certain canal companies' and railway companies' stocks and bonds secured by mortgage on real estate. At the time of the purchase these stocks and bonds were in good repute, and were considered by men, upon whose judgment it was proper to rely, as safe and desirable investments. The investments were made in good faith, the trustees having invested their own funds in similar stocks and retained the same. Upon an accounting by the trustees, the cestuis que trust refused to accept the bonds and the trustees were held liable for the amounts invested in them. The court said that a trust fund should not be placed "in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which, by the very terms of the investment, the principal is not to be returned at all," and when "it has left the control of the trustees" and "its safety and the hazard, or risk of loss, is no longer dependent upon their skill, care or discretion." "If it be said," continued the court, "that men of the highest prudence do, in fact, invest their funds in such stocks, becoming subscribers and contributors thereto, in the very foundation thereof, and before the business is developed, and in the exercise of their judgment, on the probability of their safety and productiveness, the answer is, so do just such men, looking to the hope of profitable returns, invest money in trade and adventures of various kinds. In their private affairs they do, and they lawfully may, put their principal funds at hazard; in the affairs of a trust they may not. The very nature of their relation to it forbids it."

The opinion in this case has often been quoted as sustaining the English rule, and prohibiting all investments of trust funds in other than real estate or public securities, but no such inference is justified, for the court distinctly stated that the English rule was a purely arbitrary one, not of the common law, and had no application to conditions in this country, and while saying it was not deemed necessary in this particular case to propound any new rule of conduct by which to judge of the liability of trustees with reference to the investment of trust funds, it also distinctly stated that it was "not prepared to say that an investment in the bonds of a railroad, or other corporation, the payment whereof is secured by a mortgage upon real estate, is not suitable and proper under any circumstances." But while this language clearly shows the court did not approve the

English rule in its rigor, it is difficult to see, in view of the holding in this case, under what circumstances the court would approve an investment of trust funds in the stocks and bonds of a private corporation.

In Judd v. Warner, 2 Dem. Sur. 104, it was held that a trustee was not authorized to invest trust funds in the bonds of a horse railroad company, secured by mortgage upon its tracks; citing King v. Talbot, 40 N. Y. 76.

Also, in Re Menzie's Estate, 54 Misc. Rep. 188, 105 N. Y. Supp. 925, an investment by a trustee in a certificate of a loan and trust company in Iowa was held to be improper, though it does not clearly appear from the opinion whether this decision was based on the nature of the investment or on the fact that the trust company was located in another state.

In Morrell's Appeal, 23 Pa. 44, it was held that an investment by a trustee, unless authorized by the deed of trust, in the stock of an incorporated company, whether a bank, canal, railroad, manufacturing or mining company, cannot be made at the risk of the cestui que trust, even though persons generally considered men of prudence make similar investments. And to the same effect is Thomsen's Appeal, 43 Pa. 431.

Likewise in Nance v. Nance, 1 S. C. 209, the investment by a trustee of the trust funds in certain railway stocks was held to be unauthorized, as being mere personal securities.

The court admitted, however, that the English rule prohibiting the investment of trust funds in personal securities had undergone modifications to suit the conditions of this country, and that such investments might be made under special circumstances, but it was the duty of the trustee to show the necessity and propriety of it; and the rule in this case was approved and followed in Allen v. Gaillard, 1 S. C. 279.

But the doctrine announced by the foregoing cases is far from universal and in many jurisdictions a much more lenient rule prevails.

In Massachusetts a trustee is not precluded from investing the trust funds in the stock of private corporations provided he acts in good faith and exercises such sound discretion as men of prudence and intelligence exercise in the permanent disposition of their own funds: Harvard College v. Amory, 9 Pick. 446; Lovell v. Minot, 20 Pick. 116, 32 Am. Dec. 206; Clark v. Garfield, 8 Allen, 427; Brown v. French, 125 Mass. 410, 28 Am. Rep. 254; Bowker v. Pierce, 130 Mass. 262.

In Harvard College v. Amory, 9 Pick. 446, the testator left the choice of investment to the judgment and discretion of the trustees. They invested a portion of the trust funds in the shares or stock of a cotton manufacturing company. A part of the sum so invested was lost, but the trustees were held not to be liable. In reply to the contention that the funds should have been invested in public securities and not in the stock of a private corporation engaged in trade, the court remarked that it might well be doubted if more confidence should be reposed in the engagement of the public than in the prom-

ises and conduct of private corporations which are managed by substantial and prudent directors, and said further: "There is one consideration much in favor of investing in the stock of private corporations. They are amenable to the law. The holder may pursue his legal remedy and compel them or their officers to do justice. But the government can only be supplicated"; and announced the rule in that state with reference to the investment of trust funds as follows: "All that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety, of the capital to be invested."

In Brown v. French, 125 Mass. 410, 28 Am. Rep. 254, a trustee who in the exercise of his discretion invested the trust funds in the bonds of several railroad companies, which were in the management of men who possessed in a high degree the confidence of the community for integrity and business ability, at the price at which the bonds were then selling in the market, and which were regarded as a first-class investment by persons of reputed good judgment for permanent investments, was held not liable for the loss occasioned by their depreciation in value. The court referred to the language of Mr. Justice Putnam in the case of Harvard College v. Amory which we have just quoted, and said that that rule had for nearly half a century been adhered to in Massachusetts.

But it must be observed that in all of these cases the corporations in whose bonds the trustee invested were well established, under the management of careful business men, and their bonds were in high repute, and considered by competent judges as a first-class investment.

From the later decisions of that court it is clear that the rule promulgated by the former cases was not intended to release a trustee in any degree from caution and prudence, or to authorize an investment of trust funds in the bonds of private corporations which have not acquired by reason of their property and the prudent management of their affairs such a reputation as to induce cautious and intelligent persons to commonly invest their own money in their stocks and bonds as a permanent investment.

For in Dickinson's Appeal, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279, a trustee who invested a large portion of the trust funds in the stock and bonds of the Union Pacific Railroad Company was held liable for a loss caused by the depreciation of the stock, notwithstanding he acted in perfect good faith, for the reason, as stated by the court: "It must have been manifest to any well-informed person, in the year 1881, that the Union Pacific Railroad ran through a new and comparatively unsettled country; that it had been constructed at great expense, as represented by its stock and bonds, and was heavily indebted; that its continued prosperity depended upon many circumstances, which could not be predicted, and that it would be

taking a considerable risk to invest any part of a trust fund in the stock of such a road."

The ruling in the last case was cited with approval and followed in the still later case of In re Davis' Estate, 183 Mass. 499, 67 N. E. 604, when a trustee was held responsible for an investment of the trust funds in the stocks and bonds of the Atchison, Topeka & Santa Fe Railroad Company for the same reasons as those stated by the court in Dickinson's Appeal, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279; and in this case the trustee not only acted in good faith, but upon the advice of persons on whose opinion he thought he could rely as to the value of the securities. The power given the trustees in this case was also very broad, they being permitted to make investments "in such manner as to them shall seem expedient; it being my intention to give to my said trustees, and those who may be made such, the same dominion and control over said trust property as I now have," but the court said these were only enabling words allowing the trustees the power to deal freely and expediently with the estate, but did not release them "from the obligation to exercise a sound judgment and a reasonable and prudent discretion in regard to such investments as they may make under the authority given them."

The rule established by the foregoing Massachusetts cases likewise prevails in Rhode Island and Vermont: Peckham v. Newton, 15 R. I. 321, 4 Atl. 758; Scoville v. Brock, 81 Vt. 405, 70 Atl. 1014. In the former case the court said that while it regarded safety as paramount to profit, there was no rule in that state which prescribed any particular class of securities for trust investment, but that "trustees must be prudent and vigilant, and exercise a sound judgment," and then quoted with approval the rule laid down by the supreme court of Massachusetts in Harvard College v. Amory, 9 Pick. 446, which we have already given.

And in Scoville v. Brock, 81 Vt. 405, 70 Atl. 1014, quite a recent case, it was said: "There is no special rule prohibiting the investment of trust funds in the stocks and bonds of private corporations."

So, also, in New Hampshire, a trustee is not held liable for loss arising from the investment of trust funds in the stocks and bonds of private corporations, if he acts with honesty and prudence: Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333; French v. Currier, 47 N. H. 88; but the test of prudence required in this state is quite severe, for it was said in Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333, that where a trustee in his discretion invests in such stocks and bonds, "his purchases should be limited to such as have a value in market based on a regular income, or, at least, upon an income that, upon an average for a considerable period, may fairly be deemed equivalent." It was further held in this case that the power and discretion of a trustee is not enlarged by a direction in the instrument creating the trust, that he use his "best skill and judgment" in investing the trust funds.

In Georgia, the rule prohibiting the investment of trust funds in personal securities was never adopted, for the reason, as stated by Chief Justice Brown in Brown v. Wright, 39 Ga. 96, that it was not necessary, as it was in England, where the uncommon public debt made it necessary to create a demand for public securities in order to sustain the public credit; and a statute of 1845 (Cobb Dig. 333; Code 1861, sec. 2309) which authorized trustees to invest the trust funds in securities of the state was not considered compulsory before 1863, when that statute was amended by adding a provision that any other investment of trust funds must be made under a judicial order or else be at the risk of the trustees: Moses v. Moses, 50 Ga. 9.

There are cases in other jurisdictions which, while not declaring any rule on the subject of the investment of trust funds in personal securities generally, hold that a trustee who invests the trust fund in good bank stock is not liable for loss in case of failure of the bank: Gray v. Lynch, 8 Gill, 403; Smyth v. Burns' Admrs., 25 Miss. 422.

In Willis v. Branches, 79 Ohio St. 290, 87 N. E. 185, where the executors and trustees were directed by the will to invest the trust funds "in such manner as they may think best," and they invested it in bank stock which, at the time, was considered good by reputable business men, without consulting the beneficiaries or obtaining any order of court, it was held they were not liable for the loss occasioned by the failure of the bank, notwithstanding the statute (Rev. Stats. 1908, sec. 6413) provided that trustees may invest trust funds in certificates of indebtedness of the state or of the United States. This decision is based on the ground, however, that the direction in the will to invest the funds "in such manner as they may think best" extended the scope of the trustee's power as to investments and took the case out of the statute. On this question this case seems to differ with those we have cited from Massachusetts and New Hampshire (In re Davis' Appeal, 183 Mass. 499, 67 N. E. 604; Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333), where it was held that similar words used in directing trust investments do not enlarge the discretionary powers of a trustee.

In the state of Maine, the question whether a trustee can invest the trust funds in the stock or bonds of private corporations without incurring personal liability in case of loss does not seem very clearly established. In Mattocks v. Moulton, 84 Me. 545, 24 Atl. 1004, it was distinctly held that the investment of trust funds in the stocks and bonds of new corporations where the success of the business had not become established, was improper; and the text of Professor Pomeroy (3 Pomeroy's Equity Jurisprudence, 3d ed., sec. 1074) was quoted with seeming approval: "It is the settled rule in equity, in the absence of express directions in the instrument creating the trust, or of statutory permission, that trustees or executors cannot invest trust property upon any mere personal security, nor upon the stocks, bonds, or other securities of private business corporations." But from other language used in the opinion, it might be inferred that the

court did not intend to lay down any fast rule which would prohibit the investment of trust funds in the stocks or bonds of any private corporation, but only such as had not become well established.

V. Purchases of Land.

The same rule which holds a trustee liable, in the event of loss, from investment of the trust funds in business chances, or in the stocks and bonds of new corporations, applies to speculative investments in real estate.

Thus, where trustees were empowered by the deed of trust to invest the trust funds in their discretion, and pay the income to certain beneficiaries named, the purchase by the trustees of lands, opening a coal mine therein and mining operations, was held to be a perversion of the trust: Butler v. Butler, 164 Ill. 171, 45 N. E. 426 (affirming 61 Ill. App. 51).

In Re Reed, 45 App. Div. 196, 61 N. Y. Supp. 50, an executor and trustee who was directed by the will to invest the trust funds in such manner, in his discretion, as he should deem proper, was held liable for an investment of the funds in unimproved western lands.

So, also, where a trustee is required by the terms of the trust to invest a specific amount of money in lands, he cannot invest part of it in lands and expend the balance in improving the land purchased, unless peculiar circumstances should require it: Gates v. Hunter, 13 Mo. 511.

But a trustee under a Massachusetts trust may raze an old building owned by the estate and erect a new one in its place, where a prudent business man would do so to secure a fair return of income and at the same time maintain the corpus of the principal so invested intact, having regard to the relation which such an investment, when made, would have to the amount of the principal of the trust fund as a whole, yet, where the principal of a trust estate amounted to a little over $920,000, the construction of a new building on land belonging to the estate, which, when finished, in all represented a single investment of $850,000, was not an exercise of sound discretion: Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381.

Where a trustee under a will was directed by the will to sell lands of the testatrix and invest the proceeds as he should see fit, he had no authority as trustee to purchase lands on a credit and could not charge the estate by giving a note therefor as trustee: Bowman v. Pinkham, 71 Me. 295.

Likewise, where an executor and trustee was authorized by the will to invest in productive real estate, he could not purchase a lot of land, good for nothing except the manufacturing of brick; nor could he purchase vacant lots in a town and erect brick buildings upon them: Holcomb v. Holcomb's Exrs., 11 N. J. Eq. 281.

VI. Place of Investment.

The conflict of opinion which exists among the courts of this county on the question of what classes of investment a trustee, in his dis-

cretion, may make without becoming personally liable in case of loss, is also found with reference to whether a trustee may voluntarily invest the trust funds in securities beyond the jurisdiction of the court to which he is accountable. While there does not seem to be any inflexible rule on the subject, the courts in some jurisdictions will not, as a general rule, sanction the investment of trust funds in securities outside of the state. Thus, in McCulloch's Exrs. v. McCulloch, 44 N. J. Eq. 313, 14 Atl. 123, the trustees resided in Minnesota, but were appointed in New Jersey. The cestuis que trustent resided respectively in New Jersey and in states other than Minnesota. It was held that the trust funds must be invested in the state of New Jersey, not merely because the courts would be left, said the chancellor, "without the proper facilities to obtain accurate and satisfactory information concerning the investment, but also because they will lose direct control of the fund itself."

In Ormiston v. Olcott, 84 N. Y. 339, the court said it did not hesitate to declare that as a general rule "the trustee who invests beyond the jurisdiction does so at the peril of being held responsible for the safety of the investment"; and the reason for the rule was said to be: "It would often be unjust to beneficiaries to compel them to accept such investments, and tend to increase the risk of ultimate loss. The proper and prudent knowledge of values would become more difficult and uncertain; watchfulness and personal care would in the main be replaced by confidence in distant agents, and legal remedies would have to be sought under the disadvantage of distance, and before different and unfamiliar tribunals." The court further said, however, that the rule should not be made arbitrary and inflexible so as to admit of no possible exceptions, and that it was not prepared to say "that an investment by a trustee in another state can never be consistent with the prudence and diligence required of him by law"; and moreover that the rule holding a trustee liable for investing the trust funds in another state "relates only to voluntary investments by the trustee, having the fund in his hands and full opportunity and freedom of choice, and does not govern a case where, by the act of the testator, a foreign investment has been made; nor a case where, without the fault of the executor, the assets have been transmitted into a debt which can only be secured and saved by taking a foreign security." And the doctrine laid down in this case has been recognized in the later cases of Denton v. Sanford, 103 N. Y. 607, 9 N. E. 490, and In re Reed, 45 App. Div. 196, 61 N. Y. Supp. 50; and also by the courts of Pennsylvania and South Carolina: In re Rush's Estate, 12 Pa. 375; Ex parte Copeland, Rice's Eq. (S. C.) 69.

But in some other states trustees are not thus limited to investments within the state of their appointment, and in case of loss resulting from investment outside of the state, their liability is tested by the same general rules applicable to investments within the state. Such is the rule in Massachusetts and Vermont: Amory v. Green, 13 Allen, 413; Brown v. French, 125 Mass. 410, 28 Am. Rep. 254;

Thayer v. Dewey, 185 Mass. 68, 69 N. E. 1074; Scoville v. Brock, 81 Vt. 405, 70 Atl. 1014; though in Thayer v. Dewey, 185 Mass. 68, 69 N. E. 1074, the court said that while there was no universal rule that an investment would not be approved if it consists of fixed property in another state, "ordinarily it is very desirable that investments which have a local character, like the ownership of real estate, should be within the jurisdiction of the court that controls the trust."

VII. Loans.

a. **On Personal Security.**—What is due security for moneys loaned by a trustee appears to be a point not fully settled, but it seems, in general, that personal security is not sufficient to shield the trustee from responsibility in case of loss: Hitchcock v. Cosper (Ind. App.), 69 N. E. 1029; Gray v. Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508; Vreeland v. Vreeland, 16 N. J. Eq. 512; Dufford's Exrs. v. Smith, 46 N. J. Eq. 216, 18 Atl. 1052; Smith v. Smith, 4 Johns. Ch. 281; In re Cant, 5 Dem. Sur. 269; In re Blauvett's Estate, 20 N. Y. Supp. 119, affirming 60 Hun, 394, 15 N. Y. Supp. 586; Nance v. Nance, 1 S. C. 209; Nobler v. Hogg, 36 S. C. 322, 15 S. E. 359; Wynne v. Warren, 2 Heisk. 118; Fulton v. Davidson, 3 Heisk. 614. And the fact that the trustee acts in good faith will not protect him from loss: Simmons v. Oliver, 74 Wis. 633, 43 N. W. 561.

b. **On Life Insurance Policies.**—A trustee is not permitted to loan money belonging to the estate upon the security of a life insurance policy on the borrower's life, though made in good faith.

Thus, in Sherman v. Lanier, 39 N. J. Eq. 249, an executrix and trustee loaned some of the trust funds, together with some of her own, on the borrower's promissory note, secured by a policy of insurance on his own life. The borrower kept up the premiums on the policy for a few years, and defaulted. The trustee, not feeling able to pay the premiums, surrendered the policy for a paid-up policy of one-fourth the amount of the original, the borrower being insolvent. The trustee was held liable for the full amount of the loss.

c. **On Contingent Remainder Interests.**—A trustee who loans trust funds to a contingent remainderman upon the pledge of such interest will be charged with the loss: In re Craven, 43 N. J. Eq. 416, 5 Atl. 816.

d. **On Second Mortgages.**—As a general rule, a mortgage on real estate encumbered by prior liens is not regarded as a safe investment, and a trustee who loans funds of the estate on the security of encumbered property will be held responsible in case of loss: Shuey v. Latta, 90 Ind. 136; Gilmore v. Tuttle, 32 N. J. Eq. 611; In re Petrie, 5 Dem. Sur. 352; Nance v. Nance, 1 S. C. 209.

Mr. Justice Willard, of the supreme court of South Carolina, made a most exhaustive examination into this subject, as well as on the subject of taking personal securities, in the case last cited, and summed up his conclusion as follows: "The trustee will be held responsible for losses of trust funds through loans to private persons,

unless securities are taken collateral to such loans. Such securities should primarily consist of mortgages of unencumbered real estate of a value sufficient to guarantee the debt against all contingencies liable to occur or capable of being foreseen. Bonds of individuals should not be taken in lieu of real securities, unless unobjectionable investments cannot, in the exercise of reasonable diligence, be procured. When personal securities are taken in lieu of real, it will devolve upon the trustee to make the necessity and propriety of such investments appear upon an accounting with the cestui que trust."

The fact that the property was sufficient at the time the loan was made to meet all demands against it will not excuse a trustee who invests in encumbered property—at least, such is the ruling in Singleton v. Lowndes, 9 S. C. 465.

The trustee in this case loaned $5,000 of the estate funds upon the security of a mortgage on certain real estate in the city of Charleston. The borrower enjoyed excellent credit in Charleston with the mercantile community and particularly with the banks. He also owned a large amount of real estate in the city other than that mortgaged to the trustee as security for the loan, the total cost price of his real estate holdings being nearly $74,000. But there was a judgment existing against him for over $11,000. The borrower subsequently died, and as a result of the war his estate greatly diminished in value, and his assets were not sufficient to pay off the judgment and certain mortgages on his other property. In justification of the loan, the trustee contended that at the time the loan was made sufficient property existed, bound by the judgment, without resort to the property mortgaged, but it was held that it is not enough to justify an investment that the property bound by a security is amply sufficient to meet its obligations. "It is certainly a breach of trust," said the court, "for a trustee to place trust funds in encumbered property, where it is probable that the trust estate may be called upon to redeem from such encumbrance and may be seriously embarrassed, if not unable, to effect such redemption. It is said that property sufficient existed, bound by such judgment, without resort to the property mortgaged; but there was no legal means of compelling the judgment creditor to look to any particular fund, bound by his judgment, and if there was, still the trust estate would be in the position of having purchased a lawsuit. The nature of the security, and the circumstances affecting its availability, must be such as afford means, consistent with the nature of the trust estates, as well as with the circumstances of the particular estate, of obtaining security for the trust fund and reasonable productiveness."

It seems that in order to hold a trustee answerable, who in good faith loans funds of the estate on the security of encumbered property, it must appear that actual loss will be sustained by reason of such investment. Thus, in Sherman v. Lanier, 39 N. J. Eq. 249, the trustee loaned $10,000 of the estate funds upon a mortgage on property in the city of Newark. The property was subject to a para-

mount lien of $9,000 for street improvement, but the assessment had not been ratified at the time the mortgage was taken, and as soon as it was ratified, a few months later, the mortgagor paid the assessment. Subsequently the assessment was set aside and the money refunded to the mortgagor. The mortgagor became insolvent and the trustee took title to the property in satisfaction of the mortgage and surrendered to the borrower his note. The assessment of $9,000 had been set aside because it was too large, and after the trustee took title, it was reassessed for about $3,000. The loan was made by the trustee in good faith and upon the advice of competent judges as to the value of the property that it was worth about $25,000. On an accounting by the trustee the beneficiaries refused to accept the property and demanded the $10,000 loaned and the interest thereon, upon the ground that when the trustee took the mortgage there existed a paramount lien on the property, and the security taken was therefore in effect only a second mortgage. In refusing to charge the trustee with the amount loaned, the court said: "She [the trustee] appears to have acted circumspectly in making the investment; to have taken the advice of persons whom she regarded as competent judges of the value of the property before making the loan, and to have been satisfied that the investment was a safe one. She had legal counsel in the matter also; and she acted under advice of counsel in taking the conveyance in satisfaction of the debt after the mortgagor had become insolvent. There is no reason to doubt her bona fides in either transaction. If she acted in good faith, the fact that the premises were liable to a paramount lien would not of itself make her chargeable with the money lent. Perhaps the estate will meet no loss by the investment. If so, she will have incurred no liability. When an investment has been made on second mortgage and it has not been ascertained, and does not appear, that there will be a loss, the mere fact that it was an investment on second mortgage will not of itself make the trustee chargeable with the money. The prior encumbrance may be comparatively insignificant, or, if not, it may be of an amount not so large as to endanger the security. In any such case, when the trustee has acted in good faith, it must be ascertained that there will be a loss before the trustee can be called upon to answer for having made the investment."

In Massachusetts, where, as we have seen, a very liberal rule prevails with regard to the discretionary powers of a trustee in the choice of investments, while the general principle established by the foregoing cases is recognized as the proper one to be generally applied, the courts of that state refuse to accept it as an absolute iron-clad rule. Thus, in Taft v. Smith, 186 Mass. 31, 70 N. E. 1031, a trustee held a farm subject to a mortgage of $1300. By order of the probate court it was sold for $4300 including the first mortgage. The purchaser paid the trustee $1000 cash, and gave his note for $2000, payable in annual sums of $100, secured by a mortgage on the farm subject to the prior mortgage of $1300. The trustee had

no reason to anticipate that the value of the property would decrease to any appreciable extent, but owing to general causes applicable to the whole neighborhood, the farm depreciated in value fifty per cent in seven years. The trustee was held not liable for the loss. "After all," said the court, "the true rule is whether, under the circumstances, sound discretion was exercised; and it cannot be said that under every conceivable practical set of circumstances an investment in a second mortgage is inconsistent with sound discretion. In view of the nature and size of the trust, taken in connection with the provision that from time to time some portion of the principal might be expended as required for the support of the cestuis que trust for life, and in view also of the small size of the first mortgage, either absolute or relative to the value of the whole estate, of the character and size of the farm, and of the improbability that its value would so far depreciate as to result in loss on the mortgage, we cannot say that, acting in the light which he had, the trustee did not exercise sound discretion in making the loan."

WEBSTER v. CITY OF VANCEBURG.

[130 Ky. 320, 113 S. W. 140.]

MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Nonliability for Damage.—The sidewalks of a city are intended solely for the use of pedestrians, and though they must be kept in reasonably safe repair therefor, the city is not bound to keep them fit for the use of vehicles, and drivers use them at their peril. (p. 393.)

MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Acquiescence.—The fact that the sidewalks in a city have been used by vehicles by the acquiescence of the civic authorities for many years does not affect its nonliability for damage to the drivers. (p. 393.)

MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Absence of Roadway.—The fact that using the sidewalk in a city was the only practicable way for wagons to reach a certain place does not fasten on the municipality any responsibility for injuries caused thereby. (p. 393.)

MUNICIPAL CORPORATIONS—Roadway—Obligation to Provide and Repair.—There is no legal duty on a city to furnish streets, even where they may be needed; but there is such a duty to keep such as it does furnish in a reasonably safe condition for use for purposes for which they are provided—sidewalks for pedestrians; roadways for vehicles and horses. (p. 393.)

Allan D. Cole, for the appellant.

R. D. Wilson, for the appellee.

321 O'REAR, C. J. The Chesapeake and Ohio Railway freight depot in Vanceburg is situated on Main street, alongside of which is a pavement. The lay of the land is such that in getting freight into the depot for shipment, and in

getting it out for delivery in town, teamsters have for years crossed the pavement in taking their wagons and drays up to the depot building to load and unload freight. Appellant, who was a drayman, loaded his dray with baled hay from the depot, or a car by it, and for that purpose and his own convenience had driven his dray upon the pavement. In [322] driving off the pavement the wheels of his dray dropped off at the pavement curbing, one before the other, which was a foot or more lower at that point than the sidewalk. From the jar thus caused appellant was thrown to the ground and sustained a serious injury to his shoulder. He sued the city, because it had neglected to so repair the pavement at that point as to make it reasonably safe for its use by wagons having occasion to go to the freight depot. Upon the evidence showing the foregoing state of facts, the trial court peremptorily instructed the jury to return a verdict for the defendant city, of which appellant complains on this appeal.

The sidewalks of the city are intended solely for the use of pedestrians. While they must be kept in reasonably safe repair for such use, the city is not bound to keep them fit for the use of vehicles also. If drivers of vehicles nevertheless use them for passage of their wagons, they must do so at their peril. Nor does the fact that the pavements have been so used by the acquiescence of the city for many years affect its liability in the matter, so far as vehicle drivers are concerned.

It is argued that the way used by appellant was the only practicable way for wagons to reach the depot. Be that as it may, the city was not legally bound to provide a roadway for wagons to the railroad depot, and is not liable for a failure to do so. If the driver of the wagon saw proper to use ways not provided for such vehicles, he has no legal complaint against the city that they were not fit for the use to which he was putting them. A city's legal duty is not to furnish streets, even where they may be needed; but it is to keep such as it does furnish in a reasonably safe condition for use for purposes for which they are provided— [323] sidewalks for pedestrians; roadways for vehicles and horses.

Judgment affirmed.

The Liability of a City for Defective Streets is the subject of a note to Dudley v. City of Flemingsburg, 103 Am. St. Rep. 257. As to whether a city is required to keep a street in a safe or proper condition throughout its entire width, see Herndon v. Salt Lake City, 34 Utah, 65, 131 Am. St. Rep. 827; Nelson v. Spokane, 45 Wash. 31, 122 Am. St. Rep. 881.

ROBARDS v. P. BANNON SEWER PIPE COMPANY.

[130 Ky. 380, 113 S. W. 429.]

MASTER AND SERVANT—Watchman's Authority.—The mere employment of a watchman to guard property does not involve the authority to shoot a trespasser who was running away therefrom. (p. 397.)

PLEADING—Construction of, with Amendments and Substitutions.—While a pleading and its amendments are ordinarily taken together to determine whether a cause of action is stated, where an amended and substituted petition in lieu of the original one and its amendment is filed, the party thereby indicates that the later documents alone set forth the cause of action, and a demurrer depends upon the allegations they alone contain. (p. 397.)

MASTER AND SERVANT—Torts of Servant—Limit of Liability.—A master is liable for the acts of his servant only when the servant acts within the scope of his employment. (p. 398.)

MASTER AND SERVANT—Scope of Employment—Definition of Special Terms.—The phrases "course of employment" and "scope of the authority" are not susceptible of accurate definition as to the acts of the servant, because the authority from the master is only gatherable from the surrounding circumstances and the root of his liability is his express or implied assent to the acts of the servant. (p. 398.)

MASTER AND SERVANT—Injury to Third Person by Servant—Liability—Scope of Employment.—When authority is given to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force toward others, the use of such discretion or force is part of the thing authorized, and when exercised becomes, as to others, the discretion and act of the master, even though the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business and was acting within the general scope of his employment. (p. 398.)

MASTER AND SERVANT—Injury to Third Person by Servant—Doubt as to Scope of Employment.—When in cases of tort by servants there is a doubt as to the line which separates the acts of the servant under authority and of the individual, it will be resolved against the master, because he set in motion the servant who committed the wrong. (p. 399.)

MASTER AND SERVANT—Injury to Third Person by Watchman.—Where the master employs a watchman and authorizes him to use firearms in his discretion, the act of the watchman in shooting a third person near the premises he was guarding is not, as a matter of law, without the scope of his employment. (p. 399.)

Popham & Webster, for the appellant.

Charles B. Taylor and Kohn, Baird, Sloss & Kohn, for the appellee.

381 CLAY, C. Oscar Robards, suing by his next friend, W. P. Robards, instituted this action against George Vanetta and the P. Bannon Sewer Pipe Company to recover

damages for personal injuries inflicted by George Vanetta while acting as watchman for the P. Bannon Sewer Pipe Company. The trial court sustained the P. Bannon Sewer Pipe Company's demurrer to plaintiff's petition and amended petition, and [383] also to his substituted and amended petition; and the propriety of this ruling is before us for determination.

That portion of the petition necessary to be considered is as follows: "He states that the defendant P. Bannon Sewer Pipe Company is a corporation, created and existing by virtue of law, and as such has power to sue and be sued in its corporate name, to operate a general brickyard and brick manufacturing establishment in the city of Louisville, and to employ night watchmen and other persons to protect its property and conduct its said business. He states that the defendant George Vanetta was at all of the times hereinafter set out in the employ of defendant P. Bannon Sewer Pipe Company as its night watchman in said brick establishment, and as such it was his duty to said company to protect from injury its said properties during the night-time. He states that on or about the 8th of December, 1907, this infant plaintiff was passing at and close to said brick establishment in said city, when he approached said establishment, and was then and there mistaken for a wrongdoer, burglar, or other lawbreaker by the defendant P. Bannon Sewer Pipe Company by and through its agent and night watchman, defendant George Vanetta, who suspected said infant of attempting to destroy or steal said property. He states that he was at said time and place acting in the peace, was guilty of no wrong or violation of law, and that the defendant P. Bannon Sewer Pipe Company, by and through its agent and night watchman, Vanetta, and the defendant Vanetta, severally and jointly, and with gross negligence, culpable carelessness, and recklessness, then and there set upon him, this infant, and he was then and there shot by said Vanetta with a firearm containing lead bullets or other hard substance, from [383] the infliction of said gunshot wounds said Vanetta this infant plaintiff was caused to and did, does and will in the future, suffer great mental and physical pain, has become and is obligated for great doctor's bills and expenses on account thereof, and his power to earn money has been materially lessened and impaired permanently, by reason of all of which he has been damaged in the sum of at least twenty-five thousand dollars. He states that the defendant Vanetta was at

said time and place acting as the night watchman, agent, and employé of his codefendant P. Bannon Sewer Pipe Company, and as such it was his duty to protect the property of said corporation, and was in the course of his employment as such at the time and place of the disaster and injury to this infant plaintiff hereinbefore set out by the infliction of the gunshot wound hereinbefore described." The demurrer of the P. Bannon Sewer Pipe Company to the petition being sustained, plaintiff amended his petition as follows: "For amendment to his original petition against defendant P. Bannon Sewer Pipe Company, plaintiff says that on the night complained of in his original petition he entered the property of defendant P. Bannon Sewer Pipe Company for the purpose of getting warm; that defendant George Vanetta, agent for the defendant P. Bannon Sewer Pipe Company, then in charge of said property, directed plaintiff to leave said property; that as plaintiff was running away from said property defendant P. Bannon Sewer Pipe Company by its said agent in charge thereof negligently shot plaintiff as set out in his original petition." The demurrer of the P. Bannon Sewer Pipe Company being sustained to the petition as amended, the plaintiff filed an amended and substituted petition containing the following allegations: "That defendant P. Bannon Sewer [384] Pipe Company is a corporation, created and existing by virtue of law, and as such has power to sue and be sued in its corporate name, to operate and control a general brickyard and brick manufacturing establishment in the city of Louisville, and to employ night watchmen and other persons to protect its property and conduct its business; that defendant George Vanetta was at all of the times hereinafter set out in the employ of defendant P. Bannon Sewer Pipe Company as its night watchman in said brick establishment, and as such he was authorized by said company to carry firearms to protect said property from injury during the night-time, and was authorized to use such firearms whenever, in his judgment, it seemed necessary or advisable; that on or about December 8, 1907, while defendant Vanetta was acting as night watchman for defendant P. Bannon Sewer Pipe Company as hereinbefore set out, upon its said premises, and while said Oscar Robards was on or near said premises, with gross negligence he wrongly adjudged that said Oscar Robards was doing or attempting to do wrong to the property of defendant P. Bannon Sewer Pipe Company, and with gross negligence adjudged that it was necessary or advisable to

fire at said Oscar Robards to properly protect said property; that thereupon said Vanetta fired leaden bullets or other hard substance at said Oscar Robards, wounding and injuring said Oscar Robards, whereby he was and will be caused to suffer great mental and physical pain, has become obligated for doctor's bills and expenses on account of said injuries, and his power to earn money has been materially and permanently lessened and impaired, all to his damage in the sum of twenty-five thousand dollars." We are inclined to the opinion that the court ruled properly in sustaining the demurrer of the P. Bannon Sewer Pipe [385] Company to plaintiff's original and amended petition, upon the ground that the mere employment of a watchman to guard the property did not involve the authority to shoot the plaintiff under the circumstances described: Belt R. R. Co. v. Banicki, 102 Ill. App. 642.

Counsel for appellee insists that the court's action in sustaining the defendant's demurrer to the amended and substituted petition was also proper, for the reason that the pleadings are to be construed all together and most strongly against the pleader; that under this rule the plaintiff is bound by the allegation that he was actually running away from the property when he was shot by Vanetta. That being the case, it is insisted that under the rule laid down in the case of Golden v. Newbrand, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537, the act of Vanetta was not within the scope of his employment. While it may be the rule that a pleading and the several amendments thereto are ordinarily to be considered all together for the purpose of determining whether or not a cause of action is stated, we are of opinion that, where a party files an amended and substituted petition in lieu of the original petition and its amendment, he thereby indicates a purpose to rely upon the amended and substituted petition as alone setting forth his cause of action. The question whether or not the latter pleading is demurrable depends altogether upon the allegations which it alone contains.

The question, then, is whether or not the allegation that the plaintiff was "on or near said premises," being considered from the standpoint of the weaker term (that is, that he was merely near said premises), is conclusive evidence of the fact that Vanetta at the time of the shooting was not acting within the scope of his employment.

[386] The question of the liability of the master for the acts of his servant depends altogether upon the fact of whether or

not the servant was acting within the scope of his employment. The terms "course of employment" and "scope of the authority" are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rule, the authority from the master generally being gatherable from the surrounding circumstances. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered, as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. When authority is conferred to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force toward or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant from which injury to a third person has resulted that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master. [887] It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused

by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another: Rounds v. Delaware etc. R. R. Co., 64 N. Y. 129, 21 Am. Rep. 597. Furthermore, the law under such circumstances will not undertake to make any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong: South Cov. & Cincinnati Street Ry. Co. v. Cleveland, 30 Ky. Law Rep. 1072, 100 S. W. 283, 11 L. R. A., N. S., 853; Thompson on Negligence, secs. 554, 563; New Ellerslie Fishing Club v. Stewart, 123 Ky. 8, 29 Ky. Law Rep. 414, 93 S. W. 598, 9 L. R. A., N. S., 475.

Let us, then, apply these principles to the facts as set out in plaintiff's amended and substituted petition. [888] That pleading alleges that George Vanetta, the watchman who shot plaintiff, was the night watchman of the P. Bannon Sewer Pipe Company, and, as such, he was authorized by said company to carry firearms to protect said property from injury during the night-time, and was authorized to use said firearms whenever in his judgment it seemed necessary or advisable; that on the occasion in question, and while Vanetta was acting as such night watchman for the P. Bannon Sewer Pipe Company, and while the plaintiff was "on or near said premises," he, with gross negligence, wrongly adjudged that the plaintiff was doing, or attempting to do, wrong to the property of the defendant P. Bannon Sewer Pipe Company, and with gross negligence adjudged it was necessary to fire at said Oscar Robards, in order to protect said property; and that he did actually fire at and wound the plaintiff. Where the master employs a watchman and authorizes him to use firearms in his discretion, we cannot hold as a matter of law that the act of the watchman in shooting a third party who, at the time, was only near the premises, is conclusive evidence of the fact that the watchman was not acting within the scope of his employment. The master cannot escape liability for the acts of his servant when he has given the servant authority to act and the discretion when to act, and the servant negligently acts at a time when such action was not necessary. The statements of this pleading may be overcome when all the surrounding facts and circumstances are made known; but taken by themselves, as we must do for the purposes of the question before us, they show that the act of Vanetta was within the scope of his employment.

For the reasons given, the judgment is reversed and cause remanded, with directions to overrule the [389] demurrer of the P. Bannon Sewer Pipe Company to the amended and substituted petition.

The Liability of an Employer Where His Watchman Shoots a Trespasser is discussed in Holler v. Ross, 68 N. J. L. 324, 96 Am. St. Rep. 546; Lipscomb v. Houston etc. Ry. Co., 95 Tex. 5, 93 Am. St. Rep. 804; Golden v. Newbrand, 52 Iowa, 59, 35 Am. Rep. 257; Deck v. Baltimore etc. R. R. Co., 100 Md. 168, 108 Am. St. Rep. 399.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY v. RAINE.

[130 Ky. 454, 113 S. W. 495.]

CARRIERS—Passengers—Failure to Notify of Place of Transfer.—When the servants of a carrier know that a passenger is in the wrong car, they may simply tell him what to do, and ordinarily leave him to follow their directions; but if they tell him to keep his seat and that they will transfer him to the other car, and fail to do so, their company is liable. (p. 403.)

CARRIERS—Sleeping-cars, Who not a Passenger in.—A passenger who orders a reservation in a sleeping-car which is to be attached to the train she is traveling in at a given junction, which train belongs to another company, is not a passenger of the sleeping-car company, and that company is not liable to her because its conductor failed to get her into the right car. (pp. 403, 404.)

CARRIERS—Passengers—Duty to Advise Means of Reaching Destination.—A passenger who purchases a through ticket on an overnight train and orders a reservation in a sleeping-car which was usually attached thereto, and is informed by the sleeping-car conductor, in the presence of the conductor of the train she is in, that the car will not be attached till they reach a named junction, and that she should stay where she was and he would transfer her to it, and after passing the junction she is informed by him that her sleeper had been attached to the first section of the train for her destination which had gone on and she had her choice of submitting to a night's delay in a strange place or of returning to her starting point, which latter alternative she adopted, has a valid claim for damages against the company whose train she was in up to the junction referred to, the sleeping-car conductor being pro hac vice their agent in making the arrangements for her disposition. (p. 404.)

CARRIERS—Passengers—Misleading as to Means of Reaching Destination.—The servants of a carrier must not mislead a passenger to his prejudice. It is proper that a passenger should obey the instructions which he receives from them; and when they tell a passenger to keep his seat and they will at the proper time transfer him, he has a right to trust implicitly to their directions. (p. 404.)

CARRIERS—Passengers—Measure of Damages.—Where a railroad company fails to furnish transportation according to agreement, the proper measure of damages is a reasonable compensation for the

time lost by the passenger and any expense he was forced to incur and no recovery can be had for vexation or personal inconvenience or sickness by reason of the delay. (p. 405.)

C. R. McDonald, C. H. Rhodes and Kohn, Baird, Sloss & Kohn, for the appellant Pullman Company.

Chas. R. McDowell and Humphrey & Humphrey, for the Southern Railway Company in Kentucky.

Robt. Harding, J. F. Vanarsdall, E. M. Hardin and E. V. Puryear, for the appellee.

460 HOBSON, J. Mrs. Minnie Raine lived in Atlanta, Georgia. Her father lived in Harrodsburg, Kentucky, and she made trips about three times a year from her home to her father's. In January, 1906, she was at her father's and desired to go home on Sunday, January 7th. That morning her father called up the station agent of the Southern Railway in Kentucky at Harrodsburg by telephone, and told him that he wanted a reservation for his daughter in the sleeper for Atlanta on the train that night. That afternoon he called up the station agent, and was told by some one at the station that the reservation had been secured. The train from Louisville reached Harrodsburg about 10:35 P. M. Mrs. Raine bought a through railroad ticket to Atlanta, and with this got on the train at the day coach. She passed 461 back, walking through two sleepers, where she found the sleeping-car conductor. She asked him for the Atlanta sleeper, saying that she had a reservation in there. He told her there was no Atlanta sleeper on the train, but that there would be an Atlanta sleeper which would come from Cincinnati on the train which they would meet at Danville. Danville is ten miles from Harrodsburg. The Southern train runs from Louisville to Danville, and there connects with the train running from Cincinnati to Atlanta. While she was talking to the Pullman conductor, the passenger conductor also came in. They told her there was a Chattanooga sleeper on that train, and she could go into it and get a reservation at once, advising her to do so as the other train was frequently late, and she might have to sit up some time if she waited for the Atlanta sleeper. She had her little boy, about six years old, with her, and, when she learned that she would have to get up about 6 o'clock in the morning if she did this, she decided not to take the Chattanooga sleeper. They then advised her to sit in the Chattanooga sleeper until she got to Danville,

telling her that, when they reached Danville that sleeper would be put next to the Atlanta sleeper, and she would only have to walk from one car to the other, while the Knoxville sleeper, in which she was then, would be put at some distance from the Chattanooga sleeper. She said that she would stay in the Knoxville sleeper with some friends, and they agreed for her to do so. When they reached Danville, the train from Cincinnati was forty minutes late. When she saw it come in, she went to the Pullman conductor, and asked him if he would not go and get her reservation for her. He answered that he was not allowed to leave his sleeper while it was standing at the station; [462] that, as soon as they were out of Danville, he would see about it; that there would be plenty of time. When her car was attached to the other train, she again made the same request of him, and he made in effect the same answer. When the train pulled out of Danville, she and the Pullman conductor went forward and learned there was no Atlanta sleeper on that train; that the Cincinnati train had on that night been divided into two sections, the Atlanta sleeper being in the first section, and the Knoxville sleeper in which she had been sitting having been put in the second section. The first section was ten miles ahead of them. She then said to the Pullman conductor: "Now, see what you have done by not attending to my reservation in Danville." He said: "Madam, I am not to blame. My clothes are on that section too." The train had only been running to Danville a month, and this Pullman conductor had never known the Cincinnati train before to run in two sections, although it happened from time to time when travel was heavy. The Chattanooga sleeper had been put in the first section, and if Mrs. Raine had taken a seat in that sleeper, instead of staying with her friends, there would have been no trouble. The section which she was in went to Knoxville. She talked the matter over with the conductor of the train. He told her that he would wire to Somerset, which was about fifty miles below, and ask that the first section be held there for her. At the next stop, at Junction City, he held his train ten minutes and did wire to Somerset, but was unable to get an answer. When he was unable to get an answer, he came in and told Mrs. Raine the facts, and they then consulted as to what she had better do. The Pullman conductor had in his pockets the tickets of all the passengers in the Chattanooga sleeper. The [463] Knoxville train would turn off from the main line at Oakdale, a station

about half way between Somerset and Chattanooga. Mrs. Raine did not want to sit up all night, and finally concluded that she would get off there and go back to Harrodsburg, and wait there for the next train. The conductor she says advised her to do this. The conductor says she proposed it; but, however this may be, she got off voluntarily at the station. It was then about 1 o'clock in the morning. She was assigned to a room by the clerk, but declined at first to have a fire made. Afterward she had a fire made, but did not go to bed. At 4 o'clock she took the train for Harrodsburg, and went back to her father's, and that evening took the train for Atlanta, and went through without trouble. But she had taken a violent cold, and the cold produced a very bad nervous condition approaching hysteria. The bad nervous condition may have been due also in part to the excitement incident to her leaving the train and sitting up all night. After she got home she was sick for two months, and at the trial, a year or more later, her health was still infirm. She brought this suit to recover damages against the Pullman Car Company, the Southern Railway in Kentucky, and the Cincinnati, New Orleans & Texas Pacific Railway Company. On a trial of the case a judgment was rendered in her favor against all the defendants for the sum of four thousand dollars, and they appeal.

The only questions we deem it necessary to consider on the appeal are, first, should the jury have been instructed peremptorily to find for the defendants; second, if not, what is the proper measure of damages?

1. When Mrs. Raine came upon the sleeper, she had nothing but a railroad ticket. She had no sleeping-car [404] ticket, and she had nothing to show that she had any reservation in any sleeper. She remained in the Knoxville sleeper entirely by the courtesy of the conductor. She paid nothing for her seat in that sleeper, and it is evident that he allowed her to remain because she had her little boy with her, and she decided to stay there and talk to her friends until she got to Danville. When the servants of a carrier know that a passenger is in the wrong car and that he must go into another car, they may simply tell him what to do, and ordinarily leave him to follow their directions; but, when they tell him to keep his seat, and that they will at the proper time transfer him to the other car, and fail to do so, the company which they represent is liable. Mrs. Raine was not a passenger of the Pullman Car Company, for she had not

been received as a passenger. She had simply been allowed to sit in the sleeper with her friends, and the Pullman Car Company is not answerable to her because its conductor failed to get her in the right car; for he did not represent the company as to the Atlanta sleeper and she had made no contract with the Pullman Car Company, and it owed her no duty. But, while this is so, the Pullman conductor in dealing with Mrs. Raine, who had a railroad ticket, was discharging a duty which the railroad company owed her. The train conductor was with him, and assented to what the Pullman conductor said. In undertaking to transfer Mrs. Raine at Danville to the proper sleeper, and in telling her that she might remain in the Knoxville sleeper until he so transferred her, the Pullman conductor was discharging a duty which devolved upon the Southern Railroad Company. While he might have told Mrs. Raine what to do and left her to follow his directions, a very different state of case is presented when he told her that he would [465] transfer her to the other sleeper, and for her to sit where she was, that there was plenty of time, and he would attend to it. The passenger conductor was present when the arrangement was made, and he left her in the care of the Pullman conductor. It was incumbent on these men under the circumstances to see that the lady was transferred to the proper train. The servants of a carrier cannot mislead a passenger, to his prejudice. It is proper that a passenger should obey the instructions which he receives from them; and when they tell a passenger to keep his seat, and they will at the proper time transfer him, he has a right to trust implicitly their directions. If Mrs. Raine had not been told to keep her seat, that there was plenty of time, she might have protected herself from the consequences that followed.

We therefore conclude that the jury should have been instructed peremptorily to find for the Pullman Car Company, but that the motion for a peremptory instruction as to the Southern Railway in Kentucky was properly refused. It remains to consider whether any liability was shown on the part of the Cincinnati, New Orleans and Texas Pacific Railway Company. Mrs. Raine did not see the conductor of this train until after it had pulled out of Danville. He did not take up her ticket, and evidently did all in his power to rectify the mistake that had occurred, for which he was in no wise responsible. She had remained in the Knoxville sleeper with the consent of the conductor of the Southern

Railway, and she had come into the custody of the second line when that sleeper was attached to its train. Junction City was the proper place for her to alight, and, as said, she got off there voluntarily. We therefore conclude that there was no liability on the part of the second line; for it had a perfect [466] right to run its train in two sections and to attach the sleepers which came to it from the other line to that section which best suited its convenience. It had no notice of Mrs. Raine's situation until she saw the conductor after the train pulled out from Danville.

2. It remains to consider what is the measure of damages as against the Southern Railway Company. Mrs. Raine by its negligence missed her train, and was delayed twenty-four hours in returning home. In Illinois Central R. R. Co. v. Head, 119 Ky. 809, 27 Ky. Law Rep. 270, 84 S. W. 751, this court said: "The evidence presents simply a case where the railroad company agreed to furnish transportation and failed to do so promptly, if Hupert Head was not guilty of contributory negligence in going to the wrong place for his ticket, and of this the jury must judge. But, if the railroad company was negligent in furnishing the transportation, the measure of damages is simply a reasonable compensation for the time lost by Rupert Head and any expenses he incurred by reason thereof." Mrs. Raine testifies that nobody was on the platform when she got off and that she made her way to the hotel alone, but she did not request the conductor to go with her or to furnish anybody to accompany her, or make any objection to his leaving her. The hotel was near by, and it is evident that she went directly to it. The trouble with her was not that she did not go to the hotel without difficulty, but that after she got there she went into a cold room, and stayed there for some time without a fire. Her nervousness was perhaps largely due to the fact that she remained up all night. But neither one of these things was the proximate result of the negligence of the Southern Railway in Kentucky in failing to transfer her to her train. She no doubt acted as she did [467] without realizing the danger; but her remaining in the cold room was not due to the act of the railroad company, and all of the consequences which followed would seem to be due primarily to the violent cold which she took afterward settling upon her stomach and impairing her digestion. A passenger who, by the negligence of a railroad company, fails to make a connection, cannot hold the railroad company responsible for consequences which a

person of ordinary prudence might not reasonably anticipate as the result. A person of ordinary prudence might reasonably anticipate that one who missed his connection would have to pay a hotel bill and would have to wait until the next train, but, a well-regulated hotel being right at hand, other consequences such as these proved here should not be anticipated. Under all the circumstances, we conclude that the proper measure of damages is such expense as Mrs. Raine incurred and the value of the time which she lost by reason of her not being transferred to the Atlanta sleeper. The rule for the measure of damages in such cases is the same for both men and women; and, if this had been a man, manifestly no other damages would be allowed. There was nothing in Mrs. Raine's condition or appearance to show that she was not capable of taking care of herself, or to apprise a person of ordinary prudence that it was not safe to leave her at Junction City within a few feet of a well-regulated hotel. No recovery can be had for vexation or personal inconvenience by reason of the delay: Robinson v. Western Union Tel. Co., 24 Ky. Law Rep. 452, 68 S. W. 656, 57 L. R. A. 611. Mrs. Raine was treated with courtesy and kindness by all the conductors. The mistake was due to a misapprehension, the Pullman conductor not being allowed to leave his car, and the railroad conductor [468] assuming that the Pullman conductor would get her to the proper sleeper at Danville. The mistake would not have occurred had the Cincinnati train run in one section as it usually did, or if the Pullman conductor had known it was liable to run in two sections. There is nothing in the case to take it out of the general rule as to the measure of damages for delay on a journey.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

The Obligations and Liabilities of Sleeping-car Companies are considered in the note to Pullman Palace Car Co. v. Lowe, 26 Am. St. Rep. 331.

The Liability of a Railroad Company for injuries or losses arising from the operation of cars not owned by it is the subject of a note to Louisville etc. R. R. Co. v. Church, 130 Am. St. Rep. 33.

BATES v. BURT & BRABB LUMBER COMPANY.

[130 Ky. 608, 113 S. W. 820.]

TIMBER.—The Sale of Standing Timber Includes the Right to Remove It in a judicious manner, but not to cut it down and leave it or any part of it so that it will do damage to the lands of the owner. (p. 407.)

R. O. Brashears, for the appellant.

Jas. H. Jeffries and D. D. Fields, for the appellee.

[609] O'REAR, C. J. This is the second appeal of this case. The merits of the case, as presented by the somewhat imperfect record before us, impress us that appellee, who sues upon a breach of warranty, did not show itself entitled to recover for a greater number of trees than were admitted in appellant's answer. On the other [610] hand, the damage done to appellant's lands unnecessarily by appellee's agents in removing the timber, and the value of the trees taken by them that were not branded, as found by the circuit court, practically offset the value of the trees lost to appellee by the failure of the title to part of the branded timber. In addition, we think appellants should be allowed for the damage done by appellee's leaving the tops and debris of the timber felled by them. The sale of standing timber includes the right to remove it in a judicious manner, but does not include the right to cut it down and leave it, or any part of it, so that it will do damage to the lands of the grantor or owner of the principal estate. On the whole, we think the accounts of the parties are about equal. Limitation on appellant's account is saved by the disability of the female appellant.

Judgment affirmed on the cross-appeal, and reversed on the original appeal, with directions to the lower court to dismiss the petition. Each party will pay their own costs in this court.

Conveyances of Standing Timber and the Rights of the Parties Thereunder are discussed in the note to Wilson etc. Co. v. Alderman & Sons Co., 128 Am. St. Rep. 868.

LOUISVILLE RAILWAY COMPANY v. COMMONWEALTH.

[130 Ky. 738, 113 S. W. 517.]

CRIMINAL LAW—Indictment—Demurrer.—Where an indictment substantially follows the language of the statute and does not omit any essential averment necessary to constitute an offense under the statute, a demurrer cannot be sustained. (p. 409.)

RAILROADS—Separation of White and Colored Races—Street Railroads—Interurban Railroads.—While a street railway operating within the territory to which its charter confines it is not required by law to provide separate cars or compartments for the transportation of white and colored passengers, an interurban railway is, and cannot evade its duty by leasing or otherwise turning over the use of its lines to a street railway or other railroad. (p. 409.)

RAILROADS—Separation of White and Colored Races—Street Railroads—Interurban Railroads.—Kentucky statutes of 1903, section 795, require interurban railroads to have each separate coach for the transportation of white and colored passengers or the compartments thereof for each race to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart. A street railroad company which operates interurban cars in contravention of the section cannot rely upon the want of authority under its charter as a defense. (p. 410.)

CORPORATIONS — Prosecutions — Defense—Ultra Vires.—A corporation indicted for a statutable offense will not be permitted to escape punishment by showing that the act constituting the offense was ultra vires. (p. 410.)

CRIMINAL LAW—Intent—Presumption.—A corporation violating a statute which imposed obligations to have certain words inscribed on their railroad cars must be presumed to have knowingly and willfully done so. (p. 410.)

RAILROADS—Lessors and Lessees.—If a railroad company leases its roadbed without legal authority, it is nevertheless liable civilly for any dereliction of duty upon the part of the latter resulting in public or private injuries. (p. 410.)

CRIMINAL LAW—Statute—Unlawful Act—Interpretation.—When the legislature has declared that a given act shall be deemed unlawful, a person voluntarily doing that act will be charged with a criminal intent; but "voluntarily" in that connection means "intentionally." (p. 411.)

RAILROADS—Statutory Offense—Liability of Lessor and Lessee.—Where a railroad company leases its road to another company which committed breaches of a statute requiring certain inscriptions to be maintained on the cars running thereon, the lessor company was not liable for such infraction of the law, in the absence of knowledge at the time of entering into the lease that the lessee company had contemplated it, and the facts that the lessor was furnished thereby with grounds to apply to forfeit the lease, and that the lease itself was invalid, are outside the main issue. (p. 411.)

Clarence Dallam and Kohn, Baird, Sloss & Kohn, for the appellants.

James Breathitt, attorney general, and Theo. B. Blakey, assistant attorney general, for the appellee.

[739] SETTLE, J. Appellants, Louisville Railway Company and Louisville and Interurban Railroad Company, were separately indicted in the court below for violating section 795 of Kentucky Statutes of 1903, the specific charge against each being that it operated a railroad between the city of Louisville and O'Rell's Station, in Jefferson county, a distance of ten miles, without causing or having each separate coach for the transportation of white and colored passengers on the line, or compartments thereof for each race, to bear in some conspicuous [740] place appropriate words in plain letters indicating the race for which it was set apart. A jury was waived in each case, and they were heard together by the lower court upon the agreed facts, and each appellant was adjudged guilty and fined five hundred dollars. Both have appealed, and the cases have been submitted together in this court.

It is contended by appellants that the indictments were insufficient and the demurrer to each should have been sustained. There is no force in this contention. The indictments substantially follow the language of the statute, and neither seems to lack any essential averment necessary to constitute an offense under the statute.

On the merits of the cases, we do not concur in so much of the judgment of the lower court as fastens guilt upon the appellant Louisville and Interurban Railroad Company, but do not think it necessary to decide, as did that court, the question of whether the appellant Louisville Railway Company was or not without authority under its charter to operate a railroad between the points indicated. As a street railway operating within the territory to which its charter confines it, the Louisville Railway Company is not required by law to provide separate cars, or separate compartments in its cars, for the transportation of white and colored passengers. But interurban railroads are by law required to do so, and they cannot evade the performance of this duty by leasing or otherwise turning over the use of their lines to a street railway or other railroad: Commonwealth v. Louisville & N. R. R. Co., etc., 120 Ky. 91, 27 Ky. Law Rep. 497, 85 S. W. 712. It appears that the cars operated over the line in question were owned and operated by the appellant Louisville Railway Company, and whether [741] it did or did not have authority to so use said line, as it nevertheless did so, without having complied with section 795 of Kentucky Statutes of 1903, by setting aside separate coaches or compartments in each coach for the separation of the white and colored races, bearing in a con-

spicuous place appropriate words in plain letters indicating the race for which it was set apart, it violated the statute in question. This being true, it would not, had it relied upon the want of authority under its charter to operate the road at all, have been allowed to escape punishment under the indictment on that ground. A corporation indicted for an offense punishable by statute will not, if guilty, be permitted to escape punishment by showing that the act constituting the offense was ultra vires. The doctrine of estoppel applies in such a case with full force. Under the admitted facts the appellant Louisville Railway Company was manifestly guilty of the offense charged in the indictment. It must be presumed to have knowingly and willfully violated the provisions of the statute. The trial court, therefore, properly inflicted upon it the fine complained of.

The attitude of the appellant Louisville and Interurban Railroad Company is, however, different. If it should be conceded that it was without authority to lease its roadbed to the Louisville Railway Company—which is not decided—it would nevertheless be civilly liable for any dereliction of duty upon the part of the latter resulting in public or private injury from operating its road, but it does not necessarily follow from these facts that it would be criminally liable for such wrongful acts of the Louisville Railway Company as are punishable under the criminal or penal laws of the state. It does not appear from the admitted facts in the cases that the Louisville and Interurban [742] Railroad Company authorized the violation of the law committed by the Louisville Railway Company resulting in the indictment, or knew when it leased the latter the road in question that it would operate its cars thereon in a manner prohibited by section 795 of the Kentucky Statutes. We do not regard the state of case here presented as one to which the doctrine of agency should be applied. The relation between the two appellants is more nearly akin to that of landlord and tenant. And whether the lease under which the tenant Louisville Railroad Company holds the Louisville and Interurban railroad's right of way and track is or not void, when the offense for which the former was indicted was committed it was in possession of the property and operating its cars over the line. This court has held that the owner of leased premises is not liable to indictment for violations of the criminal or penal laws committed or suffered thereon by the tenant, in the absence of knowledge at the time of entering into the lease that such was the use to which the ten-

ant intended to put the property; nor does the fact that such use of the property by the tenant furnished the landlord grounds for applying to a court of equity for a forfeiture of the lease make him liable to indictment: Commonwealth v. Morris, 129 Ky. 440, 33 Ky. Law Rep. 987, 112 S. W. 580; Commonwealth v. Conway, 33 Ky. Law Rep. 966, 112 S. W. 575. While it is true that "when the legislature has declared that a given act shall be deemed unlawful, the person voluntarily doing said act will be charged with a criminal intent": Commonwealth v. Bull, 13 Bush, 656; this rule applies only to unlawful acts which are voluntarily, and in that sense intentionally, done. The facts in the record before us do not show the appellant Louisville and Interurban [743] Railroad Company guilty according to the above rule. It did not itself commit the unlawful act for which it was indicted, nor did the fact that it directly contributed to it by placing its railroad track in possession of the appellant Louisville Railway Company under a lease, whether valid or void, make it a voluntary participant in the unlawful act committed by the latter, in the absence of knowledge at the time of making the lease that it would be committed.

The judgment is affirmed as to the appellant Louisville Railway Company, and reversed as to the appellant Louisville and Interurban Railroad Company, with directions to the lower court to grant the latter a new trial.

The Liability of a Lessor Railway Corporation to persons other than the lessee is the subject of a note to Lee v. Southern Pac. R. R. Co., 58 Am. St. Rep. 147. For subsequent authorities on this question, see Travis v. Kansas City etc. R. R. Co., 119 La. 489, 121 Am. St. Rep. 526, and cases cited in the cross-reference note thereto.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

LAMBERT v. MORGAN.

[110 Md. 1, 72 Atl. 407.]

ASSIGNMENT, Effect of Prior Notice of.—The assignment of a fund operates in favor of the assignee who first gives notice to the debtor, depositary, or trustee. (p. 415.)

ASSIGNMENT, Notice of to a Trustee, What Amounts to.—Where there is a fund within the control of trustees and an administration by a court of equity, the filing of an assignment in the case has the effect of notice to the trustees, and gives the assignee precedence over a prior assignment of which no notice has been given. (pp. 415, 418.)

ASSIGNMENT, When not Protected by the Registry Acts.—If a testator devises lands to trustees to sell and pay the income of the fund for life, the tenant for life has no such interest as he can mortgage, and a mortgage thereof and its registration does not give notice to any person of the priority of the lien attempted to be created thereby, nor take precedence over an assignment subsequently made of which notice is given to the trustees by filing it in the case in which the trust is subject to the jurisdiction and administration of a court of equity. (pp. 416, 418.)

THE ASSIGNMENT OF A FUND does not by Being Recorded Become Operative Against Persons Having No Notice Thereof. Such an assignment is not an instrument within the provisions of the registry act, and its recordation gives it no greater effect than the law itself gave. (p. 416.)

DEEDS, Unauthorized Recording of.—**The Recording of an Instrument not Entitled to be Recorded** does not operate as constructive notice thereof. (p. 416.)

DEVISE, When does not Give an Interest in the Realty.—A devise of lands to a trustee with direction to sell and pay the income to a tenant for life does not give an interest in the realty. (pp. 417, 418.)

CONVERSION, EQUITABLE.—Where Lands are Devised to a Trustee with Directions to Sell and Pay the Income to a Tenant for Life, the realty must be treated as personalty on the death of the testator. (p. 417.)

CONVERSION OF REALTY into Personalty, When not Prevented by the Existence of a Discretion Respecting the Sale.—Where lands are devised to a trustee with an absolute direction for their sale, but giving him a discretion as to the terms, place, times and

manner of sale, such discretion does not prevent the conversion of the realty into personalty on the death of the testator. (p. 417.)

ASSIGNMENT OF A FUND, Mortgage, When may Operate as.—If lands are devised to a trustee to sell and pay the income of the fund to a life tenant, his mortgage of the land cannot operate except as an assignment of the fund of which, notwithstanding the recording of the mortgage, notice must be given as in other cases of assignments. (p. 418.)

Stewart Brown and George Stewart Brown, for the appellants.

Randolph Barton, Jr., Aubrey Pearre, Jr., George Weems Williams, William Pepper Constable, Stuart S. Janney and A. C. Ritchie, for the appellees.

[24] BRISCOE, J. The appeal in this case is taken from an order of the circuit court of Baltimore City, passed on the 24th of September, 1908, overruling exceptions of the appellants, to income account V, filed in the case of Osmun Latrobe et al. v. Mathilde F. Winans et al., distributing the income of the trust estate of De Witt Clinton Winans, deceased, among the creditors of Ellen Barbara Williams, one of the life tenants. The exceptions of Thomas S. Bray, a judgment on mortgage creditor of the life tenant, were sustained.

The court below by the order appealed against directed the account to be restated and the fund in the hands of the trustees to be distributed in payment of the claims of the appellees, as follows:

(1) To J. Pierpont Morgan, the balance in full of his claim, as filed in the case, on December 21, 1901.

(2) To Hotel Rennert Company, in full for claim filed in above case on June 22, 1905.

(3) To Thomas Sprackman Bray, the balance in full of his claim as filed in the above case, on September 7, 1906.

(4) To the Union Deposit Bank, Limited, of England, on account of claims filed in the above case on March 9, 1907.

The appellants and appellees are mortgage creditors of the life tenant, and there is no dispute as to the validity of these claims, but the questions involved relate to their rights and priorities of lien, in the distribution of the fund held by the trustees.

The fund in court for distribution amounts to the sum of three thousand four hundred and eighty-seven dollars and fifty-six cents, and is income of the trust estate of De Witt Clinton [25] Winans, deceased, collected by the trustees and

payable to Mrs. Ellen Barbara Williams, as life tenant, under the will.

Mr. Winans died in 1892, leaving a last will and testament wherein he directed his trustees after the death of his wife to pay the whole of the income of his residuary estate, held by the trustees, to Ellen Barbara Williams during her life, with remainders to third persons. On the seventh day of December, 1895, the circuit court of Baltimore City assumed jurisdiction of the administration of the trust estate. Mrs. Winans died shortly after the testator, and it is conceded that Mrs. Williams is the sole life tenant and is entitled to the payment of the income from the estate.

There are six claimants to the fund or income now in court for distribution, and each claim is represented by a mortgage transferring and assigning the interest of the life tenant in the estate as security for loans made to her.

It is contended, upon the part of the appellants, that the execution and recording of their mortgages being prior in date gave them a prior lien, and no further notice by them or action on their part was necessary to perfect their lien.

The appellees contend that the transfers were assignments of a fund, to wit, income accruing in the hands of trustees from the trust estate and payable to Mrs. Williams, and to render such assignments a complete transfer of her interest in the trust estate, to effect a prior lien on the fund, notice of these assignments to the trustees was necessary.

The dates of execution, recordation and filing of the various mortgage claims in controversy appear to be as follows:

Names.	Date of Execution.	Date of Recordation.	Date of Filing.
J. Pierpont Morgan.....	May 3, 1901	May 22, 1901	Dec. 27, 1901
Hotel Rennert Company..	Nov. 5, 1904	Feb. 17, 1905	June 22, 1905
Thomas S. Bray.....	Oct. 15, 1896 Judgment on claim liquidated in 1906		Sept. 7, 1906
Union Deposit Bank, Ltd., of London, England....	Nov. 1, 1904	Nov. 28, 1904	Mar. 9, 1907
Lambert & Cooper.....	May 15, 1900	July 9, 1900	Dec. 11, 1907
Albert Dixon.....	Feb. 19, 1902	Mar. 7, 1902	Dec. 13, 1907

[26] The fund in court for distribution is the income of the trust estate from July 1, 1907, to January 1, 1908, derived from interest on railroad bonds, Baltimore City stock and rents collected from real estate and payable to the life tenant under the will.

The court below held, by its order of September 24, 1908, in effect, that the claims here in controversy were mere assignments of a fund or choses in action, to wit, the income in a trust estate, enjoyed by the life tenant, and that they took effect as among the assignees from the date they were perfected by notice to the trustees, and that notice was given by filing the claims in the court proceeding and procuring proper orders thereon.

The rule thus applied in the distribution of the fund or income, in this case—that is, that the assignee who first gives notice to the debtor obtains priority—is approved and settled by numerous adjudications of the courts, both in this country and in England.

The cases of Dearle v. Hall, 3 Russ. 1, and Loveridge v. Cooper, 3 Russ. 30, are directly in point. The lord chancellor there said: "In cases like the present the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far toward equitable possession as it is possible to go, for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice."

The English rule has been approved and followed by the federal courts: Judson v. Corcoran, 17 How. 612, 15 L. ed. 331; Spain v. Hamilton's Admr., 1 Wall. 604, 17 L. ed. 619; Laclade Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. Rep. 644, 30 L. ed. 704; Methven v. Staten Island, 66 Fed. 113, 13 C. C. A. 362; Third Nat. Bank v. Atlantic City, 126 Fed. 413.

In 2 Story's Equity, section 1047, it is said, as the assignee is generally entitled to all the remedies of the assignor, so he is generally subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority [27] of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignor before such notice. The same doctrine is also stated in 2 Pomeroy's Equity Jurisprudence, sections 695 and 698. And in Robinson v. Marshall, 11 Md. 251, this court approved the doctrine laid down by these eminent text-writers, and held that the assignee of a claim or chose in action cannot recover from the original debtor who had paid it to the assignor after, but without notice of, the assignment.

While some of the state courts hold to the contrary, we think the doctrine sanctioned by the English courts, approved by the federal courts and by many of our state courts, is based upon sound reasoning and sustained by the weight of authority.

But it is earnestly contended that Mrs. Williams had at the time of the execution of the mortgages in question such an interest in the trust estate as she could mortgage, and their recordation gave constructive notice to everyone as to the priority of the liens thereunder. It will be seen, however, that the trust property in this case—"the income arising out of the residuary estate"—was but a money interest and could not be mortgaged as realty. The instruments, being mere assignments of the fund, were not within the provision of our registry act and their recordation could give no greater effect than the law itself gave.

In Glenn v. Davis, 35 Md. 208, 6 Am. Rep. 289, the court held, when an instrument is not entitled by law to be recorded, placing it on record could not of course operate as constructive notice.

In Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. Rep. 696, 38 L. ed. 578, it is said: "It is alleged that the assignments and transfers, under which the defendant claims, were recorded in the land office. The argument seems to be that the defendant and his assignors selected filing and record in that office as a means of giving notice to other parties of their rights, and that having made such selection was equivalent to an admission that they would accept a like filing and record as notice to them; but that argument cannot be sustained. The defendant and his assignors may [28] have desired to give as much publicity as possible to the fact of the transfers to themselves, and in seeking to give such publicity may have selected the filing and record in one of the principal offices of the county as a means thereto, but they did not thereby create a new law in respect to notice. They never in terms declared, and their own acts of filing for record carried no implied declaration of willingness to accept a similar record as notice to themselves. They had a right to rely upon the law of the state as enacted by its legislature, and were not bound by any constructive notice other than those laws provided. If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means for constructive notice. Indeed, it is a mere and not very reasonable inference from the fact that

they placed these instruments on record that their purpose was thereby to give notice."

We think it is apparent from the terms and provisions of Mr. Winans' will that Mrs. Williams had no interest in the nature of realty thereunder, and upon the well-established principles of equitable conversion the realty must be treated as converted into personalty at the death of the testator. In the recent case of Stake v. Mobley, 102 Md. 408, 62 Atl. 963, this court said, when a testator manifests a clear and unmistakable intention that real property belonging to his estate shall be sold and converted into money, it is in equity generally treated as so converted at the time of his death, in the absence of some provision or expression in the will which contemplates a postponement of the time of conversion. The general rule, "that lands devised to be sold are thereby turned into money and construed in equity as personal estate was recognized by our predecessors many years ago": Hurtt v. Fisher, 1 Har. & G. 88; Thomas v. Wood, 1 Md. Ch. 296.

In this will the testator clearly intended that his real estate should be sold by his trustees, because he provides as follows:

"I give, devise and bequeath unto Osmun Latrobe (hereinafter called my trustee), now residing at Baltimore, Maryland, United States of America, all my real, personal and [20] mixed estate, of what nature and kind soever and wheresoever situated, upon trust at such time or times by public auction or private treaty, in such manner and for such price or prices and subject to such conditions as he may think fit to sell or concur with any other person or persons or part owners in selling the whole or any part of my said real, personal or mixed estate, to vary contracts for sale and resell, with power to allow a portion of the purchase money to remain upon mortgage of the premises sold; and notwithstanding such power of sale, I authorize my said trustee to postpone the sale calling and conversion of all or such part of my said real in personal or mixed estate for such length of time as he in his sole and uncontrolled discretion shall think fit. And I declare that he shall not be liable or responsible for any loss which may arise in consequence of the postponement of such sale."

Now, while the time, manner and terms of sale were left to the discretion of the trustees, the fact of sale by the trustees was contemplated at all events, and in such cases the authorities are uniform in holding that this will work a conversion of the realty at the time of the death of the testator: Stake

v. Mobley, 102 Md. 408, 62 Atl. 963; Sloan v. Safe Deposit Co., 73 Md. 239, 20 Atl. 922; Church Extension v. Smith, 56 Md. 362; Reiff v. Strite, 54 Md. 298; Given v. Hilton, 95 U. S. 591, 24 L. ed. 458; Clarke v. Denton, 36 N. J. Eq. 419.

We are, therefore, of the opinion that Mrs. Williams had no interest in the trust property, under this will, which could be regarded as realty, and the recordation of the mortgages did not create a lien or give such constructive notice as to defeat the claims of the appellees, who were prior in point of time in filing their claims with the trustees.

In Gray v. Smith, 3 Watts (Pa.), 289, it is said, where a testator orders his lands to be sold and the proceeds distributed among certain persons, no interest in the land passes to the legatees. They acquire under the will nothing more than a right to receive a sum of money out of the proceeds of sale —a mere chose in action, a claim strictly of a personal character. [30] Their interest, being merely a chose in action, and not a right in the real estate, is not the subject of mortgage. Such a mortgage could create no lien: Wood v. Reeves, 23 S. C. 382; Horst v. Dague, 34 Ohio St. 371; In re Freshfield's Trust, 11 Ch. D. 198; Lloyd's Bank v. Pearson, 1 Ch. D. 872.

We therefore hold in this case that under the well-settled doctrine of equitable conversion, all of the trust property in this case must be treated as personalty, and that the instruments executed by Mrs. Williams, the life tenant, were simply assignments of a fund or choses in action, and fall within the principles of law stated herein.

The appellees having perfected their title to the fund by notice to the trustees, prior in time to the notice given by the appellants, they are entitled to priority of payment out of the fund in court.

In Dearle v. Hall, 3 Russ. 12, Sir Thomas Plummer, M. R., says: "Wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a court of equity considers tantamount to possession—namely, notice given to the legal depository of the fund. Where a contract respecting property in the hands of other persons, who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of—that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for

the new purchaser, and are charged with responsibility toward him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the market and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from encumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and encumbrancers; if it is not [31] taken, there is neglect; and it is fit that it should be understood that the solicitor who conducts the business for the party advancing the money is responsible for that neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having been made in the equitable rights affecting it; he considers himself to be a trustee for the same individual as before, and no other person is known to him as his cestui que trust. The original cestui que trust, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management and disposition of the property as absolutely as ever; so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those who may chance to deal with him protect themselves from his fraud? Whatever diligence may be used by a puisne encumbrancer or purchaser—whatever inquiries he may make in order to investigate the title and to ascertain the exact state of the original right of the vendor and his continuing right—the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees; and they must be considered as foreseen by those who, in transactions of that kind, omit to give notice; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty; and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence."

There were other subordinate questions argued and presented [32] at the hearing of this case, but as they do not affect the conclusion we have reached they need not be discussed.

For the reasons given, the order appealed from will be affirmed.

Order affirmed, with costs.

The Priority Between Successive Assignees of the Same Thing or Claim is the subject of a note to Graham Paper Co. v. Pembroke, 71 Am. St. Rep. 31. As between successive assignees of a fund in the hands of a third person, that assignee, without regard to the date of his assignment, who first gives the debtor notice of it, obtains priority and is entitled to be first paid. If an assignee of a fund fails to give notice to the person holding the fund, a subsequent assignee, without notice of the former assignment, will, upon giving notice of his assignment, acquire priority: Phillips' Estate, 205 Pa. 515, 97 Am. St. Rep. 746.

While No Special Form of Notice of an Assignment is Required, yet to affect one with such notice not formally given, it must come in such a way and under such circumstances to the person alleged to have been notified, that, as a reasonable man, he ought to regard it as notice to control his conduct in relation to the matter of the assignment: Phillips' Estate, 205 Pa. 525, 97 Am. St. Rep. 750.

As Between the Assignor and Assignee and Those Standing in the Shoes of the Assignor, notice of the assignment to the debtor or holder of the fund is not necessary: Cogan v. Conover Mfg. Co., 69 N. J. Eq. 809, 115 Am. St. Rep. 629.

LAVENDER v. ROSENHEIM.

[110 Md. 150, 72 Atl. 669.]

WILLS—Intestacy, Construction of is Against.—Where a will has been made, the testator will never be deemed to have died intestate as to any part of his estate, if this result can be avoided without violating clearly controlling legal principles. The abhorrence of courts to intestacy under a will may be likened to the abhorrence of nature to a vacuum. (p. 422.)

WILLS, When Construed as Speaking as of the Time When Made Rather Than as of the Time of the Death of the Testator.—With respect to the objects of a gift or the persons to be benefited by it, a will is construed as speaking of the time when made rather than of the date of the testator's death. (pp. 424, 425.)

WILLS—Devise of Lands to Wife, When not Affected by Her Subsequent Divorce.—If property is devised or bequeathed to the testator's son's wife, without naming her, and before the testator's death she is divorced from the son and contracts a second marriage, she nevertheless takes the gift of the will. (p. 421, 427.)

Thomas G. Hayes and Daniel B. Chambers, for the appellants.

Eli Frank and Myer Rosenbush, for the appellee.

[151] PEARCE, J. This appeal involves the construction of the will of Mrs. Elizabeth Whalen, executed December 19, 1889, and probated February 18, 1891. The particular clause which we are required to interpret is the following: "I give, devise and bequeath all the rest and residue of my estate, after the payment of the above-mentioned legacies, unto the wife of my said son, Oliver R. Whalen, absolutely." The preceding provisions of the will need not be transcribed; it will be sufficient to state their substance and effect. The testatrix devised and bequeathed all of her estate, of every kind and nature, to Benjamin Rosenheim, in trust to collect the rents, issues and profits thereof, and to pay over such part as he should think proper, to her son, Oliver R. Whalen, during his life, and upon his death the corpus of said estate to become the property of the child or children of said son surviving him. In event of his death without such surviving child or children, she directed the payment of four legacies of two hundred dollars each to certain nieces and nephews, and then immediately follows the residuary devise and bequest above transcribed. The case originated in a bill filed by the trustee under the will to obtain the direction of the court as to the distribution of the trust estate, the son having died without surviving child or children.

The heirs at law and distributees of the testatrix and the appellants, Mary A. Lavender and Frank J. Lavender, her husband, were parties defendants in that proceeding, Mary A. Lavender being the same person who was the wife of the son at the date of said will, but who was afterward divorced from the said Oliver R. Whalen. Some of the defendants were summoned and some were brought in under order of publication; all those answering admitted all the allegations [152] of fact of the bill; a decree pro confesso was entered against those not appearing under the order of publication, and the general replication was filed to the answers of those who did answer, and the case was heard upon the following agreed statement of facts filed in the cause by counsel for the plaintiff and the counsel for the defendants:

"That Mary A. Whalen was married to Oliver R. Whalen, October 31, 1889; that she knew testatrix; lived in the same house with her, and was present at time testatrix made her will, which will was executed December 19, 1889; that thereafter on December 13, 1891, testatrix died, and at the time of her death Mary A. Whalen, now Lavender, was the wife of Oliver R. Whalen, son of testatrix; that on March 4, 1898,

said Mary A. Whalen, upon her application, was granted a divorce a vinculo matrimonii from said Oliver R. Whalen on grounds of abandonment; that on or about March 19, 1899, said Mary A. Whalen married Frank J. Lavender; that said Mary A. Whalen was the only wife said Oliver R. Whalen ever had, and that said Oliver R. Whalen at time of his death had no child, or children, or descendants of children, nor did he ever have any children.

"It is further agreed that all of the material allegations of the bill of complaint, save and except such allegations as may affect the legal construction of the will of Elizabeth Whalen, are hereby admitted to be true."

The circuit court of Baltimore City decreed that said residuary clause of said will is inoperative and void as to the residuary estate in the hands of the trustee, and therefore had descended to, and should be distributed among, the heirs at law and distributees of the testatrix, and that the same should be sold by said Benjamin Rosenheim for the purpose of such distribution, he being appointed trustee for that purpose by said decree, and from that decree Mr. and Mrs. Lavender have appealed.

The effect of this decree is to establish the intestacy of Mrs. Whalen as to all of her estate except the four legacies of two hundred dollars each, aggregating, as far as the value of the estate can be [153] estimated from the averments of the bill, less than one-fifth of the estate; and this result is worked in spite of the emphatic manifestation in the language of the will of a contrary purpose on her part. Such a result is sometimes forced upon courts by the necessary application of established rules of construction to the plain language of a will, but it is never reached if it can be avoided without violation of clearly controlling legal principles. The abhorrence of courts to intestacy, under a will, may be likened to the abhorrence of nature to a vacuum, and that "axiom in the physical sciences may be appropriately transferred to a judicial question of this nature," as was said by Judge Yellott in Johnson v. Hines, 61 Md. 122, in speaking of a somewhat similar axiom.

The purpose of the testatrix to dispose of the whole of her estate appears in the first clause of the will, in which she devises and bequeaths "all my estate, real, personal and mixed of which I may die seised and possessed" to the trustee therein named, "subject, however, to the conditions, uses, limitations and trusts hereinafter mentioned"; and this purpose is

again declared in the last clause relating to the disposition of her estate, wherein she devises and bequeaths "to the wife of my son, Oliver R. Whalen, absolutely," "all the rest and residue of my estate, after the payment of the above legacies."

The repugnance of courts to construe wills so as to declare an intestacy is expressed by the highest courts in England and America and by all the standard text-books upon wills.

Mr. Jarman, volume 1, star page 809, says: "It has been generally thought that a very clear intention must be indicated, in order to postpone the vesting under a residuary bequest, since intestacy is often the consequence of holding it to be contingent, or at least (and this is the material consideration) such may be its effect; for in construing wills we must look indifferently at actual and possible events."

In Booth v. Booth, 4 Ves. 407, the master of the rolls said: "That there is a difference between a bequest of a legacy and a residue with reference to this point cannot be denied [154] either upon principle or precedent." And in West v. West, 4 Giff. 202, the court said: "There is certainly a strong disposition in the court to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property." And in Lett v. Randall, 10 Sim. 115, the same court said: "One does not like to construe a will so as to make the testator die intestate, unless it is impossible so to construe it as to give effect to what may be fairly collected to have been his intention."

In Dulany v. Middleton, 72 Md. 67, 19 Atl. 146, Judge Alvey said: "It is very clear, from all the provisions of the will, that the testator intended to dispose of all his estate, and that he did not contemplate the possibility of a state of intestacy as to any part of his estate, with respect to any event or for any interval of time. Besides this, the law favors the vesting of estates at the earliest moment that is consistent with the apparent intent of the testator or the general scheme of his will. The general principle is that any devise or bequest in favor of a person or persons in esse, whether such persons be individualized or treated as a class, unless there be some clearly expressed desire or some manifest reason for suspending or deferring the time of vesting, confers an immediate vested interest, though the time of possession or enjoyment may be postponed. This principle is especially enforced in regard to residuary bequests, since intestacy is generally the consequence of holding them to be contingent. As said by Lord Alvanley, M. R., in Booth v. Booth, 4 Ves. 407:

'Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property.' "

Mr. Jarman, in discussing the period from which a will speaks since the act of 1 Victoria, chapter 26, enacted in 1837, says, on star page 302, of volume 1: "It is clear that if a testator, under the old law, gave an estate or a sum of money to his son John, the gift took effect in favor of his son of that name (if any) at the date of the will, and of him only." The language of that act was: "Every will shall be construed, with [155] reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Mr. Jarman then adds: "It will be observed that this enactment relates to the subject matter of the disposition, and does not in any manner interfere with the construction in regard to the objects of gift, as to whom, therefore, the doctrines previously recognized, respecting the period at which the will speaks, or at which the objects are to be ascertained, remain in full force," and on the same page, speaking of a will made or republished since 1837, and containing a gift to the wife of a person other than the testator, says: "On the principle just stated the individual standing in the conjugal relation at the date of the will would take, exclusively of any other person who might happen to answer the description at the death of the testator. The intent is that she who was the wife of the person named at the time of making the will should have it, and the person is clearly the description." In support of the construction of the act of 1837 which he lays down he refers to Bullock v. Bennett, 7 De Gex, M. & G. 283, in which Lord Justice Turner, considering that act, said: "I understand this to mean, not with reference to the objects of the testator's bounty, who are to take the real and personal estate, but with reference to the real and personal estate which is to be taken by those objects. Had it been intended otherwise, the words 'with reference to the real and personal estate,' would hardly, if at all, have required to be inserted."

Section 329 of article 93 of Code of 1904, provides that "every last will and testament executed in due form of law after June 1, 1850, shall pass all the real estate which the testator had at the time of his death." That section was taken from our act of 1849, chapter 229, the first section of which is transcribed in full by Judge Le Grand in his opinion

in Magruder v. Carroll, 4 Md. 335, and which will be seen to be an exact copy of the statute of 1 Victoria, chapter 26, section 24, above mentioned. And in Rizer v. Perry, 58 Md. 112, Judge [156] Alvey, in his opinion in the lower court, published in full with the opinion of the court in that case, says: "By that section of the code, founded upon the act of 1849, chapter 229, the will is simply made to speak as of the time of the death of the testator, and in that respect changed the former rule of construction or operation of wills." It is true that Judge Alvey did not here expressly limit the change of construction to the subject matter of disposition, as Lord Turner did in the case above mentioned, and as Mr. Jarman does in the passage cited, but it will be observed that he was dealing only with the subject of disposition and not with object of the testator's bounty, and the legitimate inference is that in adopting the precise language of this English statute the interpretation given to it by the English courts entered into our act of 1849, and is its present proper interpretation in the absence of some judicial utterance to the contrary by our own courts, of which we have no knowledge or intimation.

There are numerous English cases supporting the rule above laid down by Mr. Jarman. Among these the following may be especially mentioned: "A bequest by a husband to his 'beloved wife,' not mentioning her by name, applies exclusively to the individual who answers this description at the date of the will, and is not to be extended to an after-taken wife": Niblock v. Garrett, 1 Russ. & M. 629.

Where there was a gift of an annuity to the wife of testator's nephew, he being then married, the gift was held not to extend to the widow of the nephew who was his second wife: Boreham v. Begnall, 8 Hare, 131; and this case was followed by Sir George Jessel in Firth v. Fielden, 22 Week. Rep. 622.

So where an appointment was made, under a power in a deed of settlement, to the wife of the donee, Lord Lindley said: "Does that extend to any wife that the donee might have, or is it confined to the one he then had? I think by wife is meant his then wife"; and Lord Lopes said: "Sir Henry was then married, and in my judgment the wife contemplated [157] and intended was the existing wife, and none other": In re Hancock, 2 Ch. D. 184.

In Radford v. Willis, 7 Ch. App. 7, it was held by Lord James that a gift to an unmarried woman for life with re-

mainder in fee to her husband, gives an indefeasibly vested fee in the remainder to her first husband.

In Re Laffan v. Downes (1897), 1 Ir. Rep. 469, it was held that the fact that the gift to the wife of A. is connected with a gift to his children which is so expressed as to include his children by any wife, is not enough to show that a future wife was intended to be benefited. The doctrine of these cases is supported by the text of Theobald in the sixth edition of his work on Wills, and by the cases there cited, and is affirmed in Re Drew (1899), 1 Ch. 339, as the prima facie rule, "in the absence of a sufficient context to rebut the presumption that the gift was confined to the wife living at the date of the will."

We do not think it necessary to notice the American cases cited by the appellant in his brief relating to insurance policies and pauper settlements, though distinctly analogous. Some analogy may be found in Estep v. Mackey, 52 Md. 592. In that case there was a devise to H. C. C., an illegitimate son of the testator alive at the time the will was made, but who afterward died, and another illegitimate son of the testator of the same name being afterward born claimed the devise, but the court held otherwise, saying: "He was not in being and could not have been intended."

Mr. Jarman, on page 303, deduces from general principles and the authorities cited by him the following propositions: "First, that a devise or bequest to the wife of A., who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable, at a subsequent period, and by parity of reasoning is under all circumstances confined to her; but that, secondly, if A. have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; and, thirdly, if there be no such person, [158] either at the date of the will or at the death of the testator, it applies to the woman who shall first answer the description of wife at any subsequent period."

These propositions, we think, will be found to embrace fairly and wisely the greater part of all the cases which they are designed to meet, and to enable courts in applying them to effectuate fairly the intention of testators, always bearing in mind that wherever there is a context which indicates a reasonably clear intention in conflict with any of these propositions, such context must prevail and effect be given to such intention.

One of the strongest cases relied on by the appellees in their brief, Hitchens v. Morrieson, 40 Ch. D. 30, is fairly met by Mr. Jarman's first proposition above. In that case, Lord Justice Kay held under a residuary bequest of income to the unnamed wife of testator's son, after his decease, and during the life of the wife, that the wife who was such at the date of the will, but was subsequently divorced, could not take the income, though it does not appear in the report of the case that this resulted in creating any intestacy. In so deciding, the court declined to be bound by the case of Bullmore v. Wynter, 22 Ch. D. 619, in which Mr. Justice Fry held the contrary, adopting the rule stated by Mr. Jarman. In that case the words of the bequest were: "In trust for any husband with whom she might intermarry, if he should survive her." He was divorced upon his own petition, the wife being the guilty party, and he married again during her life and survived her. The court said: "It is contended he must survive her as husband—i. e., that he must be her husband at the date of her death in order to take—but I find no such words nor any expression of such intention in the will." The court adverted to the fact that this wife might also have married a husband from whom she was not divorced, in which case there would be more than one surviving husband, each of whom would satisfy the words of the will, and disposed of that consideration as follows: "But it does not seem to be right to give so much weight to the possibility of such a contingency [159] as to overrule what appears, in my opinion, to be the plain meaning of the will." We prefer to follow in this case Bullmore v. Wynter rather than Hitchens v. Morrieson, as more satisfactory in reasoning and as in accord with the apparent weight of authority, and without further considering the cases cited in the able briefs of counsel, we are of opinion that the learned judge of the circuit court erred in rejecting the claim of the wife.

Decree reversed, the costs to be paid out of the trust estate both above and below, and cause remanded that a decree may be passed in conformity with this opinion.

The Presumption is Against Partial Intestacy, when a will has been made: Strawbridge v. Strawbridge, 220 Ill. 61, 110 Am. St. Rep. 226; Pate v. Bushong, 161 Ind. 533, 100 Am. St. Rep. 287; Willard v. Darrah, 168 Mo. 660, 90 Am. St. Rep. 468; In re Donges' Estate, 103 Wis. 497, 74 Am. St. Rep. 885; but this presumption will not prevail when the language of the will, fairly construed, is insufficient to carry the entire estate: Gallagher v. McKeague, 125 Wis. 116, 110 Am. St. Rep. 821.

A Legacy in the Words "One-third to My Wife," naming her, does not lapse, when she, after the date of the will, at her own instance, obtains a divorce a vinculo matrimonii from the testator. In such case the words "my wife" are only descriptive and do not import a condition that the beneficiary shall remain the wife of the testator: Jones' Estate, 211 Pa. 364, 107 Am. St. Rep. 581. And a married woman named as a beneficiary in a policy of insurance on the life of her husband is entitled to the proceeds of the policy, notwithstanding a divorce is obtained by her before his death: White v. Brotherhood of American Yeomen, 124 Iowa, 293, 104 Am. St. Rep. 323.

McEVOY v. SECURITY FIRE INSURANCE COMPANY.

[110 Md. 275, 73 Atl. 157.]

CONTRACT, Construction of, When Against the Party Preparing.—Where doubt exists as to the construction of an instrument prepared by one party thereto, upon faith of which the other has incurred an obligation, that construction will be adopted which will be favorable to the latter. (p. 431.)

INSURANCE, Construction of Policies, When must Favor the Assured.—Where an insurance policy drawn by the insurer is not clear or leaves doubt respecting the nature or extent of a clause limiting liability, it should be construed favorably to the assured. (pp. 431, 432.)

INSURANCE AGAINST FIRE—Loss Indirectly Due to Earthquake.—Under a policy insuring property against destruction by fire, but providing that the insurer shall not be liable for loss caused directly or indirectly by invasion, riot, labor strikes, etc., or by order of any civil authority to prevent the spread of fire, or by explosion of any kind or from any cause, or the bursting of a boiler, or earthquake, or hurricane, or lightning, but liability for direct damage by lightning may be assumed by specific agreement thereon, the insurer is liable for loss from fire caused by an earthquake and originating in the property or building insured, or spreading from its point of origin to such property or building, and when, from the occurrence of the earthquake, the water mains and pipes were disconnected, and the prevention of the spread of fire was thereby rendered impossible. (pp. 430, 436, 437.)

Joseph C. France and Charles A. Marshall, for the appellants.

Charles Morris Howard, John Phillip Hill, Gans & Haman, George Stewart Brown, Ralph Robinson, C. Howard Millikin, Hill & Ross, Hinkley & Morris and F. V. Rhodes, for the appellees.

276 PEARCE, J. The Security Fire Insurance Company of Baltimore City became insolvent in consequence of the conflagration in San Francisco, which accompanied or followed

the earthquake in that city on April 18, 1906, and its affairs are now in course of liquidation in the circuit court of Baltimore City. In an auditor's account, filed June 15, 1908, certain dividends [277] are allowed to a number of San Francisco policy-holders upon their claims filed in the case, and to these allowances, the appellants, being stockholders and creditors of the insurance company, have excepted on the ground that the fire was caused by the earthquake, and that the insurance company is not liable under the terms of the policies.

The exceptants, proceeding under section 196 of article 16, have raised certain questions of law for the opinion of the court, which the court directed to be heard as a preliminary matter upon the allegations of the application and the exhibits accompanying it. These exhibits are two forms of policies referred to in the application, and certain sections of the Civil Code of California, but it is not necessary that these should be set out, nor that the allegations of the application should be noticed specially. The policies upon which the claims are made insure the holders "against all direct loss or damage by fire, except as hereinafter provided," and they were made and accepted subject to the stipulations and conditions printed on the back of said policies. These stipulations and conditions are as follows:

"This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, labor strike, civil war, or commotion, or military or usurped power, or by order of any civil authority, to prevent the spread of fire, whether such order be legal or not, nor in consequence of any neglect of, or deviation from, police or municipal laws, rules or ordinances where such exist; or by theft at or after a fire; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and, in that event, for the damage by fire only), by explosion of any kind or from any cause, or the bursting of a boiler, or earthquake, or hurricane, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

It is upon the construction of these stipulations that the liability of the insurance company depends.

[278] The questions ordered by the court to be heard are as follows:

A. Under the statement of facts alleged in said application, is the Security Fire Insurance Company of Baltimore City liable for loss or damage to the property of the claimants therein mentioned, caused by earthquake or by dynamite prior to its burning?

B. Is the Security Fire Insurance of Baltimore City liable for loss or damage to the property of said claimants from fire caused by an earthquake, which fire originated in the property or buildings containing the property of these claimants?

C. Is the Security Fire Insurance Company of Baltimore City liable for loss or damage to the property of said claimants from fire caused by an earthquake, which fire spread from its point or points of origin until it reached and destroyed or damaged the property of said claimants?

D. Is the Security Fire Insurance Company of Baltimore City liable for loss or damage to the property of said claimants from fire, when, by reason of the occurrence of the earthquake, the water supply of the city of San Francisco had been destroyed, the water mains and pipes burst or disconnected, and said water supply rendered useless as a protection against fire or as a means of control or extinguishment thereof?

Upon argument heard, the court decreed that the insurance company was not liable for the loss caused as stated in question A, but decreed that it was liable for the loss caused as stated in questions B, C, and D, and from that decree the exceptants have appealed. Question A, being decided in favor of the appellants, need not be considered, there being no cross-appeal, and in their brief the appellants say they do not urge the point involved in question D, as an independent ground of exemption from liability and refer to it only for the purpose of showing, as they contend, the strength and reasonableness of their argument upon questions B and C.

We are required, therefore, to determine only the correctness of the court's ruling upon questions B and C.

[279] Counsel on both sides were agreed that, so far as could be ascertained, there is only one case ever decided upon the precise language of the policy now before us, and that is Borgfeldt v. North German Fire Insurance Company, decided by the general court of Hamburg in a case growing out of this San Francisco conflagration, and a copy of the opinion in that case has been filed with the brief of one of the appellees.

The fires which followed this earthquake were most disastrous, both to insurers and insured, making this case one of much importance, and we have given to it the careful reflection and examination which its own importance and the elaborate and able arguments of counsel demand.

Stated in concrete form, without present regard to the exact phraseology of the clause of the policy in controversy, the appellants contend that the company is not liable for any earthquake started fire, while the appellees contend that if fire ensues from an earthquake, the company is liable for the loss by fire, though not liable for any precedent loss caused by earthquake. In the absence of any express or closely analogous authoritative decision, we must resort to the general rules for the construction of contracts of this character, and to such intrinsic evidence of intention as may be afforded by the language of the policy and its collocation. It must be admitted that in Maryland the rigor of the prevailing rule to construe all insurance policies strictly against the company has been relaxed to this extent—that they are not specially subjected to such rigid construction, but are to be construed as other contracts: Weaver's Case, 70 Md. 536, 17 Atl. 401, 18 Atl. 1034, 5 L. R. A. 478; Hamilton's Case, 82 Md. 88, 51 Am. St. Rep. 457, 33 Atl. 429, 30 L. R. A. 633. But these cases do not conflict with the general rule as to all contracts, which Mr. Brantly, on pages 183 and 184 of his work on Contracts, states thus: "Where doubt exists as to the construction of an instrument prepared by one party upon the faith of which the other has incurred obligation, that construction should be adopted which will be favorable to the latter party." In Wallace v. German-American Ins. Co., 41 Fed. 742, Judge McCrary said: "If the words employed, of themselves, or in connection with [280] other language used in the instrument, or in reference to the subject matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured. As the insurance company prepares the contract and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the duties and burdens thereby imposed upon him." In Manufacturers' Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, Judge Taft said: "Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts,

and with these in mind attempt to limit as nearly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer." In Berliner v. Travelers' Ins. Co., 121 Cal. 458, 66 Am. St. Rep. 49, 53 Pac. 918, 41 L. R. A. 467, the court said: "Where the terms of a policy permit of more than one construction that will be adopted which supports its validity." We can discover no conflict between these cases and the views of our predecessors upon this subject, as stated by Judge Alvey in Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403, where it was said: "It is certainly true as a rule of construction that where an insurance company attempts to limit or restrict the general operation of its contract of insurance, by special exceptions or exemptions, it is bound to do so by clear and explicit terms; and if it fail in this, it cannot complain that the party insured is given the benefit of any doubt that may be reasonably raised as to the nature or extent of the exception from the general risk assumed. Where, however, the terms of the contract are clear and explicit, they must be allowed their full force and effect; there being no distinction in this respect between the contract of insurance and any other contract." This last clause is just what was said in Kelly's Case, 32 Md. 421, 3 Am. Rep. 143, and there is no conflict between these cases. Judges Alvey and Miller sat in both cases, two of the most eminent judges who ever sat in this court, and it cannot be said that they repudiated [281] in the latter anything that was said in the former. It is the understanding and intention of the parties—that is, their mutual intention—which is to govern the contract, if it can be reasonably deduced from the contract itself; but if the contract is so expressed as to be susceptible of one interpretation asserted by one party as his understanding, and of another interpretation asserted by the adverse party as his understanding, then there is no mutual intention of the parties, and that interpretation will be adopted which will uphold rather than defeat the validity of the instrument. These are not special rules for the construction of insurance contracts. They are but the application to these contracts of the general rule of construction of all contracts, "ut res magis valeat quam pereat," the propriety and necessity of which is especially apparent where the insurer alone prepares the contract and embodies in it what he deems proper.

With these principles in mind, we will now examine the clause we have transcribed and upon the construction of which the decision must depend. An analysis of that clause will in our opinion show that the company has plainly exempted itself absolutely from loss caused by or in consequence of certain conditions or circumstances, and that it has conditionally and partially exempted itself from loss resulting from certain other causes, conditions or circumstances—(1) It has absolutely exempted itself from "loss caused directly or indirectly by invasion, insurrection, riot, labor strike, civil war, commotion, military or usurped power," all these being various manifestations of vis major. (2) It has absolutely exempted itself from loss caused by the exercise of any paramount civil authority exerted to prevent the spread of fire. (3) It has absolutely exempted itself from loss in consequence of any neglect of or deviation from police or municipal regulations by the insured, or from loss by the neglect of the insured to use all reasonable means to save and preserve property at and after a fire, or when property is endangered by fire in neighboring premises. (4) It has absolutely exempted itself from loss by theft at or after [282] a fire. (5) It has (conditionally and partially) exempted itself from loss resulting from explosion of any kind or cause, or the bursting of a boiler, or an earthquake, or hurricane or lightning, unless in any of these cases fire ensues, and in that event it is liable for the damage by fire only. This being a fire policy there is an adequate reason for each of these provisions, which abundantly justifies the construction we have indicated. When social disorder and violence reign, it has been found by experience to be necessary to contract against their effect upon certain classes of obligations such as those under consideration, and where the state or a municipality intervenes and destroys the property of an individual for the common good, an insurer ought in justice to be released from the obligation of indemnity against which he could never safely contract. So when the insured by his own neglect causes or directly contributes to the loss insured against, it is fit that he should bear the loss himself; and if property endangered but not destroyed by fire is stolen at or after the fire it does not come within the true intent and meaning of a contract of indemnity against fire. But explosions of any kind, the bursting of a boiler, an earthquake, a hurricane, or even lightning, may destroy property, without fire ensuing, and then such loss does not naturally come within the scope of a fire policy.

But an explosion or the bursting of a boiler may, and often does, result in fire either instantaneous or latent. An earthquake or a hurricane may level a building and scatter fire burning within, thus causing the complete destruction of the material. Lightning very generally results in instantaneous fire, and is therefore made in this, as in most fire policies, an exception to its associated risks, and direct loss therefrom may be assumed by specific agreement noted on the policy. The construction of this policy which we have thus indicated as correct in view of the reasons above stated leading to it, is also sustained by the structure of the clause in controversy which we have pointed out, and by the grammatical rules applicable to determine its meaning.

283 The bracketed clause "(unless fire ensues, and, in that event, for the damage by fire only)" both grammatically and logically embraces each of the destructive forces of nature (not necessarily, but sometimes resulting in fire) which follow and are all alike bound up with that bracketed clause. For direct loss caused by these independent destructive forces, the company refuses to be bound, but contracts to make good the loss caused by fire ensuing from them.

If anything is needed to place the correctness of this interpretation of the policy beyond doubt, it will be found in the closing paragraph of the clause in question, viz., "but liability for direct damage by lightning may be assumed by specific agreement hereon." It is clear beyond question from this language that indirect loss from lightning is embraced in the risk assumed. If this were not so, then to give any meaning to that paragraph, it would have to read "but liability for all or any damage by lightning may be assumed by specific agreement hereon." We have already shown that the words "explosion of any kind, bursting of a boiler, earthquake, hurricane and lightning" are subject to the same precise qualifications and limitations, and if the policy covers indirect loss by lightning, there is no escape from the conclusion that it also covers indirect loss from earthquake.

The construction we have given to this policy is the same given in the Borgfeldt case, supra, by the general court of Hamburg, to a policy containing the identical language now under consideration. That court appears to be constituted of one law judge and two lay, or business, judges, and we are not to be understood to refer to that case as in any sense authoritative, but they seem to have brought to their consideration of that case excellent common sense, which, after all is said,

seems to be the best solvent of the meaning of ordinary language, unless the instrument is clearly within the scope of some technical and imperative rule of law which is made conclusive. In the course of that opinion, the court said: "The intention of the defendant (alone) is of less importance than the question of how this intention was expressed, and how, [284] from an unprejudiced point of view, this provision is to be construed in reference to the remaining provisions." This was said in reference to the defendant's contention that its intention was that the exception as to ensuing fire was to relate only to explosion, and after the same course of reasoning which we have adopted in this case, the court adds: "The defendant has, without perhaps sufficiently considering the consequences, introduced into the clause taken from the standard policy the words 'bursting of a boiler, earthquake, hurricane.' By so doing it has effected the result that the contents of the parentheses apply also to these causes." We think this is sound and persuasive reasoning, directly supporting what we have said herein as to the necessity of mutuality of intention of the parties as to the construction of the contract, when there are two possible constructions, one of which would uphold and the other would defeat the validity of the instrument.

While the precise point in this case was not presented in Dorsey's case (56 Md. 70, 40 Am. Rep. 403), where explosions only were connected with the parenthetical clause as to loss by ensuing fire, the language of Judge Alvey on page 79 in discussing that clause is strongly suggestive of the views we have expressed here. We have been referred in the briefs to four reported cases arising out of the San Francisco fire, all of which we have examined, but as it was admitted at the argument that in all these cases the language of the policies was different from that at bar, and as we do not find any of these cases controlling in this case, it is not necessary to prolong this opinion by any special reference to them, and we cite them here only as in a general way bearing upon the question before us.

These cases are Baker & Hamilton v. Williamsburgh City Fire Ins. Co., 157 Fed. 280; Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co., 157 Fed. 285; Richmond Coal Co. v. Commercial Union Co., 159 Fed. 985; Board of Education v. Alliance Assur. Co., 159 Fed. 994. We were also referred to Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, which also grew out of the San Francisco fire. There also the language of the policy [285] is different

from that at bar, but the general reasoning of that decision is in accord with the views we have here expressed.

We have read and considered carefully the elaborate brief and very able argument of the distinguished counsel for the appellant, but we are not able to adopt their views. Their construction requires us to read into this clause (upon the theory that this is exclusively a fire policy) the words, "by fire" wherever the word "loss" occurs. There are two insuperable objections to this course. First that words can only be imported into a written instrument when it is impossible otherwise to reconcile the particular clause with other parts of the instrument. Two illustrations will suffice to show that this objection applies to the present case.

In Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557, the policy provided that the company should not be liable "for any loss or damage by fire caused by means of invasion, etc., ... nor for any loss caused by the explosion of gunpowder, etc." The company contended that the words "by fire" should be read into the latter paragraph, after the word "loss," but the court would not allow it, saying "the difference in phraseology between the two clauses is so marked, that when we consider their connection with each other, we cannot resist the conclusion that the difference was intended."

In Berliner v. Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922, the policy provided for double damages for injuries sustained "while riding as a passenger in any passenger conveyance, using steam, etc." The insured was killed in a railway accident while riding on the engine drawing a passenger train, and the company contended "that the contract itself did not provide for death by an accident while riding upon a locomotive, but only in a conveyance intended for passengers." The court held, however, that the locomotive was a part of the conveyance provided for the transportation of passengers, and that the company "could not import into that clause of the policy conditions as to the part of the conveyance in which [286] the insured must be, and thus by construction work a forfeiture."

For all the reasons we have stated we are of opinion that the ruling of the learned judge below upon questions B and C were correct.

In reference to question D, the appellants very properly declined to press it, as the authorities appear to be quite uniform that where insurance companies expect to rely upon a constant and ever ready water supply for the extinguish-

ment of fires they must clearly provide for it in their policies: Townsend v. Northwestern Ins. Co., 18 N. Y. 168; Le Roy v. Park Fire Ins. Co., 39 N. Y. 56; Houghton v. Manufacturers' Fire Ins. Co., 8 Met. 114, 41 Am. Dec. 489; Sierra etc. Milling Co. v. Hartford Fire Ins. Co., 76 Cal. 235, 18 Pac. 267; Baker & Hamilton v. Williamsburgh City Ins. Co., 157 Fed. 280.

Rulings and order affirmed. Costs to be paid out of the funds in the hands of the receiver.

THE "EARTHQUAKE" CLAUSE IN POLICIES OF FIRE INSURANCE.

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I. Form of the Clause.

In speaking of the "earthquake" clause in fire policies, there is an unconscious inclination to refer to it as though certain set words and phrases constituted the clause, which was regularly inserted in the policies of such insurance corporations as desired to avail themselves of the immunity from loss attributable to earthquake. An examination of those policies which have already formed the subject of litigation on that point discloses that the remoteness of the peril has begotten a courageous carlessness, not only of diction, but an indifference to the location of the clause in that portion of the policy which contains the exceptions from the general damage clause. In some cases the proviso reads: "This company shall not be liable for *loss caused directly or indirectly* by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority; or for *loss or damage occasioned by or through* any volcano, earthquake, or hurricane, or other eruption, convulsion, or disturbance, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and in that event for the damage by fire only) by explosions of any kind, or lightning; but liability for direct damage by lightning may be assumed by agreement indorsed hereon": Baker & Hamilton v. Williamsburgh City Fire Ins. Co., 157 Fed. 280; Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co., 157 Fed. 285; Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404. (The italics are ours and are used to point the difference between the limitations in the two clauses—the "caused directly or

indirectly" of the first being supplanted by "occasioned by or through" in the second.)

In the policies of other companies the stipulation is that the company is not to be liable for loss caused directly or indirectly by earthquake: Richmond Coal Co. v. Commercial Union Assur. Co., 159 Fed. 985; Board of Education v. Alliance Assur. Co., 159 Fed. 994; Commercial Union Assur. Co. v. Pacific Union Club, 169 Fed. 776. And in the principal case the clause is, "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, labor strike, civil war, or commotion, or military or usurped power, or by order of any civil authority, to prevent the spread of fire, whether such order be legal or not, nor in consequence of any neglect of, or deviation from, police or municipal laws, rules or ordinances where such exist; or by theft at or after a fire; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind or from any cause, or the bursting of a boiler, or earthquake, or hurricane, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon": McEvoy v. Security Fire Ins. Co., 110 Md. 275, ante, p. 428, 73 Atl. 157, 22 L. R. A., N. S., 964.

II. Construction.

a. **Of Fire Insurance Policies Generally.**—There is no rule for construing the contract in a policy of insurance differently from any other contract. It must be construed according to the sense and meaning of the terms used by the parties, and those terms are to be taken and understood in their plain, ordinary and popular sense. The words should be given their common, ordinary meaning rather than that of the lexicographers or of those skilled in the niceties of language: Mobile Marine Dock etc. Ins. Co. v. McMillan, 27 Ala. 77; Wells, Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; Goodrich v. Treat, 3 Colo. 408; Wallace v. Insurance Co., 4 La. 289; Bell v. Western Marine & Fire Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; Hoover v. Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42; Miller v. Western Farmers' Mut. Ins. Co., 1 Handy (Ohio), 208; United States Mut. Acc. Assn. v. Newman, 84 Va. 52, 3 S. E. 805; Crane v. City Ins. Co., 2 Flip. 576, 3 Fed. 558; Richmond Coal Co. v. Commercial Union Assur. Co., 159 Fed. 985; Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. Rep. 379, 38 L. ed. 231; Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. Rep. 326, 45 L. ed. 460. And where the terms of such a contract are susceptible of two interpretations, one sustaining and one defeating the claim for indemnity, the former prevails: Illinois Mut. Ins. Co. v. Hoffman, 132 Ill. 522, 24 N. E. 413; Niagara Fire Ins. Co. v. D. Heenan & Co., 181 Ill. 575, 54 N. E. 1052; Goodwin v. Provident Sav. Life Assur. Soc., 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W.

157, 32 L. R. A. 473; Phoenix Ins. Co. v. Barnd, 16 Neb. 89, 20 N. W. 105; Western & Atlantic Pipe-lines v. Home Ins. Co., 145 Pa. 346, 27 Am. St. Rep. 703, 22 Atl. 665; Miller v. Citizens' Fire etc. Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452.

It is well settled that a contract of insurance which has been prepared by the insurer will be construed strictly against the insurer and liberally against the insured: Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139; Penn. Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; Utter v. Travelers' Ins. Co., 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; Wertheimer-Swarts Shoe Co. v. United States Casualty Co., 172 Mo. 135, 95 Am. St. Rep. 500, 72 S. W. 635, 61 L. R. A. 766; Greef v. Equitable Life Assur. Soc. of United States, 160 N. Y. 19, 73 Am. St. Rep. 659, 54 N. E. 712, 46 L. R. A. 288; Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379, 107 Am. St. Rep. 548, 50 S. E. 762; Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862, 91 S. W. 204. But while that rule of liberal construction most favorable to the insured is familiar, it will not justify hunting for excuses to annul a contract to the prejudice of the insurer: Baker & Hamilton v. Williamsburgh City Fire Ins. Co., 157 Fed. 280; and, on the other hand, it is incumbent on an insurance company which seeks to qualify its contracts by special provisos, to make its reservations in such explicit terms that the insured shall not be misled: Boon v. Aetna Ins. Co., 40 Conn. 575. The true rule for the construction of policies of insurance is thus stated by the supreme court in Peters v. Warren Ins. Co., 14 Pet. 99, 108, 10 L. ed. 371: "If there be any commercial contract which, more than any other, requires the application of sound common sense and practical reasoning in the exposition of it and in the uniformity of the application of rules to it, it is certainly a policy of insurance; for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions."

b. **Of the Earthquake Clause in Particular.**—As has already been pointed out, supra, I, the form of the clause varies with different insurance companies, and in place of finding different constructions of one standard clause, the paucity of decisions on the subject limits the reader to the analysis of such different versions as have come under the judicial notice. In that of the Williamsburgh City Fire Insurance Company of Brooklyn, on which the company was held liable for damage by the fire which originated on the 18th of April, 1906, in the case hereinafter referred to (Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404), the opening part of the policy reads that in consideration of the premium specified the company insures Baker & Hamilton against all direct loss or damage by fire except as hereinafter provided. The exceptions set out that the company shall not be liable for loss caused, directly or indirectly, by invasion or for loss or damage occasioned by or through any volcano, earthquake. This exception cannot be limited to loss by earthquake only and not by fire, inasmuch as the policy is a

fire insurance policy which the insured sought and the insurer undertook to give: Imperial F. Ins. Co. v. Fargo, 95 U. S. 227, 24 L. ed. 428. It would be distorting not only the policy but the best-known rules of construction to import an intention opposed to the minds of both parties. It would be in fact excepting losses, for which by the very terms of the policy the insurer would not have been liable in any event: Baker & Hamilton v. Williamsburgh City Fire Ins. Co., 157 Fed. 280.

Dealing with the same policy, the words "directly or indirectly" apply only to the losses by invasion, and not to the provision respecting earthquake, which provision is governed by the words "occasioned by or through." The proper legal signification of those words in that connection is that "occasioned" is the equivalent of "caused" and referred to the origin of the fire, and the words "by or through" are a repetition of words meaning the same thing, so that that part of the policy in reality reads, that the company is not liable (a) for losses caused directly or indirectly by invasion; (b) for loss or damage by fire caused directly by or through earthquake.

The provision in this policy therefore narrows the exemption of the company to liability for loss where the earthquake is the cause of the fire which destroyed the insured property, and that cause must be the immediate, direct and proximate cause: Baker & Hamilton v. Williamsburgh City Fire Ins. Co., 157 Fed. 280; Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404.

In Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, the single question before the court was whether the contention of the insurance company that since the fire which destroyed the insured's property could be traced back through a number of buildings to a fire started by the earthquake of April 18, 1906, their liability was excluded by the policy. The fire was started at several points in the city other than that at which the insured property was situated, and spread until it reached and destroyed it. According to the construction above set out and placed on the policy the company was held liable.

That, then, being the true interpretation, we are at liberty to say there is a consensus of opinion on the main question, although in the case of Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co., 157 Fed. 285, Judge Van Fleet, in charging the jury, said that if the evidence disclosed that an earthquake started a fire in some building other than that insured, but in its vicinity, and the fire thus started spread to and reached and destroyed the insured building, that was a loss for which the insurer was not liable, where the policy contains a proviso limiting it to cases where the fire shall not have been caused by earthquake, or, in other words, the fire which spread in such case is the fire which was caused by the earthquake; and, he continued: "If, from the evidence, you are satisfied that if there had been no earthquake, and but for the earthquake the fire which destroyed the insured's premises would not have started, and such plaintiff's building would not have been destroyed by fire, then and

in that case the company is not liable." The circuit court of appeals in its opinion in Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, went a little further in narrowing the exception which was created by the insurer: "Applying the maxim that in construing the terms of an insurance policy, if there be any ambiguity, it must be construed most strongly against the insurers, since the language of the policy is their own. Effect to that intention can only be given in the present case by holding that the second exception exempts only from liability for loss by fire which is caused directly by volcano, earthquake, etc., and that a loss indirectly caused by the progress of a fire from a distance, although originally started by an earthquake, is not within the exemption. It is unnecessary, therefore, to enter into a discussion of the question whether the earthquake was or was not the proximate cause of the loss. Conceding that it was the procuring, efficient, predominating cause, it was not nevertheless the direct cause. It did not produce a fire on the insured premises."

In the form of policy of the Commercial Union Assurance Company, Limited, the exception is that the insurer shall not be liable for any loss or damage by fire caused directly or indirectly by earthquake, and exhibits in the most direct manner the expression of the intentions of the contracting parties, and is perfectly legal and valid. Under it the onus is on the insurer to prove that the destruction of the insured premises was caused by fire which the earthquake directly generated, or of which it was the proximate cause, but he has not to go the length of proving that the insured's loss could not possibly have occurred from any cause other than earthquake. The distinction, however, must be observed that it is not sufficient for the evidence to show that the insured's loss would not have occurred but for the earthquake, because the earthquake may have produced conditions but for which the loss would not have occurred; for example, the destruction of the water mains. In order to avail itself of the exception in the policy, the insurance company must prove by satisfactory evidence that the loss was caused—that is, proximately caused—by the earthquake. In his charge to the jury, District Judge Van Fleet said: "I instruct you that if you find from the evidence that the loss was proximately, either directly or indirectly, caused by earthquake, your verdict, notwithstanding the insured property was destroyed by fire, would be in favor of the defendant, but if, upon the other hand, you find from the evidence that fire and not earthquake was the proximate or efficient, as well as the direct, cause of the loss, your verdict should be for the plaintiff": Richmond Coal Co. v. Commercial Union Assur. Co., 159 Fed. 985.

Though we have referred to and quoted from the charges given to the juries by District Judge Van Fleet in Henry Hilp Tailoring Co. v. Williamsburgh Fire Ins. Co., 157 Fed. 288, and in Richmond Coal Co. v. Commercial Union Assur. Co., 159 Fed. 985, it must be remembered that, if there is any inconsistency between such charges and the opinion pronounced and result reached in Williamsburgh City Fire

Ins. Co. v. Willard, 164 Fed. 404, the latter must be given the greater weight; first, because it was from the court of appeals, the highest court from which a judicial opinion upon the subject has been secured; and, second, because the charges referred to have not, so far as we can ascertain, been considered by any appellate tribunal, and must be treated, therefore, merely as the utterances of a trial judge in cases where he did not have the benefit of such ample argument and time for consideration as necessarily attend the decisions of an important cause in an appellate tribunal.

In Commercial Union Assur. Co. v. Pacific Union Club, 169 Fed. 776, the policy was in one of the forms already referred to, namely, that it insured the plaintiff's property against all direct loss or damage by fire except as thereinafter provided, and one of such exceptions was that the insurer should not be liable for loss caused, directly or indirectly, by earthquake. The property insured was in San Francisco and was destroyed in the fire of April, 1906. The company's defense was on the exception referred to, and that the loss would have been prevented by the use of the water supply of the city, but that that source of prevention was unavailable because the earthquake had destroyed the water mains, from which it was sought to show that the earthquake, and not the fire, was the proximate cause of the loss. The answer was wholly without merit and untenable, and constituted no defense to the action. The company might just as well have said that it meant that it should not be liable for any loss or damage by fire which could be prevented by the use of the fire department of San Francisco in the event its use be prevented by the destruction of its apparatus, or the killing or disabling of its men or horses by an earthquake shock.

In McEvoy v. Security Fire Ins. Co., 110 Md. 275, ante, p. 428, 73 Atl. 157, 22 L. R. A., N. S., 904, the earthquake clause of the policies of the defendant company was in the form set out ante, page 429; and for convenience of reference we reproduce the latter portion of it. After setting forth certain other exceptions from liability the policy reads: "Or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind or from any cause, or the bursting of a boiler or earthquake, or hurricane or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

The interpretation placed upon it by the court was that the bracketed clause both grammatically and logically embraced each of the distinctive forces of nature (not necessarily, but sometimes, resulting in fire) which follow, and are all alike bound up with that bracketed clause. In other words, the court held that the company excepted itself from liability for all those forms of destruction which are set out by them, but held themselves out as liable for the destruction of the insured property if fire ensued from any of those causes to the extent of the damage caused by the fire and not otherwise. The court in closing the argument said: "We have already shown that the words 'explosion of any kind, bursting of a boiler, earthquake, hurri-

cane and lightning,' are subject to the same precise qualifications and limitations, and, if the policy covers indirect loss by lightning, there is no escape from the conclusion that it also covers indirect loss from earthquake."

The construction given to the policy in McEvoy v. Security Fire Ins. Co., 110 Md. 275, ante, p. 428, 73 Atl. 157, 22 L. R. A., N. S. 964, is the same as the opinion in the principal case says was given in Borgfeldt v. North German Fire Ins. Co., in the general court of Hamburg on a precisely similar policy and growing out of the same cause—the earthquake and subsequent fires in San Francisco in April, 1906. Bearing out our preliminary remarks as to the careless stringing together of technical words and phrases, the German court in that case is reported to have said: "The defendant has, without perhaps sufficiently considering the consequences, introduced into the clause taken from the standard policy the words 'bursting of a boiler, earthquake, hurricane.' By so doing it has effected the result that the contents of the parentheses apply also to these causes."

In conclusion, it is well for the reader to note that the decision in McEvoy v. Security Fire Ins. Co., 110 Md. 275, ante, p. 428, 73 Atl. 157, 22 L. R. A., N. S., 964, is the affirmative answer to the two questions submitted to the court and which paraphrased contain this principle: That on a policy containing like provisions to those set out in that case, the insurance company is liable for loss or damage to the property of the insured from fire caused by earthquake, which fire either originated in or spread from its point or points of origin until it reached and destroyed or damaged the said property.

c. **Of Analogous Clauses.**—While the construction of each policy depends entirely, as we have shown, upon its special phraseology, there are parallel decisions of great interest on the subject of excepted perils and proximate cause. When a policy provided for liability only for loss directly caused by fire, and a fire caused an explosion which blew down the insured premises which were a short distance off, the explosion and not the fire was held to be the direct cause of the loss: Hustace v. Insurance Co., 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651.

Where the insurance excluded loss by explosion unless fire ensued, but specially insured against loss or damage by lightning and lightning struck a powder magazine on the opposite side of the street and caused an explosion which wrecked the insured property, the explosion and not the lightning was held to be the direct cause of loss: German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 60 Am. St. Rep. 711, 45 N. E. 1097, 36 L. R. A. 236. And on the same lines are the important cases of Louisiana Mut. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65, Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, and Scheffer v. Washington etc. R. R. Co., 105 U. S. 249, 26 L. ed. 1070; but it must be borne in mind that in those and the other cases just cited the exceptions as to liability stood alone, whereas in the policies of the Williamsburgh City Fire Insurance Company they were affected by the language of another exception which immediately pre-

ceded them, and used the terms "directly or indirectly" for the first proposition and omitted them from the second. "Expressio unius, exclusio alterius," properly governed the construction, as stated in Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404.

The final result of the litigation resulting from losses by fire following the earthquake in the city of San Francisco, in 1906. so far as such result appears from the reported decisions, is that neither the fact that the earthquake disrupted the water mains and thereby prevented the application of water for extinguishing the fires, nor the fact that a fire, though immediately resulting from the earthquake had by its spread to other blocks and parts of the town caused the loss for which recovery was sought, constituted a sufficient defense to an action against the insurer.

III. Definition of Proximate Cause.

By proximate cause is meant a cause which naturally, by continuous sequence, unbroken by a new cause, produces a result. The proximate cause is not necessarily the cause which is nearest to, or immediately or directly produces the effect; it is the efficient dominant factor in the production or bringing about of that effect, so that the real question for the jury after all in a suit on an "earthquake" policy is whether the fire which burned the insured premises was the mere instrument of an earthquake and the loss by necessary or natural sequence due to such earthquake, in which case the insurer is not liable, or whether the loss was directly or proximately caused by fire, the fact of there having been an earthquake at the same time or shortly before being merely coincidental, in which case the insurer is liable: Richmond Coal Co. v. Commercial Union Assur. Co., 159 Fed. 985; Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co., 157 Fed. 285.

IV. Pleading.

If a policy of insurance provides that the company shall not be liable if the property should be destroyed directly or indirectly by earthquake, a general allegation by the company that it was so destroyed is good pleading under the general rules: Board of Education v. Alliance Assur. Co., 159 Fed. 994.

V. Constitutionality of Recent Legislation.

Under Code of Civil Procedure of California, section 437a, Act of California, March 21, 1907, Statutes of 1907, page 836, chapter 447, if the defendant in an action on an insurance contract claims exemption from liability on the ground that although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have occurred but for a peril excepted in the contract of insurance, it is necessary for him in his answer to set out the peril and give full particulars of the proximate cause of loss. In this regard the section is valid, and does not call for such a disclosure of his evidence in advance so as to deprive him of the equal

protection of the laws, while other litigants are not compelled to do so: Board of Education v. Alliance Assur. Co., 159 Fed. 994.

But the section was held to be unconstitutional both because it violates the constitution of California, article 4, section 25, subdivision 3, prohibiting special laws regulating the practice of courts, and because it discriminates against a particular class of actions and only against the defendants therein, without showing that there is something in the nature of the action which justifies the distinction, or what there is peculiar to the defendant as contradistinguished from other defendants and plaintiffs to warrant his being singled out for the purpose of the legislation: Board of Education v. Alliance Assur. Co., 159 Fed. 994. This decision, it must be remembered, was that of the trial court, made in the progress of the cause in determining the sufficiency of the pleadings therein. So far as we are aware, no appellate tribunal has given judgment on this subject.

NICHOLSON v. ELLIS.

[110 Md. 322, 73 Atl. 17.]

CONTRACTS, Consideration of Which is to do an Immoral or Illegal Act.—A stipulation to do an immoral act taints the entire contract and renders it void in toto. A like result follows where the entire consideration is illegal. (p. 446.)

CONTRACT Partly Founded on a Consideration Illegal as in Restraint of Trade.—If, in consideration of a transfer of the business, stock in trade, goodwill and accounts by an agreement containing a stipulation not to enter into a similar business in the United States, a mortgage is given for a part of the purchase price, such mortgage will not be denied enforcement on the ground that such stipulation is invalid and in restraint of trade, if the stipulation is not immoral and is severable from the other parts of the contract. (p. 448.)

The agreement mentioned in the opinion of the court was made on the 30th of April, 1907. It purported to be by Harry R. Nicholson, in his own right and trading as the Baltimore Acid Works, and to grant, assign and convey unto Luke Ellis the grantor's right, title and interest in and to the use of the name "'Baltimore Acid Works,' stock in trade, book accounts, goodwill of the business, formulas for making No. 2 Distilled Sulphurous Acid and Benzine Bleach, to the intent and purpose that the said Luke Ellis may conduct the business of the Baltimore Acid Works free and clear from any right of the said Nicholson to interfere therein or therewith." The consideration expressed was six hundred dol-

lars, of which one hundred dollars was declared to have been paid and the balance to have been secured by a mortgage on real estate. The transfer closed with the stipulation: "That the said Harry R. Nicholson hereby agrees not to enter into or conduct a like or similar business in the United States of America, nor to reveal to anyone other than the said Luke Ellis the formulas hereby conveyed."

Charles E. Ecker, for the appellant.

Charles G. Baldwin and G. Ridgely Sappington, for the appellee.

330 WORTHINGTON, J. This case comes before us upon appeal from the circuit court of Baltimore City, and presents the rulings of that court upon exceptions to the ratification of a mortgagee's sale made under and by virtue of a consent decree obtained in that court on July 8, 1908.

The lower court sustained the exceptions, annulled the sale, and declared the decree void, on the ground that the consideration for the mortgage and mortgage notes was illegal.

The consideration in this case is held to be illegal because the agreement containing the promise to pay the money secured by the mortgage contains, in addition to a transfer of certain property rights and secret formulas, to the promisor, also a covenant on the part of the promisee to refrain from doing certain things which are deemed to be illegal as in restraint of trade; and the argument is that therefore the whole consideration is tainted and insufficient to support a promise.

It seems to be well settled that any stipulation to perform an immoral act would taint the entire contract, and render it void in toto: Anson on Contracts, p. 251; Union Locomotive Co. v. Erie Ry. Co., 35 N. J. L. 240; Emerson v. Townsend, 73 Md. 224, 20 Atl. 984. So also where the entire consideration for a promise is illegal, merely, though not immoral, the contract is 331 void: Wildey v. Collier, 7 Md. 273, 61 Am. Dec. 346. So also it has been held that where a part of the consideration is good and part illegal merely, though not contrary to good morals, if the bad part of the consideration is not severable from the good, the whole promise fails: Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299. On the other hand, the supreme court of New Jersey, in a well-considered opinion by Beasley, Chief Justice, maintained that a stipulation which was not immoral would not vitiate or avoid the entire agreement, although such stipulation was

so blended with the residue of the consideration, consisting of valuable rights and interests, as not to be severable from it: Fishell v. Gray, 60 N. J. L. 5, 37 Atl. 606.

The learned judge in that case said: "There is nothing immoral or criminal in a stipulation not to engage in a certain business. A man may bind himself to such an abstention without incurring any legal penalty. The only effect is that such an agreement cannot be enforced, either at law or in equity." Further on in the same opinion he said: "If it be true that by reason of the promise of the plaintiff to abstain from this business being blended with the residue of the consideration, that consisted of valuable interests transferred to the company, will prevent a recovery of the price agreed to be paid for such property, and will enable the company to retain it without giving the equivalent agreed on, a result certainly obtains that would be both wholly unconscionable and impolitic."

In a later New Jersey case (1901), the court of errors and appeals of that state said: "The contract between the parties was based on sufficient reciprocal consideration, apart from the plaintiff's restrictive agreement. Both parties must be presumed to have known the law as to contracts in restraint of trade, and therefore the restrictive covenant, if invalid, ought not to be held to avoid the valid covenants. Contracts in restraint of trade are loosely spoken of as 'illegal contracts'; it would be more accurate to style them 'unenforceable contracts.'"

[aaa] These cases and others that might be cited show that there is some contrariety of opinion as to how far a partial illegality of consideration involving no moral turpitude will affect the whole contract.

We think, however, that the present case is free from difficulty, because, assuming, without deciding, that the covenant contained in the agreement of date April 30, 1907, is illegal as in restraint of trade, yet the covenant is so far distinct from the residue of the consideration for which the promise to pay the money secured by the mortgage was made, as to be easily severable from it.

The agreement above mentioned which we will ask the reporter to set out in full in his report of this case is, in effect, the sale and transfer of all the right, title and interest of Harry R. Nicholson, the appellant, in and to the use of the name "Baltimore Acid Works," also of the stock in trade, book accounts, goodwill of the business and formulas for mak-

ing No. 2 Distilled Sulphurous Acid and Benzine Bleach, in consideration of the payment to him, by Luke Ellis, the purchaser, of the sum of six hundred dollars. One hundred dollars of which was paid in cash and promissory notes, secured by mortgage, given for the residue.

In a separate paragraph at the end of the contract is the covenant on the part of Nicholson not to enter into or conduct a like or similar business in the United States, nor to reveal to anyone other than the said Luke Ellis the formulas thereby conveyed to him.

No part of the purchase price is expressed to be paid for this covenant, and so far as appears from the language and form of the agreement, the covenant was an afterthought, voluntarily entered into by Nicholson as a better protection to his grantee. At any rate, the covenant is clearly separable from the other part of the consideration, and even if it be illegal as against public policy, it contains nothing contrary to good morals, and nothing for which a legal penalty is incurred, and therefore it does not taint the whole agreement so as to render it void in toto.

333 As was said by Chief Baron Pollock in Green v. Price, 13 Mees. & W. 695: "It is not like a contract to do an illegal act. It is merely a covenant which the law will not enforce, but the party may perform if it chooses."

There is no intimation that the defendant in this case has not faithfully observed the covenant, but we are asked to declare void a mortgage given by the purchaser to secure the balance due of the purchase money agreed to be paid for a certain business, stock in trade, goodwill and secret formulas, merely because the seller, for the better protection of the purchaser, at the end of the agreement added the restrictive covenant above mentioned.

As this covenant is not so interwoven with the residue of the consideration as to be inseverable from it, we think the promissory notes, secured by mortgage, given for the residue of the purchase money, are valid and enforceable contracts, and that there was error in the ruling of the lower court holding the contrary. It follows that the decree of the lower court must be reversed and the cause remanded for further proceedings.

Decree reversed with costs, and cause remanded.

Contracts Founded on a Consideration Partly Illegal are discussed in the note to State v. Wilson, 117 Am. St. Rep. 493. As a general rule, if any part of an indivisible promise, or any part of an in-

divisible consideration for a promise is illegal, the whole is invalid and can sustain no action: Case v. Smith, 107 Mich. 416, 61 Am. St. Rep. 341; Brechlin v. Night Hawk Min. Co., 49 Wash. 198, 126 Am. St. Rep. 863. According to Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, an action will not lie on a promise made for one entire consideration, a part of which is unlawful as being in restraint of trade, if there has been no apportionment made or means of apportionment furnished by the parties themselves.

SHAWNEE FIRE INSURANCE COMPANY v. PONTFIELD.

[110 Md. 353, 72 Atl. 835.]

INSURANCE, Appraisement Fixing the Amount of the Loss, Necessity for.—Where a policy of insurance provides that, in the event of a loss and the inability of the insurer and the assured to agree upon the amount thereof, each shall select an appraiser, and the appraisers shall choose an umpire and proceed to fix the amount of the loss, and in the event of their failure to agree, that they shall submit their differences to the umpire, and that the award in writing of any two shall determine the amount of the loss, no action can be maintained on the policy in the absence of an attempt in good faith to ascertain the amount of the loss by the appraisement provided for in the policy, and where the failure to secure an award after the submission to arbitration is due to the fault of the assured, he cannot maintain any action thereon, but if the absence of the award is due to the insurer or his appraiser, the action is maintainable without the award. (p. 452.)

INSURANCE, Award Fixing the Amount of Loss, Absence of not Due to the Fault of the Assured.—If the appraisers appointed by the insurer and the assured to fix the amount of the loss fail to do so without any fault on the part of the assured, as where they cannot agree as to such amount nor on the selection of an umpire, the assured is entitled to maintain his action on his policy notwithstanding the absence of the award. (p. 458.)

James McEvoy, Jr., and Joseph Townsend England, for the appellant.

Charles F. Harley and J. B. A. Wheltle, for the appellee.

857 THOMAS, J. Morris Pontfield received from the Shawnee Fire Insurance Company of Topeka, Kansas, on the 4th of December, 1906, a policy of insurance, insuring him against loss or damage by fire on certain merchandise and fixtures in the building No. 712 South Broadway, Baltimore City, to the amount of fifteen hundred dollars.

The policy contained the following provisions: "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and dis-

interested appraisers, the insured and this company each selecting one, and the two so chosen shall each select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expense of the appraisal and umpire. No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

On the 3d of September, 1907, while this policy was in force, the property mentioned therein was consumed or damaged [358] by fire. Proper notice and proofs of loss to the amount of twelve hundred and seventy-two dollars and ninety-five cents were duly furnished by the insured. He and the insurance companies interested, including the appellant, being unable to agree as to the amount of the loss, pursuant to the above provisions of the policy, entered into an agreement submitting the matter to appraisers. The insured selected William Waldorf and the insurance companies selected Samuel Pattison, and they were required by the terms of the agreement to appoint a competent and disinterested umpire, to whom they were to submit "matters of difference only."

On the 11th of January, 1908, no umpire having been appointed by the appraisers, and no appraisement having been made, the appellee brought suit on the policy to recover two hundred and fifty-eight dollars and three cents, the amount of loss for which he claimed the appellant was liable. The appellant, in addition to the general issue plea, set up in a special plea the provisions of the policy referred to and the agreement submitting the matter of the amount of loss to appraisers, and averred that it "did and performed all that was required and could be done by and in behalf of the defendant to procure and perfect such submission, award and determination, ... and at the time of the commencement of this suit the award was not ready to be delivered and no award had been obtained, but the said arbitration was then pending and undetermined—whereof the said plaintiff had notice," etc.

The appellee joined issue on the first plea, and replied to the second plea—first, that the appraisement was abandoned

by the appellant before suit; second, that the failure to appraise was not caused by the fault of the appellee; and, third, that the appraisers failed to select an umpire and the appraisement was abandoned before suit without fault on the part of the appellee.

To these replications the appellant filed the following rejoinders, on which issue was joined by the appellee: 1. "That the said appraisement was not abandoned by the defendant prior to the suit." 2. "That the failure to appraise said loss was caused by the fault of the plaintiff." 3. "That the appraiser [359] appointed by the defendant in this suit never refused to select an umpire, but, on the contrary, endeavored by all means in his power to arrive at an agreement with his coappraiser to select an umpire mutually agreeable to both, and that at the time this suit was instituted he was waiting further advisement from his coappraiser who had been appointed by the plaintiff in this case, and that so far as the defendant and his appraiser are concerned they had no intimation that there was any intention to abandon the appraisement, and that the abandonment of the same was entirely the fault of the plaintiff."

The only questions presented by the record relate to the right of the appellee, under the provisions of the policy referred to, to maintain the suit. The second exception was to the refusal of the court below to grant the following prayers of the defendant:

1. The defendant prays the court to instruct the jury that from the evidence in this case there has not been such a compliance with the terms and conditions of the policy of insurance, which was issued to the plaintiff by the defendant, and under which the suit against the defendant was instituted, as to entitle him to any recovery against the defendant under the pleadings, and their verdict must be for the defendant.

2. The defendant prays the court to instruct the jury that there is no evidence in this case showing that the arbitration and appraisement of the loss by fire suffered by the plaintiff had at the time of the institution of this suit been either abandoned or waived by the defendant; but that, as shown by the undisputed evidence in this case, the said arbitration was pending at the time the said suit was so instituted, and had not been determined or concluded, and that therefore the plaintiff is not entitled to recover under the pleadings in this suit, and their verdict must be for the defendant.

3. The defendant prays the court to instruct the jury that, from the undisputed evidence in this case, the appraisement of the loss by fire suffered by the plaintiff was submitted by him and the defendant to arbitration, in accordance with the [360] terms and provisions of the policy of insurance issued by the defendant to the plaintiff, and that at the time of the institution of this suit the same was pending and had not been abandoned by the defendant, and that, therefore, the plaintiff is estopped from maintaining this suit, and their verdict must be for the defendant.

It is the duty of both parties to a contract of insurance which provides, in case the insured and insurer cannot agree as to the amount of loss, for the submission of the question of loss to arbitration, to act in good faith and to make a fair effort to carry out such provision and accomplish its object, and it has been accordingly held in a number of cases where the failure to secure an award after submission to arbitration is due to the fault of the insured the absence of an award is a bar to an action on the policy, but where it is due to the fault of the insurance company or its appraiser the insured may bring suit on his policy without an award. These cases are collected in an extensive note to Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 Atl. 134, 8 Ann. Cas. 302-304, and some of them are there cited as going to the extent of holding that where the arbitration fails because of the fault of the appraiser appointed by the insured suit cannot be maintained; but since the cases of Caledonian Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13, Connecticut Fire Ins. Co. v. Cohen, 97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 675, and Home Life Ins. Co. v. Schiff's Sons, 103 Md. 648, 64 Atl. 63, the established rule in this state is that unless the insured is responsible for the failure of the appraisement he is entitled to recover on his policy.

The reason of the rule is both obvious and sound. The right of the insured to bring the suit is not derived from the agreement to submit to appraisement. His policy is the source of his title, and if he in good faith complies with its terms and is in no way chargeable with the failure of the appraisers to make the appraisement, his right to maintain the action is complete. The primary obligation of the insurer is to pay the loss, and it is the right of the insured to enforce that obligation. The agreement to submit to appraisement only provides [361] a means of ascertaining the loss. If that means fails without his fault, the rights of the insured under his policy are

not by reason thereof forfeited. If such a result is contemplated by the parties to a contract, they should be required to so stipulate in clear and positive terms. All that the law exacts is a compliance with the terms of the contract. It is the duty of the insured to select a competent and disinterested appraiser. If he does so in good faith, the person so selected is in no sense his agent. On the contrary, he is required to abstain from any interference with the appraisement. He cannot be held responsible for the conduct of one whom he is forbidden to influence and with whom he has not interfered in the discharge of his trust. If, on the other hand, no award is obtained by reason of the fault of the appraiser selected by the insurer, the insured has a right to sue, not because the appraiser so in fault is the agent of the insurer, but because the means provided by the contract of ascertaining the loss failed without any fault on the part of the insured. There may, of course, be circumstances under which it would be the duty of the parties to select new appraisers, but, so far as the appellee is concerned, no such question is presented in this case.

There is not a suggestion in the record that the appellee did not act in good faith in the selection of an appraiser, nor is there any evidence to show that either the appellee or his adjuster did anything to prevent an appraisement, unless, as contended by the appellant, it was prevented by the bringing of the suit. If, therefore, there was any evidence in the case tending to show that before the suit was brought the submission to appraisement had failed, the prayers of the defendant were properly refused. These prayers present the proposition, and learned counsel for the appellant contend, that suit cannot be brought, after submission to appraisement, until the appraisement is either abandoned or waived by the defendant. We cannot give our assent to this proposition. As we have said, the right of the appellee to bring the suit was not based upon the agreement to submit the question of loss to appraisers, [3a2] and if, after he, in good faith, complied with the terms of his policy, the appraisers failed, without any fault on his part, to agree upon an umpire, after having had a fair and reasonable opportunity to do so, he had the right to sue. To hold otherwise would enable the insurer to postpone indefinitely the recovery by the insured of the benefits of his policy.

J. George Baetjer, appellee's adjuster, states that the agreement appointing appraisers was executed about the 1st of

November, 1907; that about the middle or latter part of December he learned from Waldorf, the appraiser selected by the insured, that Pattison, the appraiser selected by the appellant, had left the city in bad health and had gone to Florida, and that they had not agreed upon an umpire, and that he then went to see Mr. Bond, appellant's adjuster, and told him what he had learned and that he didn't know when Pattison would return, and asked him to appoint some one in his place and that he refused to do it, and on the 11th of January he brought suit on the policy; that sometime after suit was brought Waldorf handed him a letter from Pattison, dated the 16th of January, in regard to the appointment of an umpire, and that he took the letter to Mr. Bond and told him that suit had been entered, but that he was willing to go on with the appraisal again, provided he would agree that it should not, in case the appraisers did not agree on an umpire, interfere with the suit, but that Mr. Bond refused to make such an agreement. Waldorf testified that after he was selected as appraiser he went to see Pattison "a dozen times or more" for the purpose of appointing an umpire; that he wanted some one familiar with the "line of business" in which the appellee had been engaged and the value of goods of the same character and quality as those destroyed or damaged by the fire; that he presented to Pattison a list of ten names of persons in the same line of business in different sections of Baltimore City, and also suggested other persons, but he refused to consider any of them; that Pattison suggested a gentleman from Richmond, Virginia, one from West Virginia and another from Baltimore County, and that he declined to [363] appoint either of them because he thought they ought to select some one from Baltimore City who was familiar with the business; that Pattison also suggested Mr. Katten and that he, knowing that Mr. Katten had been in the same kind of business as the appellee, at first agreed to accept him, but later learned that he was then working for an insurance company and refused to appoint him; that Pattison suggested Daniel Boss and he refused to appoint him because he was salesman for Likes, Berwanger & Co., engaged in selling "high-priced stock," and did not know anything about the values of low-priced goods such as were sold by the appellee; that he got tired of going to see Mr. Pattison; that Pattison wrote him, and he went to see him again, when he suggested another party, and he told Pattison he did not know him but would find out who he was and let him know in a day or so;

that he shortly after learned that Pattison had left the city, and was told by his son or clerk that he had gone to Florida and would not return until sometime in January; that he did his best "to get the thing attended to," but they could not select an umpire; that he tried to agree upon an umpire, but that Pattison would not listen to him "or to anybody" that he mentioned. Joseph Rosenfield testified that he was present when Waldorf handed Pattison a list of names from which to select an umpire, and heard Pattison say: "I won't take any of those."

Pattison testified that after the appraisers were appointed he wrote to Waldorf to come to see him, and when he came he told him that they would first have to appoint an umpire; that Waldorf suggested some one connected with the firm of Grotjan, Lobe & Co., whose name he could not recall, and that he asked him if he was not a creditor and he said yes, and that he then said that a creditor could not serve as an umpire, and that he would think of some names and would notify him in a day or two to come up and talk the matter over; that the first name he suggested to Waldorf was Daniel Boss, connected with Likes, Berwanger & Co., but Waldorf said he would not suit because it was "a too high-toned concern, [364] too high-priced"; that he next suggested William S. Ashby, of Straus Bros., but he did not suit; that he then suggested names of Mr. Valentine, of Richmond, Mr. Wilson, of West Virginia, and C. R. Varley Myers, of Baltimore county, but Waldorf said he did not like them because they did not live in Baltimore City; that he also suggested Mr. Yewell, who lived on McCulloh street, but he was not acceptable; that on December 20th, he wrote to Waldorf suggesting Mr. P. T. Fogarty, who was connected with the Maryland Rubber Co., and stating that Waldorf had not, up to that time, given him the name of a single person he had selected to act as umpire; that Waldorf came to see him on the 21st or 22d and said he did not like the people that he, Pattison, had mentioned, and that he wanted to take some one on Broadway in the neighborhood of the fire; that he, Pattison, objected to taking anyone in that neighborhood because he thought the umpire should be from another part of the city, but that Waldorf did not agree with him, and that witness then told him he would not take anybody from that locality; that he then told Waldorf that he had been working pretty hard and he was going to take a trip to Florida, and would like him to act on Fogarty before he went away, if not he would have to wait until he

returned; that he returned on the 15th of January, and on the 16th of January wrote to Waldorf asking him to let him know if Fogarty was satisfactory, and stating that if he was not he would suggest another name, as it was important that the matter should be closed up; that Waldorf did not offer him any names whatever, except the names of some people in that section of Baltimore City where the fire occurred whom he refused to appoint, and the name of some one connected with Grotjan, Lobe & Co.

In Cohen's case (97 Md. 294, 99 Am. St. Rep. 445, 55 Atl. 675), the fire occurred August 26, 1901, and the appraisers were selected October 29, 1901. Applefield, the appraiser selected by the insured, suggested two persons and Likes, the appraiser selected by the insurance company, suggested one person for umpire. Applefield rejected the one suggested by Likes because he did not know him, and Likes [365] rejected those suggested by Applefield because he had reason to believe that they had sold some of the insured goods to Applefield. Likes testified that he offered to submit to Applefield a list of six names of representative business men of Baltimore from which he could select an umpire, but that Applefield declined to accept the proposition. Applefield testified that when he refused to accept the person suggested by Likes, Likes said: "If you are not satisfied with him I will get out of it." This Likes denied, but admitted that he had told company's adjuster that he would prefer to step out and let them get another appraiser. He did not, however, resign, and no umpire having been appointed, suit was brought on the 24th of December, 1901. This court treated the case as one in which the appraisement had failed, and said: "We regard the propositions asserted in the opinion in 83 Md. 524, 35 Atl. 13, in Traub's case, as conclusive of the present appeal in so far as to require us to hold that unless the jury were satisfied from the evidence in the case that the failure or abandonment of the appraisement was caused by the fault of the appellee, it constituted no impediment to his right to recover. The rejected prayers failed to submit that question to the jury and were for that reason properly refused." In the case of Brock v. Dwelling-house Ins. Co., 102 Mich. 583, 47 Am. St. Rep. 562, 61 N. W. 67, 26 L. R. A. 623, the loss occurred July 25, 1892, and appraisers were appointed January 27, 1893. The insured's appraiser wanted to select an umpire from persons living in the locality of the fire, and the company's appraiser insisted upon the selection of some one

living elsewhere. Not having reached an agreement upon an umpire, suit was commenced February 18, 1893. At the trial defendant's counsel asked the court to instruct the jury "that inasmuch as arbitration proceedings had been agreed upon, and were pending, and the arbitrators were, on the day that suit was brought, negotiating with reference to the selection of an umpire, the action was prematurely brought, and plaintiff could not recover," but the court refused to give the instruction, and, after stating the effect of an agreement to arbitrate, instructed the jury [366] as follows: "You have heard the negotiations between the two arbitrators, and that they did not agree; unless an arbitration has gone further than merely the appointment of two men and their efforts to agree upon a third party, after the lapse of time that elapsed after this fire and before the commencement of this suit, I charge you that the clause for arbitration is not a bar to this action." On appeal the judgment was affirmed, and the court said that persons living in the locality of the fire "would naturally be best qualified to pass upon the question of values"; that no valid reason was assigned by defendant's appraiser for a refusal to accept one of the persons suggested by plaintiff's appraiser, "and the only reason given is that he did not care to take the chances of getting one that would be partial," and that "it is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable and virtually amounts to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit brought will not bar an action on the policy." In the case of Uhrig v. Williamsburg City Fire Ins. Co., 101 N. Y. 362, 4 N. E. 745, the court held that a claimant cannot be tied up forever without his fault, and against his will, by an ineffectual arbitration, and the cases of Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405, Hickerson & Co. v. German-Am. Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172, and Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102, referred to by the appellant, are to the same effect.

In this case suit was not brought until more than four months after the fire, and more than two months after the selection of appraisers to determine the loss. According to the testimony of appellee's witnesses Waldorf tried to make the appraisement, but "could not select an umpire" because of Pattison's refusal to consider any of the persons suggested by

him, and failure to suggest anyone living in Baltimore City who was familiar with the value of goods of the kind damaged or destroyed by the fire. There was, therefore, evidence in the case tending to show that after having had a reasonable time in which to make the appraisement, the appraisers [367] failed to agree upon an umpire, and the appraisement failed because of the unreasonable conduct of appellant's appraiser. Under such circumstances, all, or practically all, of the authorities agree that the court cannot say that the insured is not entitled to sue on his policy. But apart from any consideration of the conduct of appellant's appraiser, the rule in this state is that when the insured acts in good faith, and does not interfere with the appraisement, he is not responsible for the conduct of the appraisers. If, after having had a fair opportunity, and a reasonable time in which to make the appraisement, the appraisers fail to agree upon an umpire and the appraisement fails, without any fault of the insured, he is entitled to receive the benefits of his contract, and the fact that the appraisement is still pending, in the sense that it has not been abandoned or waived by the defendant, constitutes no bar to his action.

It follows from what we have said that there was no error in the refusal of the court below, on the pleadings and evidence in this case, to instruct the jury that the plaintiff had not complied with the terms of his policy, or that the appraisement had not been abandoned or waived by the defendant, and that their verdict should be for the defendant.

The only other exception in the case is to the granting of plaintiff's prayer. This exception was not pressed in this court, and we assume that the prayer was excepted to on the theory that the case should have been taken from the jury by the granting of defendant's prayers. If not strictly accurate, there was, at least, no reversible error in granting it.

Plaintiff's and defendant's prayers, having all been submitted at the same time, should have been embodied in one exception: McCosker v. Banks, 84 Md. 292, 35 Atl. 935.

Finding no reversible error in the rulings excepted to, the judgment appealed from will be affirmed.

Judgment affirmed with costs.

A Condition in a Fire Insurance Policy for Appraisal by Arbitration is valid, and a compliance therewith is ordinarily a condition precedent to a right of action by the insured on the policy (Southern Home Ins. Co. v. Faulkner, 57 Fla. 194, 131 Am. St. Rep. 1098), provided the parties actually disagree as to the amount of the loss: Kelly v. Liverpool etc. Ins. Co., 94 Minn. 141, 110 Am. St. Rep.

351. But the insured is released from complying with a contract to submit the loss to arbitration, as a condition precedent to bringing suit, by any conduct on the part of the insurer's representatives which has the effect of unreasonably delaying or preventing an appraisal from being had or an award being made: Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 120 Am. St. Rep. 395; Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 105 Am. St. Rep. 218; Connecticut Fire Ins. Co. v. Cohen, 97 Md. 294, 99 Am. St. Rep. 445. And the insured, once having waived the right to demand arbitration, cannot thereafter insist that the dispute be submitted to arbitration: Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 105 Am. St. Rep. 218. According to Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 103 Am. St. Rep. 725, an agreement for arbitration, in case the parties cannot agree to the amount of the loss, is held unenforceable, as tending to oust the courts of their jurisdiction.

BUCK v. BRADY.

[110 Md. 568, 73 Atl. 277.]

EVIDENCE—Declarations Against Interest.—In an action to recover for being bitten by defendant's dog, suspected of having hydrophobia, a statement of the defendant that his employé did not want the dog turned out for fear it had the hydrophobia is admissible as tending to prove scienter on the part of the defendant, and, therefore, being a declaration against interest. (p. 462.)

DAMAGE, Fear of the Plaintiff as an Element of—Evidence. In an action wherein the plaintiff seeks to recover for being bitten by a dog claimed to have been suffering from hydrophobia, evidence on the plaintiff's part showing a fear of contracting the disease and of being worried thereby is admissible. (p. 462.)

EVIDENCE of the Fears of an Employé of the Defendant Respecting a Dog's Being Afflicted with Hydrophobia.—In an action to recover damages from being bitten by a dog claimed to have been suffering from hydrophobia, evidence is admissible to show that a servant or employé of the defendant having the dog in charge seriously apprehended danger from the dog and communicated his fears to his employer. (p. 463.)

MASTER AND SERVANT.—The Knowledge of a Servant as to the condition of a dog in his charge developing symptoms of hydrophobia is the knowledge of his master. (p. 463.)

EVIDENCE OF HYDROPHOBIA — Experiments and Notes and Memoranda Thereof.—If the head of a dog suspected of having hydrophobia is placed in the Pasteur Institute, and different parts are examined by different persons, who enter on different records the result of their examinations, such entries and the opinions of the witnesses thereon are admissible to prove that the animal was so afflicted. (p. 466.)

HYDROPHOBIA, Owner of Animal, When Liable to Person Bitten by.—If a dog suspected of having hydrophobia is turned loose by its owner after knowledge of its symptoms and behavior, he may be found to have been guilty of negligence, and he is liable to one injured subsequently by being bitten by such animal. (pp. 466, 467.)

HYDROPHOBIA, Duty of Owner of Animal Suspected of Having.—Whenever the owner of a dog has reason to suspect that it may be afflicted with hydrohobia, it becomes his duty to be very circumspect and to use every precaution to prevent the animal from inflicting injury on any creature. (p. 467.)

C. Baker Clotworthy and J. Southgate Lemmon, for the appellant.

Z. Howard Isaac and W. Gill Smith, for the appellee.

570 WORTHINGTON, J. This action was brought by the appellee against the appellant to recover damages for injuries sustained by the plaintiff from the bite of a dog belonging to defendant.

The gravamen of the action is negligence on the part of the defendant in setting the dog at large, after being warned not to do so, and when he had good reason to suspect that the animal was suffering with rabies or hydrophobia.

It appears that Mr. Buck is an attorney at law, practicing his profession in Baltimore City, but having his residence in Baltimore county. At his county place was a handsome young collie dog, belonging to him, which was proven to have been naturally of a quiet and gentle disposition; and there also, in his employ, was a man of all work, by the name of Amos Triplett.

The defendant usually went to his office in the city early in the morning and returned to his home in the evening. On Wednesday evening, November 20, 1907, as the defendant and his hired man were on their way home from the railroad station, Triplett informed his master that the dog had been acting strangely, that it was restless, running about the place and barking, and that he thought there was something unusual the matter with the dog. Thereupon the defendant, as a precaution, directed Triplett to confine the dog.

Other conversations took place between the defendant and Triplett concerning the animal in which Triplett stated that the dog was acting suspiciously, and expressed his apprehension that the dog was developing hydrophobia, but the defendant made light of the suggestion and told the man not to be so fearful.

On Saturday afternoon, November 23d, the defendant being at home and hearing the dog barking in the stall where it was confined, went to look at it. He says in his testimony that the dog appeared to be all right except he was barking. He inquired of Triplett if the dog had been fed and watered, and being told that it had, he resolved to turn the dog loose.

[571] But Triplett was still apprehensive, so defendant got an old shotgun, loaded it, and gave it to Triplett with instructions to shoot the dog as it came out, if it acted suspiciously. The dog was then set free. It went first to its master, who patted it, and then to the house, where Mrs. Buck says she saw it eating; that she patted it, and that the dog acted as he naturally did at any time.

About an hour later, the plaintiff was bitten in the wrist by the dog near her home, about a quarter of a mile distant from Mr. Buck's house, while getting a piece of wood along the roadside.

Triplett testified that on Wednesday he observed the dog acting in an unusual manner. It was restless, running about the lot and showing unusual symptoms. That by Mr. Buck's direction he confined the dog. That all the while it was confined, the dog was barking and yelping. That he tried to attract the dog's attention, but it would not respond. That when Mr. Buck suggested on Saturday turning the dog loose, he told him he did not think the dog was safe to be turned out, that he thought the dog was getting hydrophobia.

The subsequent history of the dog is, in effect, that it traveled with its head down, snapping at the ground. That its tail was hanging low between its hind legs, and that it made a peculiar snorting noise. It traveled several miles from its home, and at about 5 o'clock the same evening was killed by a young man for biting his pet pig. Several witnesses, who saw it meanwhile, as it traveled the road, testified that it acted quite naturally so far as their observation went. A few days after being killed, its head was taken to the Pasteur Institute, where certain tests were made to discover if the dog was afflicted with rabies or not.

By advice of physicians there, Miss Brady attended the City Hospital, and for twenty-one days took the Pasteur treatment for the prevention of hydrophobia.

The verdict of the jury was for one thousand dollars, upon which judgment was entered, and the defendant has appealed.

[572] There are fourteen bills of exception in this record, thirteen to the testimony, and one to the prayers, all of which we will now proceed to consider in their order.

The first and second exceptions relate to a conversation that took place between the plaintiff and defendant subsequent to the injury complained of. At the trial of the case in the court below Miss Brady, in answer to questions, stated that Mr. Buck in that conversation expressed his regret at

the occurrence and said that his man did not want him to turn the dog out, because he thought the dog was mad, and that he himself afterward thought the dog had hydrophobia.

The declaration that Triplett did not want the dog turned out because he thought it was mad was certainly admissible, as it tended to prove scienter on defendant's part, and was therefore a declaration against interest. The expression of his regret at the occurrence did credit to his humane instincts, and its communication to the jury could not therefore prejudice him.

The testimony to the effect that the defendant said he thought afterward himself that the dog had hydrophobia could do him no injury, as under the very proper instructions of the court, he was only responsible, if at all, for the want of proper care and caution in setting the dog free, in disregard of the previous advice and warning given him by Amos Triplett.

The third and fourth exceptions were to the following questions put to Miss Brady:

Q. "Did you have any fear?"

Q. "Have you any fear now?"

To the first question the witness answered: "Well, I didn't know, I thought I might get the hydrophobia, I didn't know this was a sure cure or not."

To the second question she answered: "Yes, sir; I still worry about it."

We think the lower court rightly permitted these questions to be answered.

573 In Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751, the court said: "The apprehension of poison from the bite of the dog, and the fear and solicitude as to evil results therefrom—all pain, anguish, solicitude, occasioned by the bite—were proper matters for consideration by the jury in estimating the damages."

In Friedman v. McGowan, 1 Penne. (Del.) 436, 42 Atl. 723, the court held that the following question was relevant though objectionable, because leading: "Have you, or not, been afraid of hydrophobia ever since you were bitten by the dog?" In neither of these cases was there any evidence that the dog was rabid.

In this case, there was evidence tending to show that the dog was afflicted with hydrophobia, and we think the evidence was relevant. If the form of the questions was deemed objectionable on the ground that they were leading, such objec-

tion should have been made at the time they were asked of the witness: Jones v. Jones, 36 Md. 447, 11 Am. Rep. 505.

The fifth exception was disposed of by the granting, subsequently, of a motion to strike out the answer excepted to.

The sixth and seventh exceptions were taken to the following questions and answers:

Q. "What, if anything, was said by Mr. Buck of the treatment of hydrophobia, at the time you let the dog loose?" Ans. "Well, I expressed some fear for my children and he said not to be so fearful; he said if they got bitten they could just go to the city and have the juice inserted into them and they would be well in a short time."

Q. "Just tell his exact words." Ans. "Well, he said don't be so fearful, if they do get bitten you can go to town to that dutchman and have the juice squirted into them and they will be well before night; that is the best of my judgment his words."

We see no objection to this testimony. It tended to show that Triplett seriously apprehended danger from the dog, and that he communicated his fears to the defendant.

The defendant in his testimony said: "That Triplett was a reasonably intelligent man, though a little apprehensive [574] and nervous. That he was a very good man, and told everything in a straight way."

As Triplett was given charge of the dog in Mr. Buck's absence from home, and had ample opportunity to observe the dog's behavior, the answer complained of was evidence from which the jury could form an opinion as to whether or not the defendant treated Triplett's warnings more lightly than a prudent man should have done under the circumstances.

The eighth exception was to the admissibility of evidence concerning the dog's behavior on an occasion when Triplett thrust a stick at it while it was confined.

Triplett testified that the dog took hold of the stick and seemed to be cross and angry, though its general disposition previously had been good. It does not clearly appear from the evidence whether this particular incident was communicated to Mr. Buck or not, but Triplett did tell the defendant on more than one occasion that the dog was acting strangely, and from his observation of it he thought the animal was developing rabies.

Besides this, Triplett was given charge of the dog, and under such circumstances knowledge of the servant is the knowledge of the master. In the case of Baldwin v. Casella, L.

R. 7 Ex. 325, an ordinary carriage dog was kept in a stable of the defendant, and was under the care and control of the defendant's coachman, who lived there. The dog was known to the coachman to be cross and to have knocked down a child and scratched it. The defendant, however, supposed the dog to be harmless and allowed it to play with his children. In an action by an infant for a bite inflicted by the dog a verdict was found for the plaintiff.

In that case Sir Samuel Martin said: "The dog was kept in defendant's stable, and the defendant's coachman was appointed to keep it; the coachman knew the dog was mischievous, and it is immaterial whether he communicated that fact to the master or not; his knowledge was the knowledge of the master."

575 We find no error in the ruling of the court on the eighth exception.

The ninth, tenth and eleventh exceptions relate to substantially the same kind of evidence that we considered under the first and second exceptions, and what we there said disposes of these also.

The twelfth and thirteenth exceptions were taken to the refusal of the trial court to strike out the opinion evidence of Drs. Keirle and Haines, two physicians from the Pasteur Institute in Baltimore, both of whom testified that from their investigation of the dog's head the animal had hydrophobia.

The ground for the motion to strike out was that all the work of making the experiments at the institute was not done by one person, but that different parts of the process of investigation were performed by different members of the staff employed there, and that therefore the witnesses' opinions were based upon hearsay.

The testimony of all three of the persons who took part in the tests was admitted subject to exception. Dr. Herbert H. Haines testified that he had been Dr. Keirle's assistant at the City Hospital for four years; that he made the preliminary test, and that it was positive, indicating hydrophobia. That he was in the courtroom and heard the testimony of Miss Brady and of Amos Triplett, and that if the facts stated by them were true the history of the dog was typical of a mad dog. That his opinion, based on his examination and the history, was that the dog had hydrophobia, but he would not swear to it as a fact.

Dr. C. H. McClean testified that he had been assistant to Dr. Keirle in the Pasteur Institute for two years; that his work in November, 1907, was done immediately under Dr. Haines, who was his senior at the time in charge of the laboratory, that he took out the medulla from the dog's head and put it in a tube with glycerine and labeled the tube; that subsequently he inoculated two rabbits with virus from this tube and put them in a box. The box was labeled with a card 576 label; that he made the entries in the record book and on the card label.

The record book and card label were then offered in evidence, without objection.

Both the card and the record book contained the following entries, among others: "No. 674. Brady. Box E."

Both the rabbits appear to have been gray in color, as that word appears twice in the record book and twice on the card label. One rabbit died prematurely, and the letters "P. D." were written before the word "Gray" on the card label. Before the other word "Gray" on the card was an "O" in red ink, put there by Dr. Keirle, to indicate that that rabbit developed rabies.

The witness was then asked what opportunity there was for mistake in making the experiments, and replied that: "There was no more liability of error than there was in any other scientific work."

Dr. Keirle testified that from the books and records the dog had hydrophobia.

The defendant's motion to strike out testimony was directed only against that of Drs. Keirle and Haines. Dr. McClean's was not objected to.

In Owen's Case, 67 Md. 307, 10 Atl. 210, 302, this court said, quoting from Aetna Ins. Co. v. Weide, 9 Wall. 677, 19 L. ed. 810: "There can be no doubt but the daybooks and ledger, the entries in which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence per se, but with the testimony of the witnesses accompanying them all objection was removed."

Dr. McClean testified that he did the work of inoculating the rabbits and made the entries, and that Dr. Keirle made the "O" in red ink, to indicate that one of the rabbits inoculated by him died of rabies.

The weight and sufficiency of evidence are of course matters for the consideration of the jury, but whether there be any evidence or not is a question for the court.

[577] In this case the investigation to discover whether the dog had rabies or not seems to have been scientifically and carefully made, according to the established system in vogue at the Pasteur Institute.

All the physicians who took part in the experiments testified as to the part performed by them respectively, thus making a complete chain of investigation, and the entries in the record books and on the card were admitted in connection with the testimony of the witnesses. We think that under the circumstances the testimony as to the result of the experiments was admissible.

Objection is also made in the brief of the appellants to the evidence of Dr. Haines, because some of his testimony was based in part upon the evidence of two witnesses whom he heard testify at the trial of the case below, and not upon a hypothetical statement of facts: Edelin v. Sanders, 8 Md. 118.

But no objection on this ground appears to have been made to this evidence at the time it was given, and the motion to exclude is based on other grounds entirely. As the question does not plainly appear to have been decided by the court below, it cannot be raised on appeal: Code, art. 5, sec. 9.

No question was asked Dr. Haines based upon evidence in the case, and if the point now raised was deemed important, objection to the doctor's statement should have been made at the time in the court below.

The fourteenth exception is to the ruling of the trial court upon the prayers. The defendant's first prayer, which was rejected, asked the court to instruct the jury that their verdict must be for the defendant. In defense of this prayer the learned counsel for the defendant says in his brief that hydrophobia was not proved, and "if the dog did not have hydrophobia there was no negligence to be imputed to the defendant, because the dog was conceded to be of an affectionate and gentle disposition."

But it could not be declared as a matter of law that in turning the dog loose, with the knowledge he possessed at [578] the time of its behavior under the observation of his man Triplett, the defendant acted with that degree of caution which is required of a reasonably prudent man under such circumstances.

Whether the dog was mad or not may be matter of suspicion, and yet it was not enough for defendant to say: "I did use a certain precaution." He ought, from the grave nature

of the disease suggested to him, to have put it out of the animal's power to do harm: Addison on Torts, sec. 264; Jones v. Perry, 2 Esp. 482. The care should have been commensurate with the serious consequences of a miscarriage: Bishop on Noncontract Law, sec. 1235. Whenever the owner of a dog has reason to even suspect that the animal may be afflicted with hydrophobia, it becomes his duty to be very circumspect and to use every precaution to prevent the animal from inflicting an injury on any creature.

We cannot say the precaution here was sufficient and think the court below was right in rejecting this prayer.

We have examined the other rejected prayers of the defendant and, without discussing them in detail, we think they were properly rejected. An examination of all the instructions actually granted, taken together, convinces us that the case was fairly and properly submitted to the jury.

Finding no reversible error in any of the rulings of the lower court, the judgment will be affirmed.

Judgment affirmed with costs.

The Owner of a Dog is not Liable in Damages merely because the animal bites a person: Martinez v. Bernhard, 106 La. 368, 87 Am. St. Rep. 306; but if he has notice, actual or constructive, of the dog's viciousness, he is answerable for injuries inflicted by it: Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50; Strouse v. Leipf, 101 Ala. 433, 46 Am. St. Rep. 122; Plummer v. Ricker, 71 Vt. 114, 76 Am. St. Rep. 757; Crowley v. Groonell, 73 Vt. 45, 87 Am. St. Rep. 690. In Martinez v. Bernhard, 106 La. 368, 87 Am. St. Rep. 306, it is held that the bite of a dog is not ground for damages against his owner if the death of the person bitten is traced to another cause; and that the hair of the dog is not an antidote for his bite, and for injuries due to using it as such antidote his owner is not answerable.

In an Action for Injury by the Bite of a Dog, the Fear and solicitude as to poison are proper elements of damage: Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751.

CASES

IN THE

SUPREME COURT

OF

MASSACHUSETTS.

CRIMMINS v. BOOTH.

[202 Mass. 17, 88 N. E. 449.]

SHIPS AND STEVEDORES—What Deemed not a Part of Ways, Works and Machinery.—In the absence of any special agreement governing the relation between a ship owner and a stevedore, the hatchway and hatches are not part of the ways, works and machinery of the stevedore. (p. 472.)

SHIP OWNERS, Duty of to Longshoreman.—The duty of a ship owner toward a longshoreman, lawfully at work upon a vessel, is the same as that of an employer respecting his apparatus and permanent constructions with and upon which a laborer is expected to work, even though he may be in the immediate employ of an independent contractor. (p. 472.)

SHIP OWNER, Duty of to Longshoreman Respecting Improvements or Changes.—A ship owner does not owe a duty to a longshoreman to make improvements or changes in the ship to make the conditions of labor safer. (p. 472.)

SHIPS AND LONGSHOREMAN — Assumption of Risk.—A longshoreman working upon a ship does not assume risks which are not obvious. Even when the assumption of risk grows out of a contract, it does not cover those unseen or obscure dangers which cannot reasonably be discerned by an employé and which the employer properly may be held to know about. (p. 473.)

SHIP OWNER AND LONGSHOREMAN—Warning, Duty to Give.—A ship owner, where there are unknown or obscure dangers with which a longshoreman cannot fairly be charged with knowledge, owes a duty of warning where such owner knows, or ought to know, the danger. (p. 473.)

SHIP OWNER AND LONGSHOREMAN—Danger, When cannot be Held to be Obvious.—It cannot be ruled, as a matter of law, that a danger is obvious when it is not readily observed by the eye and is revealed only by an experiment, to perform which two men at least are required, or by accurately measuring a five foot space. (p. 473.)

MASTER AND SERVANT—Risks Assumed by the Latter.—The risks with reference to which an employé may be held to have made his contract of service are only those open and obvious to a reasonable man making such examination as he might be expected

to make if he wished to ascertain the nature and perils of the prospective service. (p. 473.)

SHIP OWNER AND LONGSHOREMAN—Risks of Defective Hatches, When not Assumed by the Latter.—Where the hatches were about five feet long and two feet wide and so heavy that two men were required to move them, and they were provided with insufficient flanges and coamings to hold them in place, because of the hatches being a half inch too short, a longshoreman, working in the employ of a stevedore and having no actual knowledge of this condition of affairs, cannot be held, as a matter of law, to have assumed the risks of injury from the falling of such hatches. (p. 474.)

SHIP OWNER AND STEVEDORE, Contract Between When does not Exempt the Owner from Liability for Defects in the Hatches.—A contract between a ship owner and a firm of stevedores, which attempts to make the latter and their employés mere licensees and to exempt the owner from liability to keep the winches, booms, fall, tackle and other appliances in a sufficient or fit condition for use, does not extend to the hatches of the ship, nor exempt the owner from liability for injury due to their insufficient and unsafe condition. (p. 474.)

SHIP OWNERS AND STEVEDORES, Liability of the Latter to an Employé Injured Through a Defect in the Ship or Its Appliances.—Where, by the terms of a contract between a ship owner and a firm of stevedores for the loading and unloading of a ship, the latter are given sole and entire charge, direction and control of the work, this involves such possession by the latter as is necessary to perform their contractual obligation, and they are liable to one of their employés for personal injuries received through a defect in the hatches of the vessel, because of which he fell through while he was standing on them in the discharge of his duties, if the circumstances were such that the ship owner is also answerable to such employé, especially if the employé was set to work without providing lights, and adequate lights might have revealed to the employé the defect occasioning his injury. (p. 475.)

H. F. R. Dolan and T. R. Bateman, for the plaintiff.

J. Lowell, J. A. Lowell, A. D. Hill and F. J. Sulloway, for the defendants.

[18] RUGG, J. These are two actions of tort to recover damages for the alleged negligence of the defendants. The declaration in the one against the Leyland Company contains a single count averring liability at common law for providing an unsafe place in which the plaintiff was rightfully at work. It contains no count based upon Revised Laws, chapter 106, section 76. The declaration in the [19] action against Booth contains one count alleging negligence at common law and two others based respectively upon the first and the second clauses of Revised Laws, chapter 106, section 71.

The plaintiff was a longshoreman in the employ of Booth, a stevedore, and was working upon the "Columbian," a vessel owned by the Leyland Company. On the day of the accident

he had been helping to load the vessel. Just before midnight he, with others, was directed to stop work and put on the hatches. The hatches, made of wooden planks, were about five feet long, two feet wide, three inches thick, and were each so heavy that two men were required to handle them. The hatchway itself was about fourteen feet long by ten feet wide, surrounded by an iron frame called the coamings. When the hatch was to be put on, there was first placed across the middle of the hatchway an iron beam called the thwartship piece, and on its middle two other iron beams rested, called fore and aft pieces, one reaching to the middle of the forward coamings and the other to the middle of the aft coamings. These three beams fitted in sockets, and on both sides of the fore and aft pieces were flanges two to two and one-half inches in width, and on the inside of both the inshore and offshore coamings were flanges one to one and one-half inches in width. It was the customary, and the only practicable, way, after the first hatch was put on, for one man to stand on it and successive hatches in placing the next. The night of the accident was dark and a canvas suspended from a boom over the hatchway came down within two or three feet of the deck and covered the whole hatchway except for an opening where the cargo was taken in. There was no light on the deck. The plaintiff with others was putting down the hatches, his post of duty requiring him to stand on the hatches as they were successively placed. As he was standing on the fourth or fifth hatch and helping to put the next one in position, the one on which he was standing went down and he sustained thereby the injuries for which in these actions he seeks recovery. There was sufficient evidence to support a finding that the hatches were being put down in the same order and places in which they were when the ship came into port, and there was no evidence which compelled the conclusion that they were being placed in any way other than that [20] for which they were supplied by the defendant ship owner. The next morning after the accident the officers of the vessel and the defendant Booth and others tested the hatch that went down with the plaintiff on it. It then appeared that when pressed hard against the coamings (where the flange was one to one and one-half inches wide) it would hold, but when pressed against the fore and aft piece (where the flange was two to two and one-half inches wide) the hatch cleared the flange on the coamings by about one-half inch and would go down. It does not appear that the plaintiff had had any-

thing to do with these hatches before the accident except that he helped to put hatches upon the same hatchway at 6 o'clock on the night of his accident.

The defendant Booth was doing the work of loading and unloading the "Columbian" under a contract with her owner, from which this extract was in evidence:

"The said stevedore agrees to discharge and load each of the said steamships at the stated rates promptly upon her arrival in Boston. Said stevedore agrees to hire and pay the necessary men for the purpose, to provide all necessary engines, fuel, lights, tackle and other appliances for the purpose, and shall have the sole and entire charge, direction and control of the work; (the work, however, is to be done to the satisfaction of Fred'k Leyland & Co. (1900) Ltd. and of the Owners of the steamers stated on the attached schedule) and the Steamship Company agrees to pay for discharging and loading the same at the rates specified, payment for the work on each ship to be made when each ship is loaded ready for sea. A sufficient number of men is to be provided by Mr. Booth whenever required and at his sole expense for docking and undocking the various steamers coming under this contract.

"There is to be no extra charge for rigging up to start the ship or for taking off hatches and putting them on again whenever required, neither is there to be any charge for handling cargo tents and stages used in discharging and loading.

"In loading and discharging the steamships in question, the stevedore has permission to use the ship's winches, booms, falls and tackle or any other appliances of the ship if he desires so to do, in such condition as he may find them in, on or over [21] the ship's deck, the stevedore furnishing men to run them; but no obligation or undertaking of any sort is assumed by the Steamship Company or its agents, or is to be implied from such permission to use or from the furnishing by the ship of the necessary steam or otherwise, to keep or have such winches, booms, falls and tackle or other appliances or any of them at any time in safe or fit condition for use, or to have any winches, booms, falls and tackle or other appliances in any condition on or over the ship's deck, and this permission shall be construed as a mere license to the stevedore and his men to use at his or their own risk and discretion for the purposes aforesaid, any winch, boom, fall, tackle or other appliance that may happen to be on or over the ship's deck without any responsibility whatever on the part of the

Steamship Company or its agents in respect to the fitness or safety of such winch, boom, fall, tackle or other appliance for such use or its condition in any respect at any time."

The plaintiff was not a party to this contract and did not know of its existence. Due notice under the employers' liability act was given to the defendant Booth. The presiding judge directed a verdict in favor of both defendants.

In the absence of any special contract governing the relation between a ship owner and stevedore, it seems to be settled that the hatchway and hatches are not a part of the ways, works and machinery of the stevedore: Hyde v. Booth, 188 Mass. 290, 74 N. E. 337; Bamford v. G. H. Hammond Co., 191 Mass. 479, 78 N. E. 115. Hatches are as much a part of the ship as doors are of a house. It is impossible to load or unload her without using them. The defendant Booth could not perform his contract with the other defendant without using them, and taking them off and putting them on is specifically referred to in the contract. But this is not decisive in favor of either of the defendants.

It appears that the work of putting on these hatches was being done in the dark late at night. There is nothing to show that this was not the usual way for performing this work, or that the plaintiff assumed the risk of any beyond the ordinary dangers of working without light. Apart from contract, the duty of the defendant ship owner toward a longshoreman lawfully at work upon his vessel is the same as that of an employer respecting his apparatus and the permanent constructions with and upon which [22] the laborer is expected to work, even though that laborer may be in the immediate employ of an independent contractor: Hayes v. Philadelphia etc. Iron Co., 150 Mass. 457, 23 N. E. 225; Toomey v. Donovan, 158 Mass. 232, 33 N. E. 396; Elliott v. Hall, 15 Q. B. D. 315; Moynihan v. King's Windsor Cement Dry Mortar Co., 168 Mass. 450, 47 N. E. 425. Such duty is commensurate only with the scope of the invitation extended to the longshoreman, which is simply to use the ship and its appurtenances as they then are and does not require improvements or changes, which would make conditions of labor safer. As was said in Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288, 76 N. E. 1048, at page 292, "the employé as matter of contract assumes all obvious risks incident to the use of the apparatus on which he was employed to work": McLeod v. New York etc. R. R., 191 Mass. 389, 114 Am. St. Rep. 628, 77 N. E. 715. But the contract does not contemplate

an assumption of a risk which is not obvious. The numerous set-screw cases all go upon the ground that the risk of injury from such a source is an obvious one and may be easily enough discovered on inspection: Mutter v. Lawrence Mfg. Co., 195 Mass. 517, 81 N. E. 263, and cases cited; McKenna v. Gould Wire Cord Co., 197 Mass. 406, 83 N. E. 1113. But even when the assumption of risk grows out of a contract, it has never been held to cover those unseen or obscure dangers which cannot reasonably be discerned by an employé, and which the employer properly may be held to know about. Under such conditions a duty to warn exists on the part of owner or employer, who knows or ought to know the danger, toward the laborer, who does not know and cannot fairly be charged with knowledge of it: Wheeler v. Wason Mfg. Co., 135 Mass. 294; Silva v. Davis, 191 Mass. 47, 77 N. E. 725.

The circumstances in the case at bar bring it within the latter rule. The duty of the defendant ship owner is in this respect as strong as it would be if it was the employer of labor. The danger was fraught with highly perilous consequences. The shortness of a little over half an inch, which rendered the hatch unsafe when placed in one position, though harmless when put in another, was one which cannot be said as matter of law to have been apparent upon inspection by the eye, as hatches of that size and character were lying on the deck. They were so heavy that they could not be moved by one man. It cannot be ruled [23] as a matter of law that a danger is obvious when it is not readily observed by the eye and is revealed only either by an experiment, to perform which two men at least are required, or by accurately measuring a five foot space. The doctrine of contractual assumption of risk rests for one of its fundamental supports upon the theory that the employé can, if he desires, look over the place at which and appliances with which he is to work, if he makes the contract for service, and decide whether he cares to enter the employment upon the conditions disclosed in view of the well-settled principle of law that the employer is not bound to change the permanent arrangements then existing in order to make them safer. The risks with reference to which he may be held to have made his contract therefore are only those open and obvious to a reasonably prudent man making such examination as he might be expected to make if he wished to ascertain the nature and perils of the prospective service: Rooney v. Sewall & Day Cordage Co., 161 Mass. 153, 36 N. E. 789; Young v. Snell, 200 Mass. 242, 86 N. E. 282,

19 L. R. A., N. S., 242; Donahue v. Boston etc. R. R., 178 Mass. 251, 59 N. E. 663; Doolan v. Pocasset Mfg. Co., 200 Mass. 200, 85 N. E. 1055; Fearns v. New York etc. R. R., 186 Mass. 529, 75 N. E. 68; Carroll v. Metropolitan Coal Co., 189 Mass. 159, 75 N. E. 84; Murphy v. Marston Coal Co., 183 Mass. 385, 67 N. E. 342. The circumstances here are such as not to warrant the ruling as a matter of law that the danger was obvious or that the plaintiff contracted with reference to it. While the general principles laid down in Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288, 76 N. E. 1048, are applicable to the case at bar, the facts here differ enough to distinguish the two cases and call for a different result here from that reached in the Sullivan case.

The written agreement between the ship owner and the stevedore, by which the parties attempted to make the latter and his employés mere licensees, does not by its terms or fair intendment include hatches. Therefore it is not necessary to discuss whether such a contract would affect the rights of those not parties to it and ignorant of its terms: See Rev. Laws, c. 106, sec. 76; Kansas Pac. Ry. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630. While it is impossible that under some circumstances and in another connection the word "appliance" might be broad enough to comprehend them, reading it as used in this contract in the [24] light of the maxim, noscitur a sociis, it is apparent that it was intended to mean only those portions of a ship's outfit and equipment kindred in general character to winches, booms and other like apparatus, and not to include such permanent and essential parts of the ship itself as hatches.

The case against the Leyland company is also plainly distinguishable from Pingree v. Leyland, 135 Mass. 398. There the injury arose from a defective winch belonging to the ship owner but used by the stevedore whose employé was the plaintiff. There was no evidence as to the terms under which it was thus used. It was said that it might be a mere loan of the winch in its then defective condition with no express or implied agreement that it was in good repair. That case was governed by the principle applied in Mahoney v. W. A. Murtfeldt Co., 198 Mass. 471, 84 N. E. 798, which these defendants embodied in their contract. But here the hatches were not a piece of machinery; they were an essential part of the vessel. The relation of longshoreman and ship owner implied by inherent necessity an invitation on the part of the latter to the former to use the ship for the purposes of loading and un-

loading, and to use the hatches therefore as much as the hold. It must have been the intention of the ship owner that the hatches should be used by the plaintiff and his fellow-laborers. Out of this springs liability: Hayes v. Philadelphia etc. Iron Co., 150 Mass. 457, 23 N. E. 225. The duty is not onerous; it is only to call attention to dangers not obvious nor incident to the business or to pay for the consequences of failure to do so.

It is strongly urged that the defendant Booth is exonerated from liability in a case like the present by Hyde v. Booth, 188 Mass. 290, 74 N. E. 337. But without impugning that decision in any degree, the present case is distinguishable from it. As has been pointed out, the contract entered into between the two defendants does not include the hatches. But the contract between the two defendants distinguishes this from the Hyde case in that the stevedore here has "the sole and entire charge, direction and control of the work" of discharging and loading the steamship. This involves such possession as is necessary to perform the contractual obligation. It constitutes an appropriation by him for the time being of the ship for the purposes of performing [25] the contract. Having thus appropriated it by virtue of his contract he became liable to his employés respecting it as if it were his own. While to the ordinary relation of stevedore and ship owner the rule of Hyde v. Booth would apply, the present contract places the stevedore in a position akin to that of the lessee of a tenement, who adopts the building as his own and assumes the obligation of owner toward his employés. While he could not be required to make over the ship in order to render it safer, he was obliged to give warning of those dangers not incident to the business and not apparent upon reasonable inspection. In this respect his duty was the same as that indicated as resting upon the owner of the vessel.

Moreover, it might have been found that a proximate contributing cause to the plaintiff's injury was the darkness in which he was directed to assist in putting on the hatches by the foreman of the defendant Booth. The duty to furnish lights was one cast by the contract between the two defendants upon the defendant Booth. Many cases, where failure to furnish proper lights has been held not to be evidence of negligence, are not in point, for the reason that the danger which confronted the plaintiff, was one as to which he may have been found to have had no knowledge and which adequate light might have revealed. The defendant Booth, there-

fore, had sufficient control of the ship to enable him to provide necessary lights, and it might have been found to be his duty with reference to such a condition as existed here to furnish them. Even though as to ordinary conditions it may have been the usual way to put on the hatches in the dark, yet to set his men at work in the dark with a short hatch amounted substantially to a trap. Though he could not change the construction of the ship, he could have done something to enable the men to see hidden and unusual dangers: Gaynor v. Old Colony etc. R. R., 100 Mass. 208, 97 Am. Dec. 96; Haggblom v. Winslow Bros. & Smith Co., 198 Mass. 114, 84 N. E. 301; Hodde v. Attleboro Mfg. Co., 193 Mass. 237, 79 N. E. 252; Johnson v. Field-Thurber Co., 171 Mass. 481, 51 N. E. 18.

Exceptions sustained in both cases.

The Liability of an Employer to Employés Injured While Unloading a Vessel is considered in Portance v. Lehigh Valley Coal Co., 101 Wis. 574, 70 Am. St. Rep. 932; Pearson v. Alaska Pacific S. S. Co., 51 Wash. 560, 130 Am. St. Rep. 1117.

The Doctrine of Assumption of Risks in the law of master and servant is discussed in the notes to Houston Ry. Co. v. De Walt, 97 Am. St. Rep. 886; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 314. For recent decisions on this subject, see Podvin v. Pepperell Mfg. Co., 104 Me. 561, 129 Am. St. Rep. 411; Di Bari v. J. W. Bishop Co., 199 Mass. 254, 127 Am. St. Rep. 497; Knox v. American Rolling Mill Corporation, 236 Ill. 437, 127 Am. St. Rep. 291.

FROST v. FROST.

[202 Mass. 100, 88 N. E. 446.]

WILLS, Assignment to Trustees to be Named in the Testator's Will, What Will is Meant.—If a testator assigns policies of insurance on his life to the trustees to be named in his will, this must be held to mean the document filed and admitted to probate as his will and to exclude every other will, though in existence at the time of the assignment, but which is not admitted to probate, nor entitled to be admitted. (p. 478.)

WILLS, Assignment, When of Testamentary Nature and not Effective Unless Executed as if a Will.—An assignment of insurance policies to the trustees to be named in the assignor's will is without effect unless executed and attested in a manner required of a will, though the wife of the assignor, being the beneficiary of the trust, assents thereto. (p. 479.)

INSURANCE, LIFE—"Statutory Investiture" Under the Statutes of Massachusetts.—Where policies of insurance on the assignor's life are by him assigned, to be held by the trustees named in his will, and the assignment must be declared invalid as such because not executed and attested in a manner required for a will, and his wife is named as the beneficiary of the trust attempted to be cre-

ated, the paper cannot operate as a "statutory investiture" in her favor under the statutes of Massachusetts, providing that every policy of life insurance made payable to or for the benefit of a married woman, or after it is issued, assigned, transferred, made payable to such woman, or to any person for her benefit, shall inure to her separate use and benefit and that of her children. (p. 479.)

Suit in equity by the widow of Alfred G. Frost against the persons named in his will as trustees and executors thereof to have them declared to be trustees for her benefit under assignments of five life insurance policies, and to have them directed to pay the proceeds of such policies to her. The master reported in favor of the complainant, but the defendants excepted to the report, and the cause was reserved upon the pleadings, the master's report, and the exceptions thereto for the determination of the full court.

A. F. Converse, for the defendants.

S. H. Tyng, for the plaintiff.

[101] HAMMOND, J. One of the questions is whether the assignments were valid. The plaintiff does not contend that there was a gift, but insists first that the assignments were operative as a perfected trust, and second, that there was a "statutory investiture" under Statutes of 1894, chapter 120, which was in force when the policies were taken out and assigned.

1. Was the trust perfected during the lifetime of the assignor? There were five policies, of which two were each payable to his executors, administrators and assigns, and three were each payable to his legal representatives. Each assignment was of all his right, title and interest "in and to said policy, subject to all its terms and conditions," and each was made to "the trustees to be named in my will," for the sole use and benefit of the plaintiff. The master has found that the plaintiff was informed of these assignments and that she assented thereto; and we think the facts reported by him warrant such findings. But she testified that she never saw any of these policies, nor any of the assignments, until after her husband's death; and the master has further found that "these insurance policies and assignments were matters of common knowledge among the brothers and sisters of the testator; also that they discussed them at [102] times with the plaintiff; also that they were mistaken in supposing that these assignments gave to the plaintiff only the income of the proceeds of these policies for her life, and that the plaintiff

had knowledge that her husband had made provision of some kind for her, by means of these policies and assignments, and that she was willing to accept, and did accept, such provision, whatever it might be, just as her husband made it, but did not see these policies and assignments, and was not informed about the details of the provision made for her therein until after his death."

Who were the assignees? They were to be named in his will. What will? Was it to be the first testamentary document he should thereafter make, whether or not revoked before his death, or was it to be the one which should finally be admitted to probate as his will? The assignor actually made three wills after the assignments were executed and "the trustees named in the different wills were not exactly the same." There can only be one sensible interpretation of the phrase "my will." It must be held to mean the document finally admitted to probate as the will of the assignor. It is certain, therefore, that the trustees could not be finally ascertained until after his death. The assignment could not be delivered to the assignees until after his death. There is nothing to indicate that he intended to make any delivery to any third person to hold for the trustees until they were finally ascertained, nor is it shown upon the facts in the case that he intended to hold the policies himself as trustee. While it is true, as contended by the plaintiff, that the trustees when finally ascertained would derive their appointment under the assignment and not under the will, still it remains equally true that they could not be appointed, nor even ascertained, until after the death of the assignor. It is to be noted that the papers were all retained by the assignor.

Here, then, is a case where no assignments are delivered to the assignees, nor can they be delivered until after the assignor's death, where also there is no delivery to anyone for them and where it does not appear that the assignor intends to hold for them. The language of the assignments seems to point to a testamentary intention, and the whole scheme is manifestly not to take effect as an operative assignment during the lifetime of [103] the testator. The assignments were of a testamentary nature, and, not being witnessed as required by the statutes concerning wills, were inoperative after his death.

Nor is the defect cured by the assent of the cestui que trust to the assignments. While such an assent might have a bearing upon the validity of the trust if there was any question

as to notice or acceptance, still it has no effect upon the validity of the assignments upon which the trust depends. The question is not simply whether, assuming the validity of the assignments, the trust was good, but is much deeper, and is whether the assignments upon which alone the trust depends ever became operative in law. The case is plainly distinguishable from Kendrick v. Ray, 173 Mass. 305, 73 Am. St. Rep. 289, 53 N. E. 823, upon which the plaintiff relies. There the trustee was the beneficiary named in the policy; and the question was as to the terms of the oral trust upon which he received the insurance, and not as to the validity of the appointment of the trustee: See, also, Gould v. Emerson, 99 Mass. 154, 96 Am. Dec. 720.

Upon the facts in the case these assignments never took effect within the lifetime of the assignor, for want of assignees, and never took effect after his death for want of proper attestation. There was therefore nothing upon which to base the contemplated trust, and it never was perfected.

2. What has been said disposes also of the contention that there was a "statutory investiture" in the plaintiff. Statutes of 1894, chapter 120 (now a part of Revised Laws, chapter 118, section 73), upon which this contention is based, runs thus: "Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children, subject" to certain provisions not here material. These policies were not made payable to the plaintiff, nor, for reasons hereinbefore stated, were they ever legally assigned for her benefit or in any way legally made payable to her. Hence they are not within the statute.

[104] It follows that the second and sixth exceptions of the defendant to the master's report must be sustained. It becomes unnecessary to consider the other exceptions. The order must be, bill dismissed.

Instruments Which Constitute Testamentary Writings are discussed in the note to Ferris v. Neville, 89 Am. St. Rep. 486.

The Assignment of Life Insurance Policies is the subject of a note to Chamberlain v. Butler, 87 Am. St. Rep. 484.

MILLER v. ALDRICH.

[202 Mass. 109, 88 N. E. 441.]

LAWS OF ANOTHER STATE—Questions of Fact.—Though both counsel in a case on the argument refer to the decisions of the courts of another state respecting its laws, yet they must be treated as questions of fact, and the court will not go beyond the averment of the declaration to ascertain either the common or the statutory law of such state, except as the court may be aided by the presumption that the common law is the same as that of the forum. (p. 482.)

LAWS OF ANOTHER STATE, Averment of the Complainant Respecting must be Accepted as True.—Whatever is well averred in the declaration as the law of another state must be taken by the court as true, notwithstanding counsel on both sides, in the course of the argument, refer to the decisions of the courts of that state and show its laws. (p. 482.)

CORPORATIONS OF ANOTHER STATE—Stockholder's Liability, Enforcement of Beyond the Jurisdiction.—An action cannot be maintained in Massachusetts against a resident thereof on his liability as stockholder of an insolvent corporation of another state to enforce a liability created by its statutes, when it does not appear that they have provided any remedy for the enforcement of such liability beyond the state in which they were enacted. (p. 483.)

Action of contract against the defendant residing in Massachusetts as a stockholder in a corporation organized in the state of Colorado to enforce his alleged personal liability under the statutes of that state.

The declaration, after averring that the defendant was a stockholder in a designated corporation of Colorado, and the number of shares owned by him and their par value, alleged that such corporation was a bank and that at the time of its organization the law of such state provided that, "shareholders in banks, savings banks, trust, deposit, and security associations, shall be held individually responsible for debts, contracts and engagements of said corporations, in double the amount of the par value of the stock owned by them respectively." The complaint further alleged that certain creditors of the corporation brought an action in behalf of all its other creditors against it and its assignee and stockholders, including the defendant, in a district court of Colorado to ascertain and fix the amount due from each stockholder to the creditors, and that it appears from the proceedings and record in such case that judgments were rendered against all the stockholders of the bank residing in Colorado, and three thousand two hundred and fifty dollars had been collected from those who were solvent, and that executions had issued

against all the others and had been returned "No property found."

The complaint also stated that the Civil Code of Colorado declared that: "Of the parties to the action, those who are united in interest shall be joined as plaintiffs, or defendants, but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, and the court may make an order that the action be so prosecuted or defended"; that under such Civil Code the court entered its decree appointing the plaintiffs to represent the creditors, and authorized them to sue for the benefit of all the creditors of the corporation and bring all necessary actions and proceedings for the purpose of collecting the stock liability from the stockholders of the corporation residing outside of the state; and that it further appeared that there was still due from the corporation to plaintiffs and the other creditors eighty-four thousand three hundred and nineteen dollars and eighty-nine cents, and that the corporation was wholly insolvent, and that it would be necessary for the stockholders who had not paid anything to pay fifty-three and one-half per cent of their stock liability; and that by such decree the defendant was adjudged liable to the plaintiffs for six thousand four hundred and twenty dollars, to be collected by them for the benefit of the creditors of the bank.

The defendant demurred, first, on the ground that the complaint showed the plaintiffs' cause of action was barred by the statute of limitations; second, that the declaration did not state a legal cause of action; third, that it did not appear but the plaintiffs were statutory assignees and powerless to enforce in this commonwealth the rights of creditors; fourth, that the pretended decree does not appear to be a decree entitled to faith, credit or effect in the courts of this commonwealth. The demurrer was overruled and the case reported for the determination of the supreme court, and all proceedings were stayed except such as were necessary to determine the rights of the parties.

T. D. Cobbey and W. R. Bigelow, for the plaintiffs.

C. H. Hanson, for the defendant.

[113] SHELDON, J. In the argument of this case counsel on both sides have referred to the decisions of the courts of Colorado as showing the law of that state. But as any question of foreign law including the law of any other state must be treated here as a question of fact, we cannot go beyond the averments of the declaration to ascertain either the common or the statutory law of Colorado, except as we may be aided by the presumption that the common law of that state is the same as our own: Demelman v. Brazier, 193 Mass. 588, 79 N. E. 812; Cherry v. Sprague, 187 Mass. 113, 105 Am. St. Rep. 381, 72 N. E. 456, 67 L. R. A. 33. Accordingly, we cannot consider or refer to any of the Colorado decisions which have been cited to us, except as evidence of the common or general law, just as we may and do refer to decisions rendered elsewhere. Whatever is well averred in the declaration as to the law of Colorado must now be taken to be true: Hancock National Bank v. Ellis, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29 L. ed. 535.

There is much ground for upholding the defendant's contention that on the face of the plaintiffs' declaration the right of action which they seek to enforce accrued on June 15, 1899, when the State Bank of Monte Vista became insolvent and made an assignment of all its assets for the benefit of its creditors, and so that this action is barred by the statute of limitations: Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113, and cases there cited. But it does not follow that the demurrer can be sustained for this reason. That ground of defense must be taken by answer, and not by demurrer: Hodgdon v. Haverhill, 193 Mass. 327, 79 N. E. 818, and cases there cited; McRae v. New York etc. R. R., 199 Mass. 418, 85 N. E. 425. We proceed accordingly to consider other grounds of demurrer.

[114] The plaintiffs do not seek to maintain this action as creditors. Indeed, except inferentially, there is no averment that they are themselves creditors. They rest their right upon a decree of the Colorado court by which they were appointed to represent the creditors and to collect for the creditors the amount of the corporate indebtedness which the bank is unable to pay. We do not doubt that all stockholders, including the defendant, would be bound by proceedings properly taken in the Colorado court to determine their liability. But it does not appear that the proceedings taken in Colorado were in accordance with the provisions of any statute or rule

of law fixed by the decisions of its courts and in force when the defendants became stockholders and incurred their contractual liability as such. The reason for the rule adopted in Converse v. Ayer, 197 Mass. 443, 84 N. E. 98, Francis v. Hazlett, 192 Mass. 137, 116 Am. St. Rep. 230, 78 N. E. 405, and Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, fails here. The difficulty is not merely as to the plaintiffs' right to sue in their own names. Though not called receivers, they yet might perhaps be shown to have become quasi assignees of the right of action within the rules stated in Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, and Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. Rep. 755, 51 L. ed. 1163. But the difficulty goes deeper. It does not appear that the statute of Colorado, as construed by its courts, has provided any remedy for its enforcement which can be made available outside that state: Erickson v. Nesmith, 15 Gray, 221, 4 Allen, 233; Clark v. Knowles, 187 Mass. 35, 105 Am. St. Rep. 376, 72 N. E. 352, 2 Ann. Cas. 26. That did appear or was assumed, so far as we have been able to ascertain, in the cases in which, under similar circumstances, suits like this have been sustained against the domestic stockholders of foreign corporations: See, besides cases already referred to, Bank of North America v. Rindge, 154 Mass. 203, 26 Am. St. Rep. 240, 27 N. E. 1015, 13 L. R. A. 56; Abbott v. Goodall, 100 Me. 231, 60 Atl. 1030; Pulsifer v. Greene, 96 Me. 438, 52 Atl. 921; Miller v. Willett, 70 N. J. Eq. 396, 62 Atl. 178; Olson v. Cook, 57 Minn. 552, 59 N. W. 635; Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. Rep. 757, 30 L. ed. 825.

This action is not in any sense brought to enforce a judgment rendered by the Colorado court; it seeks only to enforce the defendant's original statutory liability: Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. Rep. 810, 40 L. ed. 986; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. Rep. 244, 47 L. ed. 380; Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113. That court did not assume to give any judgment against the [115] nonresident stockholders. But it does not appear that there is or was in Colorado any statute or any fixed rule of law authorizing such proceedings as were had and so making them final and conclusive upon all stockholders as being represented by the corporation itself. The statute set out in the declaration merely established a rule of practice. It cannot be given any further effect.

Accordingly the order of the superior court overruling the demurrer must be reversed, and the demurrer must be sustained for the third reason therein assigned.

So ordered.

The Law of Another State is a Fact to be Proved, like any other fact, by evidence. If the evidence consists of a single statute or a decision the language of which is not in dispute, the interpretation of it presents a question of law for the court; but if the law must be determined by construing numerous decisions, more or less conflicting, or bearing upon the subject collaterally or by way of analogy, from which inferences must be drawn, the question to be determined is one of fact and not of law: Wylie v. Cotter, 170 Mass. 356, 64 Am. St. Rep. 305; Wickersham v. Johnston, 104 Cal. 407, 43 Am. St. Rep. 118; Electric Welding Co. v. Prince, 200 Mass. 386, 128 Am. St. Rep. 434.

The Enforcement of the Liability of a Resident Stockholder in a foreign corporation is discussed in the recent cases of King v. Cochran, 76 Vt. 141, 104 Am. St. Rep. 922; Clark v. Knowles, 187 Mass. 35, 105 Am. St. Rep. 376; Miller v. Smith, 26 R. I. 146, 106 Am. St. Rep. 699; Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 113 Am. St. Rep. 863. Courts of equity have no authority to dissolve a foreign corporation or wind up its business, but they may, in case of mismanagement in its affairs, take charge of its property within their jurisdiction and enforce the rights of creditors and stockholders in respect thereto: Culver Lumber etc. Co. v. Culver, 81 Ark. 102, 118 Am. St. Rep. 17. See, also, Francis v. Hazlett, 192 Mass. 137, 116 Am. St. Rep. 230. As to whether the liability of a stockholder is contractual in its nature, see Pusey & Jones Co. v. Love, 6 Penne. (Del.) 80, 130 Am. St. Rep. 144, and cases cited in the cross-reference note thereto.

MABARDY v. McHUGH.

[202 Mass. 148, 88 N. E. 894.]

DECEIT, Action for, When will not Lie—Failure to Employ Means to Ascertain the Truth.—Where representations are made respecting a subject as to which the complaining party has at hand reasonably available means for ascertaining the truth, and the matter is open for inspection, if, without being fraudulently diverted therefrom, he does not take advantage of this opportunity, he cannot be heard to impeach the transaction on the ground of the falsehoods of the other party. (p. 488.)

STARE DECISIS.—The doctrine of stare decisis is as salutary as it is well recognized. (p. 488.)

VENDOR AND PURCHASER—Misrepresentation as to Area Where the Boundaries are Correctly Pointed Out.—Where the seller of real property shows upon the face of the earth its true boundaries to the purchaser and does not fraudulently dissuade him from making full examination and measurement, and the estate is not so extensive or of such a character as to be reasonably incapable of inspection and estimate, and there is no relation of trust between

the parties, the purchaser has no remedy for a misrepresentation as to area alone. (p. 489.)

MISREPRESENTATION AND OPINION, Difference Between. An opinion respecting the number of acres in a tract of land pointed out by the seller to the purchaser, made in good faith, is not a false representation for which the seller is bound, there being no fraudulent intent on his part, but if he knows that there are not nearly the number of acres stated, or does not know anything about it, yet states it as if it were his personal knowledge, this is a false representation for which he is liable, provided it is material and induces the purchase of the property. (p. 490.)

The instruction respecting the difference between the representation and the expression of an opinion was as follows:

"Now, what is the next issue? It is that those representations were known by the person who made them—that is, by the defendant McHugh—to be false; or that, not knowing them to be true, he represented them to be true. If he expressed an opinion that there were sixty-five acres, and that expression of opinion was made in good faith, it would not be a false representation for which he could be bound; because there must have been a fraudulent intent on his part, although he is bound by the natural results of his own statement. But if he stated an opinion that there were sixty-five acres, and that was an honest opinion, he could not be held, however mistaken he may have been. But if he knew that there were not sixty-five or nearly sixty-five acres, or if he didn't know anything about it and stated it as a fact within his personal knowledge, then it would be a false representation for which he would be liable; provided, further, that it was a material representation, and that it was a representation that induced these plaintiffs to buy the farm."

Verdict and judgment for the defendants, and the plaintiffs alleged exceptions.

J. T. Connolly and J. L. Sheehan, for the plaintiffs.

J. H. Vahey, P. Mansfield and T. F. Vahey, for the defendants.

148 RUGG, J. This is an action of tort sounding in deceit. There was evidence tending to show that the plaintiffs went upon a certain irregularly shaped tract of land (for false representations inducing the purchase of which this action was brought) with one of the defendants, who pointed out the true boundaries and fraudulently stated that the tract contained sixty-five acres, when in fact it contained forty and three-fourths acres. Upon this aspect of the evidence, the

trial judge instructed the jury [149] that "if the plaintiffs were taken over the farm by the defendants or [and] were shown the bounds so that the plaintiffs knew where the farm was and what was comprised within the bounds, it would not be of any consequence that representations may have been made by the defendant in relation to the acreage." The evidence being conflicting as to whether the boundaries were shown, the jury were further instructed that if the defendant, who talked with the plaintiffs, "knew that there were not sixty-five or nearly sixty-five acres, or if he did not know anything about it and stated it as a fact within his personal knowledge, then it would be a false representation for which he would be liable, provided" the other elements essential to a recovery were found to exist.

The correctness of the first of these instructions is challenged. It is in exact accordance with the law as laid down in Gordon v. Parmelee, 2 Allen, 212, and Mooney v. Miller, 102 Mass. 217. The facts in the case at bar are similar in all material respects to these cases. An attempt is made to distinguish them on the ground that the present plaintiffs were Syrians, ignorant of our language, and that hence a trust relation existed between them and the defendant. But whatever else may be said of this contention, it fails because they were accompanied by two of their own countrymen, who were thoroughly familiar with our language and acted as interpreters for them. In effect, the contention of the plaintiffs amounts to a request to overrule these two cases. They have been cited with approval in Roberts v. French, 153 Mass. 60, 25 Am. St. Rep. 611, 26 N. E. 416, 19 L. R. A. 656, and as supporting authorities, without criticism, in other opinions. The court, however, has refused to apply the rule of those decisions to other facts closely analogous: See Lewis v. Jewell, 151 Mass. 345, 21 Am. St. Rep. 454, 24 N. E. 52; Holst v. Stewart, 161 Mass. 516, 42 Am. St. Rep. 442, 37 N. E. 755; Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262, 51 N. E. 1084; Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108. This court in recent years, by pointed language and by conclusions reached, has indicated a plain disposition not to extend legal immunity for the falsehood of vendors in the course of negotiations for sales beyond the bounds already established: Dawe v. Morris, 149 Mass. 188, 14 Am. St. Rep. 404, 21 N. E. 313, 4 L. R. A. 158; Way v. Ryther, 165 Mass. 226, 42 N. E. 1128; Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108; Andrews v. Jackson, 168 Mass. 266, 60 Am. St. Rep. 390,

47 N. E. 712, 37 L. R. A. 402; Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262, 51 N. E. 1084; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894; [150] Arnold v. Teel, 182 Mass. 1, 64 N. E. 413; Adams v. Collins, 196 Mass. 422, 82 N. E. 498; Long v. Athol, 196 Mass. 497, 82 N. E. 665, 17 L. R. A., N. S., 96; Gurney v. Tenney, 197 Mass. 457, 84 N. E. 428; Lyons Burial Vault Co. v. Taylor, 198 Mass. 63, 84 N. E. 320; Rollins v. Quinby, 200 Mass. 162, 86 N. E. 350.

This judicial attitude perhaps reflects an increasingly pervasive moral sense in some of the common transactions of trade. While the science of jurisprudence is not, and under present conditions cannot be, coextensive with the domain of morality, nor generally undertake to differentiate between motives which mark acts as good or bad, yet it is true, as was said by Mr. Justice Brett, in Robinson v. Mollett, L. R. 7 H. L. 802, that: "The courts have applied to the mercantile business brought before them what have been called legal principles, which have almost always been the fundamental ethical rules of right and wrong." This is only a concrete expression of the broader generalization that law is the manifestation of the conscience of the commonwealth.

In many other jurisdictions the rule of Gordon v. Parmelee, 2 Allen, 212, and Mooney v. Miller, 102 Mass. 217, has not been followed and false representations as to area of land, even though true boundaries were pointed out, have been held actionable: McGhee v. Bell, 170 Mo. 121, 70 S. W. 493, 59 L. R. A. 761; May v. Loomis, 140 N. C. 350, 52 S. E. 728; Boddy v. Henry, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769, 126 Iowa, 31, 101 N. W. 447; Antle v. Sexton, 137 Ill. 410, 27 N. E. 691; Estes v. Odom, 91 Ga. 600, 18 S. E. 355; Lovejoy v. Isbell, 73 Conn. 368, 47 Atl. 682; Cawston v. Sturgis, 29 Or. 331, 43 Pac. 656; Starkweather v. Benjamin, 32 Mich. 305; Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717; Walling v. Kinnard, 10 Tex. 508, 60 Am. Dec. 216; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496. See, also, Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. Rep. 701, 34 N. E. 779; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755.

Other cases apparently opposed to the Massachusetts rule, on examination prove to go no further than to decide that misrepresentations as to area, when there is no evidence that boundaries were shown, constitute deceit: Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673; Cabot v.

Christie, 42 Vt. 121, 1 Am. Rep. 313; Coon v. Atwell, 46 N. H. 510; Ledbetter v. Davis, 121 Ind. 119, 22 N. E. 744; Perkins Mfg. Co. v. Williams, 98 Ga. 388, 25 S. E. 556; Sears v. Stinson, 3 Wash. 615, 29 Pac. 205; Hill v. Brower, 76 N. C. 124; Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212. This is the substance of the latter part of the instruction [151] given in the superior court, and is the law of this commonwealth.

The rule of Mooney v. Miller, 192 Mass. 217, seemingly has been approved or followed in Lynch v. Mercantile Trust Co., 5 McCrary, 623, 18 Fed. 486; Crown v. Carriger, 66 Ala. 590, and Mires v. Summerville, 85 Mo. App. 183, although the last case has been overruled in Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558.

If the point were now presented for the first time, it is possible that we might be convinced by the argument of the plaintiffs and the great weight of persuasive authority in its support, especially in view of Lewis v. Jewell, 151 Mass. 345, 21 Am. St. Rep. 454, 24 N. E. 52. But there is something to be said in support of the two earlier decisions now questioned. A purchase and a sale of real estate is a transaction of importance and cannot be treated as entered into lightly. People must use their own faculties for their protection and information, and cannot assume that the law will relieve them from the natural effects of their heedlessness or take better care of their interests than they themselves do. Thrift, foresight and self-reliance would be undermined if it was the policy of the law to attempt to afford relief for mere want of sagacity. It is an ancient and widely, if not universally, accepted principle of the law of deceit that, where representations are made respecting a subject as to which the complaining party has at hand reasonably available means for ascertaining the truth and the matter is open to inspection, if, without being fraudulently diverted therefrom, he does not take advantage of this opportunity, he cannot be heard to impeach the transaction on the ground of the falsehoods of the other party: Salem India Rubber Co. v. Adams, 23 Pick. 256; Slaughter v. Gerson, 13 Wall. 379, 20 L. ed. 627; Long v. Warren, 68 N. Y. 426; Baily v. Merrell, 3 Bulst. 94. This rule in its general statement applies to such a case as that before us. It is easy for one disappointed in the fruits of a trade to imagine, and perhaps persuade himself, that the cause of his loss is the deceit of the other party, rather than his own want of judgment.

It is highly desirable that laws for conduct in ordinary affairs, in themselves easy of comprehension and memory, when once established, should remain fast. The doctrine of stare decisis is as salutary as it is well recognized: Rogers v. Goodwin, 2 Mass. [152] 475; Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381; Smith v. Worcester, 182 Mass. 232, 65 N. E. 40, 59 L. R. A. 728; Commonwealth v. Walsh, 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 Ann. Cas. 642; Spicer v. Spicer, Cro. Jac. 527; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. Rep. 673, 39 L. ed. 759; Goodtitle v. Kibbe, 9 How. 471, 13 L. ed. 220; Minnesota M. Co. v. National M. Co., 3 Wall. 332, 18 L. ed. 42. While, perhaps, it is more important as to far-reaching juridical principles that the court should be right, in the light of higher civilization, later and more careful examination of authorities, wider and more thorough discussion and more mature reflection upon the policy of the law, than merely in harmony with previous decisions (Barden v. Northern Pac. R. R., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992), it nevertheless is vital that there be stability in the courts in adhering to decisions deliberately made after ample consideration. Parties should not be encouraged to seek re-examination of determined principles and speculate on a fluctuation of the law with every change in the expounders of it. As to many matters of frequent occurrence, the establishment of some certain guide is of more significance than the precise form of the rule. It is likely that no positive rule of law can be laid down that will not at some time impinge with great apparent severity upon a morally innocent person. The law of gravitation acts indifferently upon the just and the unjust. A renewed declaration of law that is already in force, supported by sound reason and not plainly wrong, in the long run probably works out substantial justice, although it may seem harsh in its application to some particular case. These considerations are regarded as so weighty by the house of lords that it cannot overrule any of its own decisions: London Tramways Co. v. London County Council, [1898] App. Cas. 375.

The conclusion is that we do not overrule the decisions whose soundness has been debated at the bar, although we do not extend their scope, but confine them strictly to their precise point, namely, that where the seller of real estate shows upon the face of the earth its true boundaries to the purchaser and does not fraudulently dissuade him from making full examination and measurement and the estate is not so

extensive or of such character as to be reasonably incapable of inspection and estimate, and there is no relation of trust between the parties, the purchaser has no remedy for a misrepresentation as to the area alone.

153 The instruction as to the difference between representation and expression of opinion was adequate and adapted to the testimony.

The charge is not reported in full. No requests for rulings were presented, and the only exceptions relate to the statement of the rule of Gordon v. Parmelee, 2 Allen, 212, and Mooney v. Miller, 102 Mass. 217. It does not appear, therefore, that full instructions were not given as to the effect of fraudulent dissuasion by the defendants (of which there was some evidence) from a full examination of the farm by the plaintiffs.

Exceptions overruled.

The Rights and Remedies of a Vendee of Land to whom the boundaries or area of the tract he has purchased have been misrepresented by the vendor or his agent, are considered in McKinnon v. Vollmar, 75 Wis. 82, 17 Am. St. Rep. 178; Roberts v. French, 153 Mass. 60, 25 Am. St. Rep. 611; Newton v. Tolles, 66 N. H. 136, 49 Am. St. Rep. 593; Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262; McMichael v. Webster, 57 N. J. Eq. 295, 73 Am. St. Rep. 630; Lawson v. Vernon, 38 Wash. 422, 107 Am. St. Rep. 880.

ZEITLIN v. ZEITLIN.

[202 Mass. 205, 88 N. E. 762.]

DIVORCE, Vacating Decree for Perjury.—If a decree of divorce has become absolute, it will not be vacated on the ground that it was procured by perjured testimony as the cause for divorce knowingly procured by the libelant. (pp. 491, 492.)

Petition to vacate a decree of divorce on the ground that the libelant procured it by the perjury of himself and his brother in law in falsely testifying that the defendant was guilty of desertion in refusing to come to and live in America with her husband. The process in the divorce suit was served by mailing to the defendant in Russia, where she resided, and she had actual notice of the pendency of the divorce proceedings, but was without means with which to come to this country and to make a defense thereto. The petition was allowed, the decree vacated, and the respondent appealed.

F. R. Hall, for the respondent.

R. Homans and F. J. Sulloway, for the petitioner.

[207] KNOWLTON, C. J. This is a petition to vacate a decree of divorce obtained by the respondent against the petitioner. The jurisdiction of the court that granted the divorce, both over the case and the parties, was perfect. The ground on which the petition rests is that the case for a divorce was made out at the hearing by perjured testimony, knowingly procured by the libelant. The only question presented is whether a decree of divorce so obtained should be vacated upon proof of the fraud practiced upon the court.

It is in the interests of justice that, after a trial and final judgment in a case, the matters heard and adjudicated shall not be opened for a further hearing because of a supposed error in the determination of facts by the tribunal that heard the evidence. A contention that some part of the material testimony was false might be made with plausibility in a large proportion of the cases that are tried. A contention that the prevailing party knowingly gave or procured false testimony, upon an issue involved, might be made and strongly supported in a great many cases. It is against public policy to open cases on no other ground than this.

In Keyes v. Brackett, 187 Mass. 306, 72 N. E. 986, 3 Ann. Cas. 81, it was assumed, with a citation of authorities, that the law does not permit an attack of this kind upon a judgment or decree, entered upon the merits, after a hearing or trial between adverse parties upon issues arising in an ordinary case in a court of justice. The fraud that was held sufficient to give relief in that case was practiced upon a master, on the question whether a bond to dissolve a mechanic's lien should be approved as sufficient. Fraud which is extrinsic or collateral to the matter tried, whereby the court was induced to assume jurisdiction when in fact it had no jurisdiction, or whereby the unsuccessful party was prevented in any way from being properly heard upon a subject which entered into the [208] merits of the matter before the court, may be a ground of vacating a judgment or decree. But in Holbrook v. Holbrook, 114 Mass. 568, Chief Justice Gray said: "A decree of divorce will not be vacated or set aside by the court after the term at which it was entered without clear proof that the libelee was prevented by fraud of the libelant or imposition upon the court from being heard in the original suit upon some matter which, if then

proved, would have constituted a good defense." In Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454, Chief Justice Shaw pointed out very clearly the objections to setting aside a decree for divorce upon an application in subsequent proceedings. One of the facts to which he referred, namely, a marriage upon the faith of the decree and the birth of a child of the marriage, exists in the present case. In Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393, it was held that such a decree may be vacated when the jurisdiction of the court was founded wholly or in part upon the fraud of the successful party. The decision in Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454, that a libel to set aside a decree of divorce on the ground that it was obtained by false testimony, fraudulently procured, cannot be maintained, is reaffirmed in this later case. The fact that the application to set aside the original decree was contained in a libel in which a divorce was prayed for was treated as immaterial. The chief justice said: "We can perceive no difference between a case where a libelant inserts such an allegation and prayer in an original libel by which she seeks a divorce a vinculo on another ground, and a case where such an allegation and prayer are made the only subject of an original libel to set aside a former decree. The object in both cases is to reverse and annul a subsisting decree." This decision is in accordance with the general doctrine in other courts: United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Smith v. Lowry, 1 Johns. Ch. 320; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336; Maryland Steel Co. v. Marney, 91 Md. 360, 46 Atl. 1077; 2 Bishop on Marriage and Divorce, 1517, and cases cited.

Decree reversed.

Relief from Judgments Because Obtained by Perjury is the subject of a note to Pico v. Cohn, 25 Am. St. Rep. 165; relief in equity from judgments in general is the subject of a note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 218; and vacation of judgments after the time specified in the statute for granting relief is the subject of a note to Nicklin v. Robertson, 52 Am. St. Rep. 795.

Judgments Entered in Divorce Cases are Open to Attack in the same manner and upon the same ground as are other judgments: Nichells v. Nichells, 5 N. D. 125, 57 Am. St. Rep. 540. That they may be set aside for fraud or perjury, see Mohr v. Mohr, 81 Neb. 499, 129 Am. St. Rep. 699; State v. Watson, 20 R. I. 354, 78 Am. St. Rep. 871; Colby v. Colby, 59 Minn. 432, 50 Am. St. Rep. 420; Brown v. Grove, 116 Ind. 84, 9 Am. St. Rep. 823. Hence a decree of divorce procured by a husband's threatening his wife that if she contested the suit he would commit suicide may be vacated on her motion supported by evidence that the threat was made in bad faith and to conceal his intention to marry another: Graham v. Graham, 54 Wash. 70, 102 Pac. 891.

WHITING v. MALDEN AND MELROSE RAILROAD COMPANY.

[202 Mass. 298, 88 N. E. 907.]

CORPORATION, When not Answerable for the Debts of Another.—The acquisition of the stock, property and assets of a corporation by an individual or by another corporation does not make the new holder liable to pay the debts of the corporation. The mere purchase of such capital stock and assets is a taking of title, which leaves unsecured creditors with no claim against the purchaser and no means of collecting their debts except from their corporate debtor. (p. 495.)

CORPORATION, Presumed Legality of Acts of and of Its Officers.—In the absence of anything to the contrary, there is always a presumption that the action of a corporation was lawful, and still more is there such a presumption in regard to the official acts of its board of directors. (pp. 498, 499.)

CORPORATION, Presumption of the Doing of Acts Required by Law for the Acquisition by One Corporation of the Property and Rights of Another.—Where a statute provides the acts and methods by which one corporation may acquire the property and rights of another, and it appears that a corporation acquired by purchase from one who had purchased from another corporation all its capital stock and assets, and that such purchasing corporation reported to the board of railroad commissioners that it owned the stock and property of such other corporation, and would like to have its report to the railroad commissioners omitted, and that such commissioners thereupon struck its name from their list and reported that it had merged with the purchasing corporation, and for more than twenty years such corporation operated as its own the system formerly owned by the other corporation, it will be presumed that all the terms and conditions required by law were complied with, and that the purchasing corporation became subject to the liability of the other corporation, where such liability was imposed by statute in the event of a purchase in the manner therein prescribed. (p. 501.)

CORPORATIONS, Judgment Against, Liability of a Purchasing Corporation to Pay Though Ignorant of It at the Time of the Purchase.—Where the statute provides in the event of the purchase by one corporation of the capital stock and assets of another, the purchasing corporation should become liable for the obligations of the selling corporation, the former is liable to a suit in equity to compel the payment of judgments against the latter, though it was ignorant thereof at the time of the purchase. (pp. 501, 502.)

Bill in equity to compel the West End Street Railway Company to pay judgments against its predecessor, the defendant Malden and Melrose Railroad Company. The questions of law involved sufficiently appear from the opinion. The case, after being heard by Hammond, Judge, upon exceptions to the report of the master, was reported to the full court "for the determination of the question, what disposition should be made of the exceptions taken by the complainant to the twenty-fourth, twenty-fifth and twenty-sixth

findings of the master in his original report, and of the tenth exception of the respondents to the master's report on recommittal; such order to be entered as, in the opinion of the supreme judicial court for the commonwealth, law and justice require."

H. L. Harding, J. B. Warner and R. S. Warner, for the plaintiff.

T. Hunt, for the defendants.

[302] KNOWLTON, C. J. This report brings before us questions founded on the plaintiff's exceptions to the twenty-fourth, twenty-fifth and twenty-sixth findings of the master in his original report, in connection with the pleadings and other facts in the case. The plaintiff contends that the defendant, the West End Street Railway Company, hereinafter called the West End Company, has become liable to pay the judgments held by the plaintiff against the Malden and Melrose Street Railroad Company, hereinafter called the Malden and Melrose Company, because of an alleged union and merger of these two [303] corporations. The findings of the master on this point are as follows:

"22. One other claim was made by the plaintiff, namely, that the Malden and Melrose Railroad Company had been consolidated with the West End Street Railway Company, and that therefore the latter is liable for the debts of the former. The West End Street Railway Company conceded that, if there had been such consolidation, it would be liable for such debts; but it denied that there was such a consolidation.

"23. I find that the stock in the Malden and Melrose Railroad Company was gradually acquired by the Middlesex Railroad Company and its successors; that, after the agreement of 1862, the former company took no corporate action except for the choice of officers; that the officers of both companies, in their reports to the railroad commissioners for many years after 1862, stated that the former company was being operated by the latter company, under the terms of said agreement; that for many years prior to the consolidation of the Middlesex Railroad Company and the Highland Street Railway Company, in 1886, the president of the Middlesex Railroad Company had owned more than a majority of the stock of the Malden and Melrose Railroad Company, which he had acquired since the lease of 1862; that after the

formation of the West End Street Railway Company, he transferred all of this stock to Henry M. Whitney, the president of the West End Street Railway Company, and the stock was then transferred to the said West End Street Railway Company, which reimbursed Mr. Whitney for the amount paid by him; that after this transfer to the West End Street Railway Company the treasurer of that company reported to the railroad commissioners that they 'owned the stock and property of the Malden and Melrose Company—all of it—and would like to have the Malden and Melrose Company report omitted'; that the railroad commissioners struck the Malden and Melrose Company from their lists, and reported as follows: 'The Malden and Melrose, having been merged in the West End by the purchase of all its capital stock and assets,' etc.

"24. I find that there was no such consolidation as the plaintiff alleges. It was admitted by the plaintiff that the statutory requirements for the consolidation had not been complied with. [304] The taking possession of the property of one corporation by another, the buying of the stock of the former by the latter, or the entire disregard of the rights of the former by the latter, as alleged, would not constitute a consolidation, making the latter directly liable for the debts of the former." He also finds that all the property of the Malden and Melrose Company, and all rights and benefits from the use of it that have come to the West End Company, so far as it is practicable to discover and separate them, except those from the use of the property since 1887, have been paid for at more than their full value.

It is very plain that, in the absence of a statutory provision on the subject, the acquisition of all the stock, property and assets of a corporation, by an individual or by another corporation, does not of itself make the new holder liable to pay the debts of the corporation. A mere purchase of such capital stock and assets is a taking of a title, which leaves unsecured creditors with no claim against the purchaser, and with no means of collecting their debts except from the corporation itself: Shaw v. Norfolk County R. R., 16 Gray, 407; Ewing v. Composite Brake Shoe Co., 169 Mass. 72, 47 N. E. 241. In the present case there is no ground for a claim of direct liability of the West End Company to the plaintiff upon these judgments, outside of the Statutes of 1887, chapter 413, which provides for a consolidation and union of the West End Company with any or all of the other street rail-

way companies authorized to run cars in or into the city of Boston, and for such a consolidation and union of each of these other street railway companies with the West End Company, or any other of said companies, and for the purchase and holding of the whole or any part of the property, rights and franchises of any or all of these companies by any of the others. It becomes necessary to consider this statute, to see whether a liability for these judgments has been created under it.

It provides in section 1, that, "In every case of consolidation as aforesaid, the corporations uniting shall constitute a new corporation under such name as shall be agreed upon in the manner and at the meetings aforesaid; but the calling of the first meeting of said new corporation shall be provided for in its articles of consolidation," etc. This shows that, in case of a union by consolidation, a new corporation is formed.

[305] There may be a purchase and holding of "the whole or any part of the property, rights and franchises of any or all of" these corporations. "In every case of purchase by one corporation of the entire property, rights and franchises of another or others, as aforesaid, the corporation purchasing shall have, hold, possess, exercise and enjoy all the locations, powers, privileges, rights, franchises, property and assets which, at the time of such purchase, shall be had, held, possessed or enjoyed by the corporation or corporations selling, or either or any of them, and shall be subject to all the duties, restrictions and liabilities to which they, or either or any of them, shall be subject." This is another and different provision, whereby one of these corporations may acquire all the rights and become subject to all the liabilities of another corporation without any formal and technical consolidation of the two. By mere purchase, all the rights and franchises pass with its property from one corporation to the other, and, if the selling corporation survives in name, it has no powers, or franchises, or anything else of value. It is, therefore, a union and virtual consolidation, although it is not the statutory consolidation mentioned in the section. In section 2 there is a provision for reaching the same result by issuing preferred shares of stock of the West End Company and delivering them in exchange for shares of one of these other corporations on terms agreed upon, and depositing the shares received from the other corporation with a trust company in Boston, until all the shares of the other company have been

received, and then canceling them. In this case, as in the last, the West End Company acquires all locations, rights, powers, privileges and franchises of the other company, and becomes subject to all its duties, restrictions and liabilities. By either of these three methods the new consolidated company, or the purchasing company, or the West End Street Railway Company after delivering its stock, stands in the place of the company whose property and franchises have been acquired.

In section 1 is this provision: "But such leases, purchases, sales and consolidations shall be only upon such terms and conditions as shall be agreed upon in the first instance by the directors and then by a majority in interest of the stockholders of each corporation [306] called for that purpose and approved by the board of railroad commissioners."

The second section is inapplicable to this case, for the stock of the Malden and Melrose Company was not acquired by giving shares of the preferred stock of the West End Company in exchange for it. The master has found that there was no consolidation, that is, that there was no formation of a new corporation under the statute. But he has also found that the West End Company reported to the railroad commissioners that it "owned the stock and property of the Malden and Melrose Company—all of it—and would like to have the Malden and Melrose report omitted." Here is an admission of the company, made many years ago, which shows that the condition is such as that referred to in section 1 of this statute, when the entire property, rights and franchises of one of these corporations has been acquired by another of them. The admission does not state in terms that the mode of acquisition was exactly that prescribed in the statute. The required approval by the railroad commissioners of the terms and conditions upon which this result was reached is found, by implication, in their report, in which they struck the Malden and Melrose Company from their lists, with this explanation: "The Malden and Melrose having been merged in the West End by the purchase of all its capital stock and assets," etc. Since then, this corporation, with all that pertained to it, has been treated by the railroad commissioners as belonging to the West End Company. The latter corporation, for more than twenty years, has treated the property formerly of the Malden and Melrose Company as its own, has acquired new locations in its own name, in place of other locations originally granted to the Mal-

den and Melrose Company, while most of these locations originally so granted have been revoked, some of them on the petition of the West End Company. The Malden and Melrose Company has known of this admission, and of all that has been done by the other company in reference to its property and interests, and seemingly has acquiesced in it.

The most difficult question in the case is whether the acquisition of the entire property, rights and franchises of the Malden and Melrose Company by the other defendant is to be deemed a purchase, upon terms and conditions agreed upon in the first instance [307] by the directors and then by a majority in interest at a meeting of the stockholders of each corporation held for the purpose. As we have said, the approval of the railroad commissioners sufficiently appears. There is no reported evidence or finding bearing directly upon the way in which the business was accomplished. It is found that the stock of the Malden and Melrose Company, which was held at the time by the president of the Middlesex Railroad Company and afterward by the president of the West End Company, was transferred to the latter corporation and paid for by it. This purchase seems to have covered most of the capital stock of the company. How or when other stock or property was procured does not appear.

It is fair to infer that this business was done lawfully, by an agreement of the directors of the two companies, and was confirmed by corporate action. Indeed, the only way in which it could be legally done was under this statute, and in accordance with its terms. Apart from this statute, the West End Company had no right to buy and hold the stock of another street railway company: Pub. Stats., c. 113, sec. 18. As it could not become the owner of the "stock and property of the Malden and Melrose Company—all of it," except by a purchase of the kind stated in the statute, it is not to be assumed, from a mere failure to present evidence of the particulars of the action, that the acquisition of this stock and property was unlawful, and that all the action of the West End Company for more than twenty years in reference to the property has been contrary to law. There is a similar and perhaps stronger inference to be drawn from the action of the railroad commissioners. As an official board, supervising the conduct of all the street railway companies in the commonwealth, it knew the law applicable to such companies, and it became satisfied that the West End Company had lawfully acquired all the stock and prop-

erty of the Malden and Melrose Company. Presumably, this was upon a presentation of evidence that this property had been purchased under the Statutes of 1887, chapter 413, upon terms and conditions agreed upon by the directors of each of the two companies and afterward by a majority of the stockholders of each company, at meetings called for the purpose. In the absence of evidence to the contrary, there [398] is always a presumption that the action of such a corporation is lawful, and still more is there such a presumption in regard to the official action of a board of public officers.

There is nothing in the statute to indicate that such a purchase might not lawfully include the buying of the stock of the corporation whose franchises and property are to be acquired. Indeed, under the second section the union and transfer are accomplished entirely by an acquisition of stock through an exchange of preferred shares of the West End Company for the stock of the other company. It was the purpose of the legislature that, upon the giving up of its property and franchises in either of the three ways, whether by an exchange of shares under sec. 2, or by a formal consolidation under sec. 1, or by a sale and purchase of the entire property, rights and franchises under section 1, the creditors of the selling or consolidated corporations should be protected by obtaining a substituted liability of the new consolidated company, or of the purchasing company. In the present case the West End Company evidently sought to acquire by purchase all the property and valuable rights and interests of the Malden and Melrose Company. It did that which its officers deemed necessary to obtain these under the statute. For more than twenty years it has held and used all the franchises and property of the other corporation as its own. It intended to put itself in a position to have all the advantages which the statute permitted it to obtain, by a purchase in the manner prescribed. That it was ignorant of the existence of these judgments against the Malden and Melrose Company, which had been recovered many years before and which were afterward renewed by suits, is immaterial to the rights of this plaintiff. These rights are protected by the statute which says that a corporation acquiring such property and franchises of another corporation shall be subject to its liabilities. Having availed itself of the privileges conferred by the statute, this defendant cannot complain because it is held to the accompanying liabilities. Nor should it object to the drawing of inferences from its

declarations and public acts, on which the legality of its corporate conduct in reference to the other corporation depends. Nothing less than strong proof of the negative would justify a conclusion that these two corporations [309] and their officers failed to heed the requirements of the statute in this important matter.

We understand the master's finding of an admission "by the plaintiff that the statutory requirements for the consolidation had not been complied with" to mean an admission that the requirements for the statutory consolidation mentioned in section 1 had not been complied with, and not an admission that there had not been a union, or a virtual consolidation through the complete ownership of one corporation by the other, obtained in a lawful way.

The master also found that "after the agreement of 1862 the former company (the Malden and Melrose Company) took no corporate action except for the choice of officers." We are not certain whether this is intended to cover the period after the enactment of the Statutes of 1887, chapter 413; but if it is so intended, it does not indicate that the directors did agree to the terms and conditions of a purchase by the West End Company which should give complete ownership and control of the entire property, rights and franchises of the corporation. It is found that the officers of the corporation made reports to the railroad commissioners for many years after 1862, and presumably they took other action as officers.

If the finding means that this company never agreed to the purchase by the West End Company at a meeting of the stockholders called for the purpose, we are inclined to hold that this provision of the statute is for the protection of the stockholders, and when the purchaser of all the property and capital stock of the company has for more than twenty years treated this as a valid purchase, and acted upon it, with its acquiescence, that the corporation cannot now set up its noncompliance with this provision against the validity of the change of ownership. Especially should this be so held when the corporation and its managers, in pursuance of the arrangement, have permitted the use of its property to be enjoyed by the purchasing corporation, and its earnings to be so mingled with the earnings of the purchasing company that it is impossible to follow them. The effect of this conduct of the managing officers of both corporations, and of the corporations themselves, has been to put the earnings of the

Malden and Melrose Company beyond the reach of creditors, [310] through the union of the two corporations. Both corporations should now be estopped to deny that the statutory requirements were complied with and that there was a complete union by purchase, such as was contemplated by the statute. There has been a virtual merger of the two corporations, acquiesced in for a long time by everybody interested. It has often been held that noncompliance with similar statutory provisions, made for the benefit of a corporation, cannot be set up against third persons, when those for whose protection they were intended have acquired advantages through action in disregard of them: Chicago etc. R. R. v. Ashling, 160 Ill. 373, 43 N. E. 373; Chicago etc. R. R. v. Ferguson, 106 Ill. App. 356; Williamson v. New Jersey Southern R. R., 26 N. J. Eq. 398; St. Louis etc. R. R. v. Terre Haute etc. R. R., 145 U. S. 393, 12 Sup. Ct. Rep. 953, 36 L. ed. 748; Phinizy v. Augusta etc. R. R., 62 Fed. 678. See Hatch v. Hawkes, 126 Mass. 177; Spaulding v. Arlington, 126 Mass. 492; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977. We are of opinion that both corporations have been so conducted, in reference to the ownership of the Malden and Melrose Company and of its property, rights, and franchises, especially in reference to the income from the use of its property, that, as against creditors of that company who are left with nothing from which to satisfy their debts, they are estopped to deny the regularity of their proceedings and the completeness of a union by purchase, such as the statute refers to. It follows that the West End Company became subject to the liabilities of the other defendant, including the liability now represented by the plaintiff's judgments.

The statement in the tenth paragraph of the bill is broad enough to include a union of the West End Company with the Malden and Melrose Company by the purchase of its entire property, rights and franchises, and therefore an assumption of its liabilities under this statute, and a consolidation in fact, although there was not a formal and technical consolidation by the creation of a new corporation. The exception to the twenty-fourth finding of the master is therefore sustained, not because of the statement that there was no technical consolidation, within the meaning of the word as used in the statute, but because [311] the finding seems to include a union and consolidation in fact, through a purchase of the entire property, rights and franchises of the other corporation, in

such a way as to make it subject to the liabilities of that corporation, under the statute.

The twenty-fifth finding is not fatal to the plaintiff's claim to recover for a direct liability of the West End Company under the statute. So far as it purports to conclude that, upon the facts, either with or without an amendment, the bill cannot be maintained, the plaintiff's exception to it is sustained.

The exception to the twenty-sixth finding is overruled. The grounds of objection on which the exception is founded are not applicable. The mere fact that the West End Company has taken possession of all the assets of the Malden and Melrose Company does not create a liability to the plaintiff. If creditors might follow the assets in equity, this finding has no relation to that subject. Whether the legal proposition stated in this finding can be availed of by the defendant at this stage of the case is a question which is not definitely presented by the report of the single justice. We treat it as a question of law that can be considered apart from the exception.

In reference to the questions intended to be presented by the report of the single justice, we are of opinion that the tenth exception of the defendants to the master's report on recommittal does not require consideration.* We overrule it as immaterial in the present aspect of the case, without prejudice to the right of the respondents to have it considered further if it becomes important hereafter.

Exceptions to the twenty-fourth and twenty-fifth findings sustained; case to stand for further hearing.

The Effect of the Consolidation of Corporations is the subject of a note to Morrison v. American Snuff Co., 89 Am. St. Rep. 604.

The Effect of a Sale by a Corporation of All Its Property and Assets is the subject of a note to Tanner v. Lindell Ry. Co., 103 Am. St. Rep. 548.

*This exception was "to the failure of the master to find that in February, 1870, the Middlesex Railroad Company had acquired from the Suburban Railroad Company (formerly the Cliftondale Railroad Company) the right to enter upon and use the tracks of the Malden and Melrose Railroad Company in such mode as might be agreed upon."

NELSON v. PETERSON.

[202 Mass. 369, 88 N. E. 916.]

APPEAL AND ERROR, Facts, When may be Re-examined.—Where, in a suit in equity, the trial judge reports the case to the appellate court for such decree "as justice and equity may require," that court will examine the facts and come to its conclusion, giving due weight to the conclusion of that judge where he has found certain facts. (p. 504.)

GIFT CAUSA MORTIS, Delivery Essential to.—To support a gift causa mortis there must be a delivery or a change of possession made for the purpose of passing the title in praesenti. The only difference between a gift inter vivos and a gift causa mortis is that in the former the change in the title is irrevocable and indefeasible, while in the latter it is revocable and defeasible under certain conditions. (p. 504.)

GIFTS CAUSA MORTIS, Delivery, to Whom must be Made.—It is not indispensable that in case of a gift causa mortis there be a delivery to the donee personally, but if not, it must be made to some person for him, who must, after the death of the donor, deliver the property to the donee, who must accept it. (p. 504.)

GIFT CAUSA MORTIS, When not Sufficiently Shown.—Where property claimed to be given causa mortis consisted of five hundred dollars in money and of wearing apparel, the latter being in a trunk and partly in a closet of a room occupied by the donor as a boarder in the house of a third person, and the donor, knowing himself to be very ill and about to be taken to a hospital, offered his landlady the key of the trunk, telling her not to give it to any person but to the president and board of trustees of a designated society, and telling her of money in a pocketbook in the trunk and also referring to some wearing apparel, which he said he supposed his nephew could wear, and, on being asked by the landlady as to whom she was to give the trunk keys, answered, "The society, they will take charge of everything," and she, instead of taking the key, asked him to put it in a designated place, whence she subsequently took it, and on his being told that this was not lawful and that the transaction should be put in black and white, he replied that he would send for the president to come to the hospital, and that if his body was not cremated, he wanted a little headstone at his grave, and that what is left he wanted the society to have, this did not show a perfect gift causa mortis. (p. 506.)

V. E. Runo, for the plaintiff.

W. A. Thobodeau and G. L. Ellsworth, for the defendant.

[370] HAMMOND, J. This was a bill in equity filed by the administrator of the estate of Nils J. Liljestrom, deceased, to compel the delivery to him of personal property claimed by him to be estate of said Liljestrom, against the defendant, who holds and claims the property by virtue of an alleged donatio causa mortis to the Skandinaviska Föreningen, a voluntary association of which the plaintiff is president and a trustee, and of which Liljestrom was a member at the time of his death.

The trial judge, having found certain facts, dismissed the bill; and the case is before us upon a report, such decree to be entered as justice and equity may require.

After stating the facts, the trial judge makes the following statement: "I do not think this evidence compels me to hold the gift incomplete. The burden seems to me upon the administrator, as the plaintiff. There is a possibility Liljestrom contemplated doing something further. It is also possible he did not."

Inasmuch as this is a proceeding in equity and is before us upon facts found, and by the terms of the report such decree is to be entered as justice and equity require, it becomes our duty to examine the facts and come to our own conclusion, giving due weight to the conclusion reached by the trial judge. [371] We have carefully studied the facts and do not think they show a completed donatio causa mortis. The most that can be said is that they indicate a desire upon the part of Liljestrom that after certain of his property had been disposed of for funeral and burial purposes, the rest should go to the society represented by the defendant. He evidently was thinking of his whole estate and of its future disposition, and not simply of certain specified articles out of his estate.

But however that may be, there was no sufficient delivery. In this class of gifts, as in gifts inter vivos, there must be a delivery, a change of possession, which must be made for the purpose of passing the title in praesenti. The donor's title must pass and such must be the intention. The only difference in this respect between the two classes of cases is that where there is a gift inter vivos the change in the title is irrevocable and indefeasible, while in the case of a gift causa mortis the change is revocable and defeasible upon certain conditions: See Duryea v. Duryea, 183 Mass. 429, 67 N. E. 351, and the authorities there cited.

There is no evidence that before the death of Liljestrom he made any delivery to the defendant, but it is contended that a delivery was made to Mrs. O'Shea as the defendant's representative by his handing to her the key of the trunk containing some of the articles, and because she, after Liljestrom's death, handed the key and the trunk and other articles to the defendant. It is true a delivery need not be made to the donee, but may be made to some third person for him; and if after the death of the donor this person delivers the subject of the gift to the donee, who accepts it, that is sufficient delivery.

The property of Liljestrom consisted of certain wearing apparel and five hundred dollars in money. Some of the wearing apparel was in the trunk and some was hanging up in the closet of his room which he occupied as a boarder in Mrs. O'Shea's house. The acts relied upon to show delivery took place on a Monday morning. Liljestrom was very sick and knew it. Before leaving his boarding-house for the hospital "he handed her the key to his trunk and said: 'Here is the key to my trunk. Don't give it to anybody but the president, Mr. Peterson, or the board of trustees. Give it to them. There is five hundred dollars in a pigskin pocket-book [372] in my trunk rolled up in my pants, and if anything happens to me there is a dress suit I am going to put on, and there is some clean underwear and you can pick it out.' Mrs. O'Shea said, 'I hope there won't be nothing happen.' He replied, 'No, but you can never tell. There is some shirts there I suppose my nephew can wear.' Mrs. O'Shea said, 'Oh, there is lots of clothes in the closet. Who will I give the trunk to and all that?' He said, 'The society. They will take charge of everything. Do not give the key to anybody but Mr. Peterson or the board of trustees.'

"He also handed her two dollars as a gift to herself; told her he gave her husband a small basket of tools, and gave her his silver watch and told her to take the watch and key to her own room and keep them till the president or board of trustees came and then give them to them. Mrs. O'Shea at the moment was brushing a coat for him to wear away and instead of taking the key, or after taking it, asked him to put it in a place she indicated, whence she subsequently took it. Mrs. O'Shea said to him, 'This ain't legal, Mr. Liljestrom. You have to have it in black and white.' He said, 'Well, Mr. Peterson is to come to-night, and I will send him word to come to the hospital. If he comes here you send him to the hospital. You can't tell what will happen.' Liljestrom said, 'If I am not cremated, I want a little headstone put up, a grave and a headstone with perpetual care.' Mrs. O'Shea said, 'I guess there won't be much left after that.' He said, 'I don't want an expensive one, I want a little, neat stone. What is left I want the society to have.' "

It is very plain that he did not intend that the society (whom the defendant represents) should have all the things in the trunk. He intended that upon his death the dress suit should be used as his burial clothes, that the "clean underwear" should be "picked out" by Mrs. O'Shea either

for a similar or some other purpose, and that his nephew might have some of the shirts to wear. None of these things, although in the trunk, were to go finally to the society. Nor did he intend that the whole of the money should go to it. Unless cremated he wanted a "little headstone put up, a grave and a headstone with perpetual care."

373 All this is inconsistent with the theory that he was then transferring to the society all his right and title to the clothes in his trunk. The delivery of the key of the trunk to Mrs. O'Shea could not, therefore, have been done with the intention of transferring to the society these articles as their property. And in view of all the circumstances of the case we are constrained to the view that the delivery of the key not being sufficient to change the title to a part of the contents must fail as to the whole. Nor was there sufficient delivery of the clothes in the closet. What was said about them was rather a direction to Mrs. O'Shea to hand them to the society than an indication of an intention to part then and there with the title.

Moreover it does not seem to us that Mrs. O'Shea agreed or supposed she was acting for or in behalf of the defendant or the society in taking the key. She certainly did not suppose that Liljestrom's purposes as to the disposition of his estate could be carried out without a writing, and we think she intended to act and supposed she was acting to keep the property safely for him rather than for the society. See as bearing somewhat on the question discussed in this case Marshall v. Berry, 13 Allen, 43, and cases there cited; McGrath v. Reynolds, 116 Mass. 566, and cases there cited.

Decree for the plaintiff.

Gifts Causa Mortis are discussed at length in the note to Johnson v. Colley, 99 Am. St. Rep. 890. Such gifts, being donations made without the safeguards cast by the law around the execution of wills, are not favored: Gilmore v. Lee, 237 Ill. 402, 127 Am. St. Rep. 330. As to the necessity and sufficiency of delivery, see Bailey v. New Bedford Institution for Savings, 192 Mass. 564, 116 Am. St. Rep. 270; Winslow v. McHenry, 93 Minn. 507, 106 Am. St. Rep. 448; Stevenson v. Earl, 65 N. J. Eq. 721, 103 Am. St. Rep. 790; Coolidge v. Knight, 194 Mass. 546, 120 Am. St. Rep. 573. That delivery may be made to a third person for the benefit of the donee, see Varley v. Sims, 100 Minn. 331, 117 Am. St. Rep. 694.

COMMONWEALTH v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[202 Mass. 394, 88 N. E. 764.]

CRIMINAL LAW—Unintentional Crime.—Unless wrongful intent or guilty knowledge, commonly designated by the use of the words "willfully" or "maliciously," is made an essential element of an act prohibited by statute, the violator of such statute may be convicted and punished, though he had no design to disobey it. (p. 508.)

RAILROADS, Obstruction of Highway by Wrongful Acts of Third Persons, When No Defense.—Under the statutes of Massachusetts imposing a penalty on any railroad corporation which shall willfully or negligently obstruct or unnecessarily or unreasonably use or occupy a highway, town way or street, or in any case obstruct, use or occupy it with cars or engines for more than five minutes at one time, it is no defense that the obstruction of the street beyond the allowed time was due to the unlawful acts of third persons without knowledge of the defendant or its servants in maliciously opening air-cocks on certain cars, and allowing the air to escape. (p. 510.)

Prosecution against the New York Central and Hudson River Railroad Company for obstructing a street in Cambridge with cars for more than five minutes at one time.

As a defense, the defendant offered to prove that while its cars were standing temporarily in the street, third persons, without the knowledge of the defendant or its servants, maliciously and in violation of law, opened the air-cocks upon certain cars, allowing the air to escape from the air-brakes and setting the brakes, so that it was impossible to move the train over the crossing and over the street without first finding and closing the air-cocks, and pumping up a fresh supply of air from the engine, and that this could not be done so as to release the brakes and move the cars within the five minutes during which they were not forbidden to obstruct the street. The trial judge ruled that the evidence so offered was immaterial and excluded it. The jury returned a verdict of guilty, and the defendant alleged exceptions.

G. L. Mayberry, for the defendant.

J. J. Higgins, district attorney, for the commonwealth.

[395] BRALEY, J. By the Statutes of 1906, chapter 463, part 2, section 155, section 196 of chapter 111 of the Revised Laws is incorporated without change, and by section 159 of part 3, the provisions being the same as those of existing statutes, section 155 is to be construed as a continuation of

section 196, and not as a new enactment. Accordingly these complaints may be properly described as brought under section 196, which, so far as material, provides that "no railroad corporation or its servants or agents, shall willfully or negligently [396] obstruct or unnecessarily or unreasonably use or occupy a highway, town way or street, nor in any case obstruct, use or occupy it with cars or engines for more than five minutes at one time," without incurring a prescribed penalty for each violation. It was undisputed that on two separate days the defendant's cars obstructed, or occupied for more than the time permitted, a street which presumably was a public way although not so described. The defendant does not question that under the decision in Commonwealth v. New York etc. R. R., 112 Mass. 412, where an earlier act, of which the present statute is substantially a reenactment, was considered, it would be no excuse if the obstruction was accidental, or could not have been avoided by the exercise of reasonable diligence. But the valves to the air-brakes having been maliciously opened by strangers without the knowledge of the defendant or its servants, so that the train could not be operated within the period owing to the delay required not only to find and close the valves but also to furnish a fresh supply of air, it contends that their interference constitutes a full defense: See Stats. 1906, c. 463, pt. 2, sec. 239; Rev. Laws, c. 111, sec. 255. Or as defined in Commonwealth v. Elwell, 2 Met. 190, 35 Am. Dec. 398, "if a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act, or concur in it, it is a matter of defense."

If, at common law, crime when committed by the individual consists of acts done with an evil intent, in statutory offenses created in the exercise of the police power, unless a wrongful intent or guilty knowledge, commonly designated by the use of the words "willfully" or "maliciously," is made an essential element of the prohibited act, the violator may be convicted and punished, even if he has no design to disobey the law: Commonwealth v. Bradford, 9 Met. 268; Commonwealth v. Wentworth, 118 Mass. 441; Commonwealth v. Connelly, 163 Mass. 539, 40 N. E. 862; Commonwealth v. Lavery, 188 Mass. 13, 73 N. E. 884. It is because of this familiar doctrine, inherent in the construction of statutes which prohibit under a penalty acts and conduct which otherwise are not generally deemed immoral or criminal, that con-

victions for the sale of liquor, where the seller had no just [397] ground to believe it was intoxicating, or of imitation butter by the defendant's agent without a descriptive wrapper, which, though furnished, he failed from mere carelessness to use, or an inadvertent sale by the defendant's servant of milk not of standard quality, and the admission of a minor to a poolroom, where the defendant neither knew nor had any reason to believe that he was under age, have been sustained: Commonwealth v. Savery, 145 Mass. 212, 13 N. E. 611; Commonwealth v. Daly, 148 Mass. 428, 19 N. E. 209; Commonwealth v. Warren, 160 Mass. 533, 36 N. E. 308; Commonwealth v. Gray, 150 Mass. 327, 23 N. E. 47; Commonwealth v. Emmons, 98 Mass. 6.

In other jurisdictions in the construction of similar statutes, proof of moral turpitude or of a guilty mind has never been deemed necessary to sustain a conviction: Barnes v. State, 19 Conn. 398; State v. Smith, 10 R. I. 258; People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; Commonwealth v. Zelt, 138 Pa. 615, 21 Atl. 7, 11 L. R. A. 602; Farmer v. People, 77 Ill. 322; Humpeler v. People, 92 Ill. 400; Jamison v. Burton, 43 Iowa, 282; State v. Hartfiel, 24 Wis. 60; Regina v. Woodrow, 15 Mees. & W. 404; Rex v. Paine, 7 Car. & P. 135. If we turn to the language of the statute, the acts for which the defendant has been convicted are positively forbidden.

It was within legislative authority to have extended the qualifying words of "willfully" or "negligently," which describe the offense defined in the first clause of the sentence in section 196, to the unlawful acts with which the defendant is charged. The history of this legislation from its origin to the latest revision, however, indicates clearly a public policy, which, in the language employed to define the offense, recognizes no extenuating circumstances of the nature relied on by the defendant: Stats. 1854, c. 378; Gen. Stats., c. 63, sec. 68; Stats. 1871, c. 83, sec. 1; Stats. 1874, c. 372, sec. 129; Stats. 1895, c. 173; Rev. Laws, c. 111, sec. 196; Stats. 1906, c. 463, pt. 2, sec. 155; Commonwealth v. New York etc. R. R., 112 Mass. 412.

By common law as well as under Revised Laws, chapter 53, the unlawful obstruction of a public way by whomsoever caused is an indictable offense: Commonwealth v. King, 13 Met. 115; Commonwealth v. Old Colony R. R., 14 Gray, 93. And under Revised Laws, chapter 111, section 124, the rights of the community are [398] recognized as paramount, for a

railroad which is laid out across a public way must be so constructed as not to obstruct it: Holliston v. New York etc. R. R., 195 Mass. 299, 81 N. E. 204. If this section is read with section 196, the reason for the unqualified language of the last section is unmistakable. The accommodation of public travel, for which the ways have been provided and are maintained, requires that at grade crossings travelers shall not be subjected to prolonged delays arising from their occupancy by the cars or engines of a railroad company. It was within the province of the legislature to fix the time during which a grade crossing could be encumbered, and this adjustment between its use by the public and by the railroad must be treated as not only reasonable but final until the statute is either modified or repealed. In the practical control of movements of its cars or trains, no argument has been advanced, nor was there any proof at the trial, that by competent supervision, even if necessarily required to be more or less constant, the defendant would not have been able to have prevented the mischief caused by intermeddlers. Whatever its ignorance of the facts may have been, the defendant was bound at its peril to know and obey the law, and its failure to adopt such precautions as might be necessary to enable it to comply with the statute furnishes no ground of justification or defense: Commonwealth v. Mash, 7 Met. 472; Commonwealth v. Curtis, 9 Allen, 266; Parker v. Alder (1899), 1 Q. B. 20.

Exceptions overruled.

A Railway Company has a Right to Leave Its Cars at Any Point on its sidetrack except in or upon the highway; and where a car was so left, but was afterward moved upon the highway by persons for whom the company was not responsible, and while there it frightened the plaintiff's horses and she was injured in consequence, no liability is created against the company, unless it negligently permitted the car to remain upon the highway an unreasonable length of time: Cleveland etc. Ry. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644.

TURNER v. WILLIAMS.

[202 Mass. 500, 89 N. E. 110.]

MARRIAGE, Question of, When for the Jury.—If, in a suit to which a woman is a party, testimony is offered that four years before her second marriage she informed the witness that her husband was alive, it is error for the court to rule, as a matter of law, that he was not alive at such second marriage. The question should have been submitted to the jury. (p. 512.)

DIVORCE, Evidence of at the Time of a Second Marriage.—A statement by a husband that at the time he contracted a marriage the wife was a divorced woman, and that she told him so, being admitted without objection, it is improper for the court to direct a verdict ignoring the divorce. Whether there was one was, upon his testimony, a question of fact for the jury. (pp. 512, 513.)

MARRIAGE, Presumption of Legality of.—If there is no extrinsic evidence either way, the legality of a marriage will be assumed. (p. 513.)

MARRIAGE, Presumption of Innocence, When not Sufficient to Support.—If a marriage is assailed and evidence received tending to impeach it, a question of fact arises, and a presumption of innocence does not compel the assumption of death or divorce in order to support the marriage. (pp. 513, 514.)

MARRIAGE, Presumption of Death in Support of.—Ordinarily whether one is alive on any given date within the period of seven years of unexplained absence is a question to be determined upon all the probabilities of the case, and there is no inflexible rule by which this presumption can be invoked to protect a subsequent marriage. (p. 514.)

MARRIAGE, Supporting on the Ground that It was Entered into in Good Faith and that an Impediment Existing Thereto had been Removed.—Where a marriage is assailed on the ground that when it was contracted the woman had a husband living from whom she had never been divorced, testimony that such husband had been absent, unheard of, for more than seven years prior to the death of her second husband is sufficient to uphold the marriage under the statutes of Massachusetts, on the ground that it had been entered into in good faith and followed by continued cohabitation after the removal of an impediment. (p. 515.)

M. M. Johnson and G. N. Merritt, for the plaintiff.

J. J. Pickman, for the defendant.

502 RUGG, J. This is an action of contract to recover money alleged to have been had and received to the use of the estate of the plaintiff's testator because obtained through the fraud of the defendant's intestate. The fraud claimed was that the defendant's intestate, under the name of Emma E. Ingalls, induced the plaintiff's testator, Joseph Turner, to marry her and settle property upon her by falsely representing herself to be a single woman. There was evidence tending to show that the defendant's intestate under the name of Emma E. Ingalls was from 1858 to 1870 the wife of

Nelson N. Ingalls, living with him at Lowell in this commonwealth; that in or before 1870 he had deserted her; that his place of residence was thereafter for some time unknown to her, and that at one time he had lived in New [503] Hampshire, but never afterward in Lowell; that in 1870 she filed a libel for divorce against Ingalls, which was dismissed in 1873; that in 1874 she was married to Joseph Turner, having represented to him that she was a divorced woman, and lived with him in Lowell until his death on September 19, 1895. One Marsh testified that on September 5 or 6, 1888, he "knew from information from" the defendant's intestate that her first husband was at Bridgeport, Connecticut. "She said something about his being down there"; and that he thought he told the plaintiff "something about his stepmother's* telling me about Ingalls being in Bridgeport, and she asked me to inquire him out when I went there." There is no evidence that he was ever heard from after that date. In the superior court a verdict was directed for the defendant.

The point at issue as the case was tried was whether the defendant's intestate, at the time of her marriage with the plaintiff's testator, was capable of entering into a valid marriage. The decision hinged upon the question whether at that time her former husband was living and undivorced. This was a fact to be determined upon all the evidence.

Plainly there was sufficient evidence to support a finding that he was then alive. He was living in 1870, three years before, and there was the testimony of the witness Marsh to the effect that he received information from the defendant's intestate in 1888 that her first husband was then living in Connecticut. In view of this evidence it was error for the court to rule as matter of law that her first husband was not living in 1874 at the time of the second marriage of the defendant's intestate.

It is said in the exceptions that the plaintiff's testator, before the marriage now questioned, "stated to his children, and others, that said Emma was a divorced woman and that she had told him she was a divorced woman." This appears to have been admitted without objection, and, being then in, was entitled to its natural probative force. Assuming that this evidence was admitted under Revised Laws, chapter 175, section 66, as having been made in good faith upon the personal knowledge of the declarant, the direction of a verdict

*The plaintiff was a son of Joseph Turner.

for the defendant was not warranted. The [504] question to be decided was whether the prior marriage of the defendant's intestate was dissolved at the time of her marriage with the plaintiff's testator. Proof that it was valid and subsisting was the burden assumed by the plaintiff, and this burden rested on him throughout the trial. Although there was oral testimony to the effect that this marital relation had been dissolved by divorce, it was nevertheless open to the plaintiff to argue that the statements to this effect were made by interested persons, who were mistaken, discredited, unreliable, deceived or deliberately attempting to deceive, and therefore not entitled to belief.

It is urged in support of the ruling, that the law has such a tender regard for solemnized marriage and for the assumption of innocence as to presume strongly that all apparent obstacles were removed so that its validity may be established. It has often been decided or intimated by way of dictum that death or divorce of one of the parties to a prior marriage will be presumed in order to support such a second one.* This train of cases appears to have had its origin in The King v. Twyning, 2 Barn. & Ald. 386, which "has been much misunderstood," as is pointed out in Lapsley v. Grierson, 1 H. L. Cas. 498, where it is explained. Where there is no extrinsic evidence either way, the legality of a marriage, like sanity, continuance of life, and the regularity of acts of public officers, will be assumed. But where it is attacked and evidence is introduced tending to impeach it, then a question of fact arises to be proved in the light of all the circumstances and the reasonable inferences from them. The presumption of innocence is not so much stronger than any other as to compel the assumption of death or divorce in order to infer its existence. The unsoundness of such a contention becomes apparent when applied baldly to every conceivable state of facts. A marriage could not be ruled as a [505] matter of law to be valid by reason of the presumption of innocence, if other

*Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; Hunter v. Hunter, 111 Cal. 261, 52 Am. St. Rep. 180, 43 Pac. 156, 31 L. R. A. 411; Cash v. Cash, 67 Ark. 278, 54 S. W. 274; Hadley v. Rash, 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312; Alabama etc. Ry. v. Beardsley, 79 Miss. 417, 89 Am. St. Rep. 660, 30 South. 660; Scott's Admr. v. Scott (Ky.), 77 S. W. 1122; Montgomery v. Bevans, 1 Saw. 653, Fed. Cas. No. 9735; Erwin v. English, 61 Conn. 502, 23 Atl. 753; Lockhart v. White, 18 Tex. 102; Carroll v. Carroll, 20 Tex. 731; Smith v. Knowlton, 11 N. H. 191; Greensborough v. Underhill, 12 Vt. 604; Palmer v. Palmer, 162 N. Y. 130, 56 N. E. 501.

evidence showed that a month or a day before its solemnization one of the parties was living with a legal and youthful spouse of good health and nondangerous employment. The law jealously regards the marriage relation and makes reasonable assumptions in its favor, but it has no special regard for second in preference to first marriage. The burden of proof in the absence of conflicting evidence may sometimes determine the result. The state of health, age, occupation or prospective journey of a given individual may warrant the inference of death within a brief time. But ordinarily whether one is alive on any given date, within the period of seven years of unexplained absence is a fact to be determined upon all the probabilities arising in a particular case. Circumstances may exist, which would make reasonable the inference of a divorce. But there is no inflexible rule by which it can be invoked to protect subsequent nuptials. There is no absolute presumption of innocence, which will of itself prove the validity of a subsequent marriage in preference to the continuance of a former one. The validity or invalidity of the marriage drawn in question must be established by the party upon whom the burden of proof is cast, upon all the facts with the reasonable inferences flowing from them. The law marks no particular consideration as of prevailing consequence in all cases. There is no "sacramental force" in the presumption of innocence over the presumption of the continuance of life or any other status in its nature likely to endure. Presumptions are rules of convenience based upon experience or public policy, and established to facilitate the ascertainment of truth in the trials of causes. There are a few instances of conclusive presumptions; but, where there are conflicting presumptions, one is not as matter of law stronger or weaker than another. The whole case then is thrown open to be decided as a fact upon all the evidence. It is for the sound judgment of the jury to weigh all the circumstances, including the characters of the persons involved and the probability of different lines of conduct, and determine where the truth lies as a matter of common sense unfettered by any arbitrary rule: Hyde Park v. Canton, 130 Mass. 505; Commonwealth v. McGrath, 140 Mass. 296, 6 N. E. 515; State v. Plym, 43 Minn. 385, 45 N. W. 848; Reynolds v. State, [506] 58 Neb. 49, 78 N. W. 483; Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; Casley v. Mitchell, 121 Iowa, 96, 96 N. W. 725; Northfield v. Plymouth, 20 Vt. 582; Lapsley v. Grierson, 1 H. L. Cas. 498; Regina v.

Willshire, 6 Q. B. D. 366, 370; The King v. Harborne, 2 Ad. & E. 540; Regina v. Lumley, L. R. 1 C. C. 196.

Inasmuch as Nelson N. Ingalls was absent and unheard of for more than seven years after the time to which the testimony of Marsh referred before the death of the plaintiff's testator, so that the presumption of his death would arise, it would seem that the marriage here questioned might be upheld under Revised Laws, chapter 151, section 6, as having been entered into with good faith by Joseph Turner and followed by continued cohabitation after the removal of the impediment. This is a fact dependent upon evidence, and could not have been ruled as a matter of law. The effect of this circumstance, as well as the right which in any event the plaintiff may have in the proceeds of the insurance policies, are not before us.

Exceptions sustained.

Presumptions in Favor of the Validity of a Second Marriage, and the burden of proof to establish the termination or want of termination of the first marriage, and what evidence is sufficient therefor, are discussed in the note to Pittinger v. Pittinger, 89 Am. St. Rep. 198. The effect of a marriage by a person whose spouse has been absent and unheard of for seven years is considered in McCausland's Estate, 213 Pa. 189, 110 Am. St. Rep. 540; Estate of Harrington, 140 Cal. 244, 98 Am. St. Rep. 51. And the effect of the removal of an impediment to marriage followed by cohabitation is discussed in the note to Klipfel v. Klipfel, 124 Am. St. Rep. 116. If a woman contracts a second marriage in the belief that her first husband is dead, when in fact he is not, but subsequently she obtains a divorce from him, after which she and her second husband continue, as before, to live together as husband and wife with the intention of being such, an actual marriage is established: Chamberlain v. Chamberlain, 68 N. J. Eq. 736, 111 Am. St. Rep. 658.

Presumptions of Death from Long Continued Absence are discussed in the note to Policemen's Ben. Assn. v. Ryce, 104 Am. St. Rep. 198.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

BRESLER v. DELRAY REAL ESTATE AND INVESTMENT ASSOCIATION.

[156 Mich. 3, 120 N. W. 21.]

CONSTITUTIONAL LAW—Amendment of Statute, When Includes Subject not Embraced in the Title.—An amendment of "An act for the probate of wills and the settlement of testate and intestate estates," which adds a clause conferring a power of sale when necessary for the preservation of the estate or to prevent a sacrifice thereof or for the best interest of all concerned therein, introduces a new subject not within the original title, and is therefore void under a constitution declaring that no law shall embrace more than one object, which shall be expressed in its title. (p. 519.)

Beaumont, Smith & Harris, for the complainants.

Israel T. Cowles, for the defendant.

McALVAY, J. The bill of complaint in this case was filed to specifically enforce a certain contract for the sale of certain real estate situated in the city of Detroit belonging to the estate of complainants' decedent. The following statement of facts proved in the case was stipulated:

"The parties hereto, by their solicitors, have agreed upon the following as a statement of what was proved at the hearing in the court below. This statement is made in pursuance of section 3, Act 340, Public Acts of 1907.

"STATEMENT.

"Complainants are administrators with the will annexed of the estate of Joseph M. Bresler, deceased. The petitioner Eva Cramer Bresler is the widow, sole heir at law, and sole legatee, of deceased. Deceased died seised of the real estate described in the bill of complaint, which is vacant and unproductive. Nearly one-half of this land is swamp. The

taxes thereon, including special assessments, have averaged one thousand dollars per annum for the past four years, and are increasing. A heavy assessment for sewers is likely to be soon made. The estate of Joseph M. Bresler has no income to pay these taxes or assessments. They have been paid out of the principal of the estate. On May 2, 1908, complainants agreed in writing to sell this real estate to defendant, and defendant agreed to purchase it at a price favorable and advantageous to the estate, and for the full and fair value of the land. It is unquestionably necessary for the preservation of the estate, and in order to prevent a sacrifice of it, and it is for the best interest of all concerned in the estate that this land be sold.

"After making the agreement of May 2, 1908, hereinbefore referred to, complainants began proceedings in the probate court, under the provisions of chapter 243 of the Compiled Laws of Michigan of 1897, and the amendatory acts, to obtain a license from the probate court of Wayne county authorizing them to make a private sale of said real estate to defendant. The petition set forth that the sale was necessary for the preservation of the estate and to prevent a sacrifice of it, and was for the best interest of all concerned therein. A license was duly made by the probate court, after a hearing on June 23, 1908, ordering complainants, and licensing them to sell the real estate to defendant at private sale, according to the terms of the [5] agreement of May 2, 1908. All of the steps and proceedings leading up to the making of this order and the issuing of this license were in due form, and were duly taken and had, as required by law, and complainants have filed with the probate court the bond and oath required by law before a sale in such cases. Complainants have procured a quitclaim deed from K. C. Robinson for the tax titles, as required by said agreement of May 2, 1908. They have also furnished the Burton abstract of title brought down to date, as required by said agreement. The complainant Eva Cramer Bresler has also executed and tendered a full warranty deed, signed by herself, as required by said agreement. Complainants have made a due and proper tender of everything that they have agreed to do under said agreement to sell, and have offered to report said sale to the probate court as required by statute, and to obtain the confirmation thereof by said probate judge. The defendant is willing and anxious to carry out and complete the sale as agreed, and admits that complainants have complied with all of the conditions of said

written agreement of sale, except that it fears that they cannot give a good marketable title for the reason following: The estate of Charles E. Bresler, deceased, presented a claim against the estate of Joseph M. Bresler. This claim was heard by the commissioners on claims and was disallowed. From this disallowance the estate of Charles E. Bresler has appealed to the circuit court of Wayne county, and this appeal is still pending and undetermined. Defendant fears that if it buys the land in question under said probate court proceedings, the sale will be made subject to the lien or claim of said Charles E. Bresler estate.

"The following admission was read into the record at the trial in the court below: It is admitted that this is a friendly suit to determine whether the proposed sale of real estate by complainants to defendant, to be made under license of the probate court of Wayne county, shall, when consummated, vest in the defendant the entire right, title, interest, and estate of said estate of Joseph M. Bresler, deceased, free and clear of any lien, charge, or encumbrance arising from any claim or indebtedness that may now or hereafter be proved against said estate by any creditor thereof, or by any creditor of Joseph M. Bresler, and especially free and clear of the lien existing, or that may exist, because of an alleged claim of the estate of Charles E. Bresler, deceased."

[6] As appears from the foregoing statement, the determination of the question in the case depends upon the regularity and validity of the legislation which is invoked as a basis for a sale of these premises according to agreement. This is admittedly a friendly suit. It cannot be said to be in any sense a contest. Defendant desires to buy this land for twenty-three thousand nine hundred and seventy dollars, but desires that the court confirm his title in advance. Both parties proceed upon the theory that the sale may legally be made, for the purpose specified, under chapter 243 of 3 Compiled Laws, section 9078, without in any way questioning the regularity or validity of the sections relied upon. Under the circumstances the court must examine this statute, because if we accept without investigation the view of the parties to this suit as our view of this legislation, we might later find that we had erred in our decision of the case. Chapter 243 of 3 Compiled Laws is entitled: "Sale or pledge of lands of deceased persons to pay debts." The subtitle is: "Of the sale of lands for the payment of debts by executors, administrators and guardians."

The first statutory provision for the sale of real estate for the payment of debts enacted in Michigan was the act of January 31, 1809 (2 Terr. Laws, p. 25, sec. 49), entitled: "An act for the probate of wills, and the settlement of testate and intestate estates." This section provided: "That when the personal estate of any person deceased shall not be sufficient to answer the just debts which the deceased owed, and legacies given, the judge of probate is empowered to license and authorize the executors or administrators of such estate to sell so much of the real estate of the deceased as will satisfy the just debts which the deceased owed at the time of his death, and legacies bequeathed by his last will and testament."

The statute then provided for the application to the probate court to sell for the purposes mentioned. This section with slight amendments continued in force, and, as revised and re-enacted, appears in 1 Revised Statutes of 1838, page 311, part 2, title 5, chapter 1, section 1, entitled: "Of title to real [7] property by special provisions of law." Chapter 1 is entitled: "Of the sale of lands for the payment of debts by executors, administrators and guardians"; the only material changes in the section above quoted at length being the omission of the words "and legacies given," and the insertion of the words "with the charges of administering his estate." Through the following compilations this section remained without change under the same entitling to the chapter: Rev. Stats. 1846, c. 77, sec. 1; 2 Comp. Laws 1857, c. 101, sec. 1; 2 Comp. Laws 1871, c. 163, sec. 1; 2 Howell's Annotated Statutes, sec. 6025, c. 229, sec. 1. By Act No. 121, Public Acts of 1897, entitled: "An act to amend section 1 of chapter 163, 2 Comp. Laws 1871, being section 6025 of Howell's Annotated Statutes, relative to the sale of lands for the payment of debts by executors, administrators and guardians," the section under discussion was amended to read as follows:

"Section 1. When the personal estate of any deceased person in the hands of his executor or administrator shall be insufficient to pay all his debts, with the charges of administering his estate, *or whenever it shall be made to appear to the probate court that it is necessary for the preservation of the estate, or to prevent a sacrifice thereof, or for the best interest of all concerned therein,* his executor or administrator may sell his real estate for that purpose upon obtaining a license therefor," etc.

This is the statute now in force, and under which the sale in the case at bar is sought to be made. The italicized lines show the amendment of 1897.

It is clear that the matter introduced by this amendment comes within the prohibition of section 20, article 4, of the constitution then in force.

"No law shall embrace more than one object which shall be expressed in its title."

The amendment is inconsistent with, and outside of the purpose indicated by, the title of the original act as revised and re-enacted, and introduces matter outside of, and inconsistent with, the entitling of the amendatory act itself. [8] There is nothing in this title to notify the members of the legislature, or other citizens, of the intent to give authority to sell real estate of decedents except for the payment of debts and expenses of administration. This latter provision was enacted before the adoption of the constitution of 1850. The entire history of this legislation has been presented to show the settled policy of the state upon the subject matter, and to emphasize the variance between the body of the amendatory act and its title. The question involved has been before the court so often, and the rule laid down is so familiar, that the citation of authorities is not necessary. Reference is had to 1 Compiled Laws, page 81. No valid sale of this land could be made for the purpose of preserving the estate, or for any other purpose than the payment of debts and expenses of administration.

Complainant was not entitled to the specific enforcement of the contract in question. The decree of the circuit court is reversed, and a decree will be entered dismissing the bill of complaint, with costs of both courts to defendant.

Blair, C. J., and Grant, Montgomery and Ostrander, JJ., concurred.

In the Case of People v. Stickle, 156 Mich. 557, 121 N. W. 485, practically the same question twice recurred. In that case a statute contained one provision in accordance with its title and another also in accordance with the title expressly repealing an earlier statute, but which went further than the title and repealed all other acts contravening its provisions. An objection on the ground of unconstitutionality founded on section 20, article 4 of the constitution, was unsustained, inasmuch as the acts covered substantially the same ground and were aimed at the same evil. The act in question had a single object and the repeal of the earlier statute was.

indicative of that object and of making the general purpose more sure.

The other instance involved the application of the same reasoning. The statute referred to was inter alia to provide for the care of the family of a person convicted of abandoning and deserting his family. A proviso to section 1 allows sentence to be suspended on his furnishing a bond that he will provide proper shelter, food, clothing, etc.; and section 2, that if in jail, a portion of his earnings in confinement shall be paid for such shelter, etc. These are not distinct legislative objects but a proper and necessary connection between the prevention of abandonment and the enforced use of the earnings of the abandoner for the benefit of the abandoned.

The Sufficiency of the Title to Statutes, within the constitutional requirements, is discussed in the notes to Crookston v. County Commissioners, 79 Am. St. Rep. 456; Bobel v. People, 64 Am. St. Rep. 70. This question is discussed with special reference to amendatory acts in the note to Lewis v. Dunne, 86 Am. St. Rep. 267.

STUMPF v. STORZ.

[156 Mich. 228, 120 N. W. 618.]

TAXATION, DOUBLE—Mortgage and Land.—The taxation of mortgages upon real estate in addition to the taxation of the real estate itself at its full value is not double taxation and therefore is not unconstitutional; though the mortgagor may pay the two, he is not doubly taxed, because when the mortgagor does pay the tax on the mortgage, it is not because it is a burden imposed upon him by the state, but because of a contract that he has voluntarily entered into, and this contract is subject to restrictions imposed by the usury laws. (pp. 522, 524.)

TAXATION—Deduction—Exemption.—The law permitting a creditor in listing his property for taxation to deduct the amount of any indebtedness owing by him is not in violation of the constitutional requirement of uniformity; and the provision for deducting such indebtedness is not an exemption of so much of his property from taxation. (p. 524.)

TAXATION—Sum Taxable.—The True Value of the taxpayer's credits is the balance due after deducting debts. (p. 525.)

CONSTITUTIONAL LAW—Statute in Force Seventy Years—Construction.—The fact that a statute has remained upon the statute books for over seventy years, and that a practice has grown up under it from the birth of the state, should not deter the court from declaring the law unconstitutional if convinced that it is, but equally it calls upon the court to move with the utmost caution before asserting its invalidity. (p. 526.)

TAXATION—Uniformity—Unequal Results.—Taxation is not invalid because of unequal results which must of necessity occur in individual instances under any system of tax legislation. Taxa-

tion would become impossible if such inequality were to defeat the general law and governments would be constrained to resort to arbitrary exactions. (p. 526.)

Fred A. Baker, for the relator.

Hal. H. Smith, for the respondent Michigan Bankers' Association.

[229] MONTGOMERY, J. This is a petition for a mandamus requiring the board of review of the township of Royal Oak to reconvene and strike from the assessment-roll of the township for 1908 a personal property assessment against the relator of nine thousand dollars, that being the value placed by the board on certain mortgages upon real estate and land contracts held by the relator. The object of the petition is to test the constitutional validity of the provisions of the general tax law relative to the taxation of real estate mortgages and other credits. The briefs of relator and respondents show that no effort has been spared to [230] place before the court all the learning obtainable upon the subjects presented, and, if we omit to refer to and discuss all the authorities cited, it is not through any want of appreciation for their aid in the final solution of the questions, or because they have not had full attention by the court. To attempt to cite the authorities bearing upon each of the propositions contended for, and to discuss and distinguish the cases, would extend the opinion beyond reasonable limits. We shall content ourselves with stating the result of our investigations, and with referring to such cases as we think should be considered controlling.

The sections of the constitution bearing upon the subject are sections 11 and 12 of article 14, which read as follows:

"Sec. 11. The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

"Sec. 12. All assessments hereafter authorized shall be on property at its cash value."

It is strenuously insisted that the taxation of mortgages upon real estate, in addition to the taxation of the real estate itself at its full value, is double taxation, and, as such, unconstitutional. It is conceded that the practice has been to tax credits as personal property ever since the organization of the state government in 1838, and it must also be conceded that the decisions of this court have recognized the constitutionality and validity of these statutes. In the case of

Attorney General v. Board of Supervisors of Sanilac Co., 71 Mich. 16, 38 N. W. 639, Chief Justice Sherwood said: "Mortgages are nowhere excepted out of the taxable property. It was evidently the intention of the legislature, under our tax laws as they now are, to make personal property bear its just proportion of the burdens of taxation, and I find no constitutional objection to this being done. I know of no reason why property in real estate mortgages cannot be assessed at its cash value as well as any other personal property. Such property is very largely dealt in by nearly all classes of business men, [231] and the various kinds have a rated value according to the extent of the security and personal responsibility of the party whose obligation is secured, if any; and I know of no reason why the assessing officer may not as well ascertain that value as any other business man. The claim that double taxation cannot be avoided under the act cannot be sustained. In order to have double taxation, the same property must be taxed twice, when it should be taxed but once. The law of 1887 creates no such injustice. When an indebtedness is secured by mortgage on real estate, and the mortgage becomes property more valuable and desirable than the land itself, there is not, nor can be, any good reason why the mortgage should not be taxed to assist in bearing the public burden; and any course of reasoning which would exempt the property in the mortgage, and make the land bear the burden of taxation which should be shared by the holder of the mortgage, would not only be unequal and unjust, but would, I think, be getting about as near double taxation as can be reached without having it pure and simple."

Justice Champlin, concurring in this view, said: "I think it is competent for the legislature to assess and tax securities representing values. Whether it is the best plan to adopt, or whether it is expedient to do so, is not a judicial, but a political, question, resting solely with the legislature."

The question was again before the court in City of Marquette v. Michigan Iron Land Co., 132 Mich. 130, 92 N. W. 934, in which this same contention was made, that a tax on both the property contracted to be sold and on the credit in question was such a double taxation as to violate the constitutional provision requiring uniformity. That case was a case of a land contract, but the principle is the same as in the case of a mortgage security. It was said by Mr. Justice Carpenter: "It is

to be noted that in this case the obligation to pay the taxes upon the property rests, not upon the vendor, but upon the vendees. Therefore the argument advanced in support of this contention is precisely the argument which has been advanced to prove that the taxation of credits secured by mortgage and of the land covered by [232] the mortgage is unconstitutional. The decision of this court upholding the constitutionality of such taxation (Attorney General v. Board of Supervisors of Sanilac Co., 71 Mich. 16, 38 N. W. 639) is controlling and decisive of this question."

We are asked to reconsider these cases, although it may be said that they have the support of many decided cases in other jurisdictions.

But it is urged that in practice the mortgagor pays the tax both upon the real estate and upon the mortgage, and that, therefore, he is subjected to double taxation. The answer is that this may or may not be true, and that, whenever the mortgagor does pay the tax upon the mortgage, it is not because it is a burden imposed upon him by the state, but because of a contract that he has voluntarily entered into, and this contract is subject to restrictions imposed by the usury laws: See Green v. Grant, 134 Mich. 462, 96 N. W. 583. As bearing on the general question, see Paddell v. City of New York, 187 N. Y. 552, 80 N. E. 1114, 211 U. S. 446, 29 Sup. Ct. Rep. 139, 53 L. ed. 275.

It is next urged that the law permitting a creditor in listing his property for taxation to deduct the amount of any indebtedness owing by him is unconstitutional as being in violation of the constitutional requirement of uniformity; the claim being that the constitution of Michigan does not make the net assets of persons or corporations the basis of taxation, but, on the contrary, provides that all general taxation must be on property according to its cash value, and it is urged with much force that the credits of which one is possessed constitute property, and that, this being so, it would be subject to taxation as property, and that any provision for deducting the indebtedness of the owner is in effect an exemption of so much of his property from taxation.

The case of Exchange Bank of Columbus v. Hines, 3 Ohio St. 1, is relied upon to sustain this contention. The majority opinion of the court in that case did sustain the contention, and that opinion has been followed by the supreme court of South Dakota in the case of In re Assessment [233] and Collec-

tion of Taxes, 4 S. D. 6, 54 N. W. 818. The constitution of Ohio of 1851 (article 12, section 2) provided that "laws shall be passed, taxing, by a uniform rule, all moneys, credits," etc., and it was in construing this constitutional provision that the rule in Exchange Bank of Columbus v. Hines, 3 Ohio St. 1, was laid down. Soon after this decision however, the legislature of Ohio enacted a statute which declared that the term "credit" meant the excess of the sum of all legal claims and demands over and above the sum of legal and bona fide debts owing by such person. In Hubbard v. Brush, 61 Ohio St. 252, 55 N. E. 829, the supreme court of Ohio said of this legislation that it had been acquiesced in for more than forty years, and that Exchange Bank of Columbus v. Hines, 3 Ohio St. 1, in so far as it denied the right to deduct liabilities from claims and demands, has been ignored. The court said: "The word 'credits,' in the connection in which it is used in the constitution, is not made at all clear by a resort to the lexicographers. It is apparent, however, that if the framers of the constitution had intended to specifically tax book accounts, promissory notes, and the like, it would only have required the addition of a few words, not at all incompatible with the brevity required in such instruments, to manifest that intention. The ease with which it could have been done gives to the omission a signification entitled to some consideration. The difficulties, however, attending a deduction of liabilities from claims and demands, have not proved formidable since the practice was authorized by the legislature, and the practice itself has received general approbation. For these considerations, not to specify others, we are of opinion that the legislative declaration is in accord with the constitution, and therefore hold that the corporation involved in this controversy rightfully in listing its property for taxation deducted its liabilities from its claims and demands."

The result of this opinion was that the term "credits," as used in the constitution, might be held to mean the net credits. The same ruling was made by the supreme court of Nebraska in County of Lancaster v. McDonald, [234] 73 Neb. 453, 103 N. W. 78. In the case of Florer v. Sheridan, 137 Ind. 28, 36 N. E. 365, 23 L. R. A. 278, the conclusion was reached that the true value of the taxpayer's credits was the balance due after deducting the debts. The case upon this point is well reasoned, and, we think, states the correct

rule. See, also, State v. Moffett, 64 Minn. 292, 67 N. W. 68, and State v. Northern Pac. Ry. Co., 95 Minn. 43, 103 N. W. 731, and, for a general discussion, Gray on Limitations of Taxing Power, section 1395 et seq. Since the adoption of the constitution, and, indeed, before, every tax law in the state has authorized the deduction of debits from credits in listing personal property for taxation, and, while the court has never been directly called upon to pass upon this question, the propriety of such legislation has been recognized in First Nat. Bank of St. Joseph v. Township of St. Joseph, 46 Mich. 526, 9 N. W. 838, and Beecher v. Common Council of Detroit, 110 Mich. 456, 68 N. W. 237.

It is urged that the fact that the practice of deducting debts from credits has so long continued should not deter the court from declaring the law unconstitutional if convinced that it is beyond the legislative power. This statement of the duty of the court is undoubtedly correct: See Pingree v. Auditor General, 120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679. But the fact that such statute has remained upon the statute books for over seventy years, and that the practice has continued from the formation of the state to the present time, does call upon the court to move with the utmost caution in asserting its invalidity. We are not convinced that the reasoning of the courts in the cases cited above from other jurisdictions is unsound, and are disposed to follow them. As to the further contentions of relator's counsel, the language of Judge Cooley (1 Cooley on Taxation, 3d ed., p. 389), quoted with approval by this court in Common Council of the City of Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59, is peculiarly appropriate: "Now, whether there is injustice in the taxation in every instance in which it can be shown that an individual [235] who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results. It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions."

The order of the circuit court dismissing the petition is affirmed, with costs.

Grant, Hooker, Ostrander, Moore, McAlvay, and Brooke, JJ., concurred.

Blair, C. J., did not sit.

In Taxing Credits It is Sometimes Difficult to Avoid Double Taxation, because both the credit and the property mortgaged to secure the payment of the debt are taxed; yet it is held that there is no constitutional objection to such taxation: See the note to People v. Worthington, 74 Am. Dec. 95. As to whether mortgages are "property" within the constitutional rule that all property shall be taxed in proportion to its value, see People v. Eddy, 43 Cal. 331, 13 Am. Rep. 143; People v. Hibernia Bank, 51 Cal. 243, 21 Am. Rep. 704. In Andrews v. King County, 1 Wash. 46, 22 Am. St. Rep. 136, it is decided that a rule by which an assessor uniformly assesses mortgages unaccompanied by other evidence of indebtedness at their par value, and the land and other property mortgaged at from one-fourth to one-fifth of its cash value, is in contravention of the constitutional provision that "all taxes shall be uniform, and that the assessment shall be according to the value of the property."

WEADOCK v. JUDGE OF RECORDER'S COURT.

[156 Mich. 376, 120 N. W. 991.]

MUNICIPAL CORPORATIONS—Powers Under Charter—Ordinances in Pursuance—Validity.—Where the charter of a municipality empowers the common council to license and regulate the keepers of junk shops and the purchase and sale of old junk, an ordinance made in pursuance thereof regulating the storing or keeping of old junk is valid, as that which it aims to regulate is necessarily incident to the business of buying and selling junk. (p. 529.)

MUNICIPAL CORPORATIONS—Reasonableness of Ordinance—Validity.—An ordinance which prescribes a certain restricted locality in which a certain class of business shall not be established or maintained, with a proviso that it shall not apply to those businesses already established there, that particular class of business having already centralized in the restricted area, is invalid for unreasonableness and unlawful discrimination. (p. 530.)

MUNICIPAL CORPORATIONS — Ordinance in Pursuance of Charter—Reasonableness.—If a power is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid. (p. 531.)

MUNICIPAL CORPORATIONS — Ordinance in Pursuance of Charter—Discrimination.—All individuals of a certain class within a municipality under its legislation must be treated alike and without discrimination. (p. 531.)

Bernard F. Weadock, in pro. per., and P. J. Hally, for the relator.

Miner & Anhut, for the respondent.

[376] McALVAY, J. This is an application by relator, who is assistant corporation counsel for the city of Detroit, for a writ of mandamus to compel respondent to vacate certain orders made by him, dismissing two cases brought by the proper authorities under an ordinance of the city of [377] Detroit. The undisputed facts are that two complaints were duly made, and two cases instituted in said court against Moses Rosenzweig, one complaint charging him with unlawfully and willfully establishing and maintaining, at a specified location, "a place for the storage of junk, rags, old rope, papers, bagging, old iron, brass, lead, commonly known as a junk-yard, said premises being located within the district established by the common council within which district a junk-yard is prohibited to be established or maintained," contrary to the provisions of a certain ordinance; the other complaint charging him with unlawfully and willfully establishing and maintaining a junk-shop at another and different location, contrary to the provisions of the same ordinance. The answer of respondent admits all the material facts. Answering the order to show cause, respondent asserts that the cases were dismissed and the defendant discharged for the reason that the ordinance under which the complaints were made was invalid and unconstitutional (a) because the charter gave the common council no authority to enact the ordinance; (b) because the ordinance is unreasonable. The charter provision referred to, as far as it relates to this case, reads: "The said council may also license and regulate the keepers of junk-shops and to regulate the buying or selling of old junk": Detroit Charter (1904), sec. 187.

The ordinance in question under which the cases were brought provides as follows:

"It is hereby ordained by the people of the city of Detroit:

"Section 1. That section 1 of an ordinance entitled, 'An ordinance prescribing certain limits within the city of Detroit where a junk-shop or what is commonly known as a junk-shop, for the purchase, storage and sale of junk, rags, old rope, papers, bagging, old iron, brass, copper, tin, empty bottles, slush or lead, shall not hereafter be established or maintained and the storage or buying and selling of the same be carried on" approved September 3, 1907, [378] be and the same is hereby amended so as to read as follows:

"Sec. 1. No building, place or lot where junk, rags, old rope, papers, bagging, old iron, brass, copper, tin, empty

bottles, slush or lead are bought, sold or stored shall be hereafter used, established or maintained within the territory within the city of Detroit described as all that portion of the city of Detroit bounded on the west by Beaubien street, on the east by Russell street, on the south by Gratiot avenue, and on the north by alley north of and parallel with Napoleon street; also all that portion of the city of Detroit lying north of the alley north of and parallel with Napoleon street and between the boundary lines of the third ward to the northerly city limits; also all that portion of the city of Detroit lying north of the alley north of and parallel with Napoleon street and between the boundary lines of the fifth ward to the northerly city limits: Provided that this ordinance shall not be construed to apply to any junk-shop now being conducted or maintained within the territory herein described."

It is conceded that the common council has plenary power for the purpose of licensing and regulating the persons engaged in the business of buying and selling old junk, and that such reasonable regulations as the council may see fit to adopt are not open to judicial investigation. It is insisted that, by the provision of the charter above quoted, no power was given to regulate the storage of junk, and therefore this ordinance is invalid. We do not agree with this contention. The rule relied upon by respondent, that the powers which may be exercised by municipal corporations are all derived from the legislature and must be found (a) in the express words of the grant, or (b) necessarily incident to the powers expressly granted, and (c) powers which are essential and indispensable to the declared objects and purposes of the corporation, has always been recognized by this court (Taylor v. Bay City St. Ry. Co., 80 Mich. 82, 45 N. W. 335), and that an ordinance cannot exceed the limit prescribed by the charter. The charge in the first complaint is that the defendant unlawfully kept "a place for the storage of junk commonly called a junk-yard." [379] The words of the charter and of the ordinance must be taken as used with reference to the business designated. A junk dealer is not a warehouseman. He buys old junk from the owner or from the junk gatherer, and keeps the same in his yard or place of business until sales can be made. The charter contains express power to regulate and license the keepers of junk-shops, and to regulate the buying and selling of old junk. The power to regulate has been given a broad signification by the court. To regulate means: "To adjust by rule,

method, or established mode; to direct by rule or restriction; to subject to governing principles or laws": 24 Am. & Eng. Ency. of Law, 2d ed., p. 243 et seq.

The storing or keeping of old junk which this ordinance aims to regulate is necessarily incident to the business of buying and selling junk.

Respondent's second contention is that this ordinance is unreasonable, and therefore invalid. This is not the usual ordinance enacted under charter powers for the purpose of the regulation of a certain trade or occupation as upon a first reading would appear. This ordinance is not one providing for the confinement of a class of business within a certain restricted territory easily supervised by the authorities. Nor does it propose to exclude all of a certain class from certain territory as did the ordinance under consideration in Churchill v. Detroit Common Council, 153 Mich. 93, 116 N. W. 558. It is an ordinance prescribing a certain restricted locality in which a certain class of business shall not be established or maintained, with a proviso "that this ordinance shall not be construed to apply to any junk-shop now being conducted or maintained within the territory herein described." There is therefore an express prohibition against disturbing those already established in this district, and it appears in the return of respondent, to which there is no denial entered, that the traffic in junk has become centralized within the restricted locality. The validity of the ordinance is not [380] defended as an exercise of the police powers of the municipality in the interest of the public health. Relator cites and relies upon the decisions of this court relative to the right to regulate this class of business: See City of Grand Rapids v. Braudy, 105 Mich. 670, 55 Am. St. Rep. 472, 64 N. W. 29, 32 L. R. A. 116. This case, as well as the Churchill case (153 Mich. 93, 116 N. W. 558), upheld the reasonable exercise of the authority conferred by the legislature, and both cases rest upon the proposition that such classes of business especially require police supervision. In the Braudy case the question of restricted locality was not before the court; but this court held, where the question was squarely raised, in the Churchill case, that the power to regulate authorized a municipality to restrict such business to certain localities. We cannot say in the ordinance before us that there is expressed any intent, by the reasonable exercise of the police powers, to regulate and control the junk business, by prohibiting its maintenance

within the limited territory where it is now centralized and permitting it everywhere else in the city. The language of the court in both the cases cited indicates that from the nature of this business, and the persons who deal with those engaged in it, police supervision is necessary, and can be better maintained by license and restriction of the territory occupied. We agree most heartily with such decisions, but in our examination of the case before us are unable to convince ourselves that this ordinance can be held to be within these decisions. In the first place, it is not restrictive as to where the business may be maintained, and no reason appears why those not already established there should be prohibited from the district created. Those engaged in this business now centralized in the prohibited territory are not disturbed, although engaged in the same business and under the same kind of license. All others must keep away from this district, and scatter where they please over miles of territory. By what reasonable exercise of delegated power may such discrimination be upheld? If a power is conferred, but the mode of its exercise is not [381] prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid: People v. Armstrong, 73 Mich. 288, 16 Am. St. Rep. 578, 41 N. W. 275, 2 L. R. A. 721, citing 1 Dillon on Municipal Corporations, 4th ed., sec. 328. It follows that all individuals of a certain class within a municipality under its legislation must be treated alike and without discrimination. This right is not granted by this ordinance.

Our conclusion is that this ordinance is both unreasonable and unlawfully discriminating. It is therefore unconstitutional and void: Tugman v. City of Chicago, 78 Ill. 405,

The action of the recorder's court is sustained. The writ of mandamus is therefore denied.

Blair, C. J., and Grant, Montgomery and Brooks, JJ., concurred.

The Constitutionality of Ordinances Regulating Junk Dealers is discussed in the note to Hager v. Walker, 129 Am. St. Rep. 279. The constitutionality of ordinances prescribing the location of certain businesses and occupations is discussed in the note to Hager v. Walker, 129 Am. St. Rep. 284.

KLEINFELT v. J. H. SOMERS COAL COMPANY.

[156 Mich. 473, 121 N. W. 118.]

MASTER AND SERVANT — Negligence — Statutory Duty — Death—Risks Assumed by Employé.—Where a statute imposes a duty upon the employer for the protection of the employé, injury from the neglect of this duty is not one of the risks assumed by the employé. (p. 535.)

MASTER AND SERVANT — Negligence — Statutory Duty — Death—Risks Assumed by Employé.—Public Act 1905, No. 100, section 3, provides that only competent and trustworthy engineers shall be permitted to operate the cages and hoisting devices in coal mines. While a fireman was operating a cage the accident occurred by which another employé was killed. The deceased did not assume the risk of his incompetency, he being unauthorized by the statute to operate the cage, and no notice to the master of his incompetency was needed, as in employing him such owners were committing a breach of their statutory duty. (p. 536.)

MASTER AND SERVANT — Negligence — Death — Proximate Cause — Master and Fellow-servant Joint Tort-feasors.—Where in operating a cage in a coal mine the death of an employé is caused, the operator being one not authorized by statute and the accident being partly caused by the carriage of a rod which protruded through the roof of the cage and struck the shaft timbers, such rod being carried by a fellow-servant, inasmuch as the death was caused by the combination of the negligent act of the servant carrying the rod and the master employing an unauthorized operator, the rule is that both may be liable. (p. 536.)

J. P. Devereaux, Vincent & Nash and R. L. Crane, for the appellant.

Fred L. Vandeveer and W. J. Lamson, for the appellee.

474 MONTGOMERY, J. This action was brought to recover for damages resulting to the estate of Otto Kleinfelt by negligently causing his death in one of defendant's mines at St. Charles, Michigan, October 24, 1905. At the close of all the proofs, the court directed a verdict for the defendant. It becomes necessary therefore to determine whether there was any testimony offered on behalf of the plaintiff which fairly tended to show facts from which a liability could be drawn.

The defendant's mine was about one hundred and ninety-five feet deep, and miners and others customarily entered and departed from the mine by means of cages operated in the main hoisting shaft. These cages were raised and lowered by means of cables attached to drums operated by the hoisting engine 475 at the surface, and so arranged that while one cage was ascending the other was descending. The cages used for hoisting coal were the same cages upon which

the men were carried. The cage upon which the accident occurred was six or seven feet long and about four feet wide. It was open at the two ends, but on the sides a piece of sheet iron extended upward about three feet from the floor. Upon the floor there were laid two tracks lengthwise of the cage, upon which the cars of coal were run. In the middle portion of these tracks, the sections of the floor upon which they were fastened were so constructed that, as the cage started upward from the bottom of the shaft, these sections, each six inches wide by two feet long, would drop down from six inches to a foot, for the purpose of allowing the car wheels to settle down, and thus hold the car securely in place. These sections dropped down as described when no car was being hoisted. Overhead a trip bar extended across the cage from side to side, so placed that it was about eighteen inches from one end. This bar was about one and one-half or two inches in diameter, and was placed upon the cage for the purpose of dumping it. Where this trip rod was there were also two rollers which held that part of the cage level. The height of the cage was about seven feet. Running from the ends of the trip rod downward were braces placed outside of the sheet iron sides. At the top of the cage, hinged near the middle, were two covers or lids of sheet iron, the purpose of which was to prevent falling objects from striking persons in the cage. The inside of the shaft was lined from top to bottom with squared timbers or buntings, so laid that there was alternately a timber, then a space, and so on. The cage ran upon guides inside these timbers, and with a very narrow space between the floor of the cage and the inside faces of these timbers.

On the date in question plaintiff's intestate, who was a miner in defendant's employ, was down in this mine breaking down coal for removal the following day. He was accompanied by his son, Gus Kleinfelt, a boy between [476] twelve and thirteen years of age. About dinner time Kleinfelt and his son and an Italian miner started to walk out toward the shaft to go to the surface. On their way they met the superintendent of the mines, John T. Phillips, and the foreman of this mine, No. 3, Hugh McKenna, Sr., and another man named Alexander, who were working at a pumping engine. Mr. Kleinfelt spoke a few words with Mr. McKenna, and the latter directed him to hurry up and get on the cage. Mr. Kleinfelt, his son, and the Italian immediately went to the cage, got on, and the cage started to go as

soon as they got on. Upon this cage when it started to ascend was Clarence Curtis, who was the regular engineer, having in charge the hoisting engine at the surface, but who was then doing work in connection with fitting up the pumping engine, also Sidney Traver, helper to the master mechanic, and Kleinfelt, his son, and the Italian. There was also placed upon the cage by Curtis and Traver a piece of iron pipe one and one-fourth inches in diameter and fourteen feet long, which they had brought from the pumping engine where they had been working under Phillips and McKenna, and which they were taking to the surface to have recut. Curtis had raised one of the sides of the lid or hood and stood it up against the cable. He then passed the pipe up through the top of the cage alongside of the lid, with the lower end resting on the floor of the cage. The lid was not fastened in any way, but merely stood up in a vertical position against the cable. He then, during the ascent, held the pipe with his hand. Mr. McKenna knew that the pipe was about to be taken in this manner. Gus Kleinfelt, who was at the side of his father during all of this time, testifies that he did not see the pipe until after he was on the cage. The cage ascended with great rapidity, so that the lights on the caps of those in the cage were all extinguished immediately after starting, leaving the cage in total darkness. It appears that the hoisting engine was at this time in charge of one George Tigner, who was not employed as an engineer, but as a fireman. There was some testimony [477] that his reputation was bad as to speed in handling the cage. When the cage had reached a point about forty feet from the surface, there was a great rattling and shaking of the cage and an outcry by the men, and the cage came to a stop in about fifteen feet. All of those on the cage, with one exception, were thrown down flat on the bottom of the cage. They got up when the cage stopped and climbed to the surface, up the buntings or timbers. They found the lid or cover, which Curtis had stood up against the cable, fallen over in its usual horizontal position, and had to push it up again in order to crawl out. When a light was taken into the cage, it was found that the end of the pipe was stuck into a timber at the side of the shaft, and the pipe was curved around inside of the cage. The two ends of the pipe were eighteen inches or two feet apart, the platform of the cage being past the timber in which the top of the pipe was caught about fifteen inches. Mr. Kleinfelt's body was found between the timbers; the

bottom of the cage having come up past his head and shoulders, and he being crushed to death. Life was extinct before he was found. There were no bars or rings placed on this cage to furnish handholds for passengers thereon.

The plaintiff charges the defendant with negligence: In failing to have this cage in the mine fitted with iron bars or rings in proper place, as required by section 15, Act No. 100 of the Public Acts of 1905; in permitting a fireman to operate the cage and hoisting device, contrary to the provisions of section 3 of the same act; in directing the deceased to go upon the cage at the same time that a pipe fourteen feet long and one and one-fourth inches in diameter was to be carried; in allowing said pipe to be carried on the cage together with deceased and other passengers; and in not providing a proper catch or safety device for holding the lid at the top of the cage in a vertical position.

The statute (Act No. 100, Pub. Acts 1905) provides, in section 3: "That only a competent and trustworthy engineer [478] shall be permitted to operate the cages and hoisting devices in all coal mines (any coal mine) of this state."

By section 15 it is provided: "Every cage on which persons are carried must be fitted up with iron bars or rings in proper place, and a sufficient number to furnish a secure handhold for each person permitted to ride thereon."

That the testimony offered on the part of the plaintiff tended to show a neglect by the defendant of each of the duties defined by these two sections is beyond controversy. It is also settled in this state that, where a statute imposes a duty upon the employer for the protection of the employé, injury from the neglect of this duty is not one of the risks assumed by the employé: See Sipes v. Michigan Starch Co., 137 Mich. 258, 100 N. W. 447; Murphy v. Grand Rapids Veneer Works, 142 Mich. 677, 106 N. W. 211; Swick v. Aetna Portland Cement Co., 147 Mich. 454, 111 N. W. 110; Layzell v. J. H. Somers Coal Co., 156 Mich. 268, 117 N. W. 179, 120 N. W. 996. It is suggested that the passenger might have caught hold of the braces or trip rod or sheet iron sides to protect himself, but it is not clear that it would not have been an act of negligence on his part to have caught hold of some of these places. It certainly would have been a great inconvenience for a man of the height of deceased to have reached the trip rod, and it does not appear that the miners were accustomed as a rule to resort to these makeshifts. It was at least a question for the jury as to whether there was a neglect

to comply with the statutory provisions of providing rings or bars in the proper place to furnish a secure handhold.

The circuit judge seems to have been of the opinion that any fault of the fireman would be a fault of a fellow-servant of the defendant, unless notice of his incompetency was brought home to the company. This view ignores the fact that the fireman was not of the class of mechanics who, under the statute, are authorized to operate hoisting engines such as these, and, this being so, the deceased did not assume the risk of his incompetency. [479] No notice was required to the company of his incompetency, as in his very employment the company had neglected a statutory duty.

It was also the view of the circuit judge that there is no evidence that would indicate that, had the handles been there, this accident would not have happened. It was in evidence that when the crash came all the employés of the cage were thrown violently to the floor of the cage. It was open to inference that, had handles been provided, and had they been in use, this would not have happened, and it might very well have been found by the jury that the death of this decedent might have been averted had these provisions been made. This being so, the most that can be said upon the question of proximate cause is that the presence of this rod might have been a cause of the crash, and that its presence may be said to have been the fault of the fellow-servant; but, if this be so, there were concurring acts of the fellow-servant and negligent acts of the employer in intrusting its hoisting device to one not an engineer who was running the car at great speed, and the failure to provide handles which might have enabled the deceased to avert the injury which came from the concurring fault of the coservant. The rule is that, where an injury results from the fault of the fellow-servant, concurring with that of the master, both may be liable: McDonald v. Michigan Cent. R. R. Co., 108 Mich. 7, 65 N. W. 597; Hayes v. Stearns & Co., 130 Mich. 287, 89 N. W. 947; Lockwood v. Tennant, 137 Mich. 305, 100 N. W. 562. To say that the proximate cause of the injury, in the absence of handholds, is something other or different from that neglect of duty, would be practically to render this statute of little value to employés. The occasion for the handhold arises only when an accident occurs, either unforeseen or through the fault possibly of a fellow-servant. It is in this emergency that the handhold is of some value to the employé, and undoubtedly it was with the view of meeting

this emergency that the legislation was enacted. It would not meet the purpose of the legislation if the courts [480] should say that it would be impossible to offer direct proof that had the handholds been provided the injury would not have happened, and that therefore no recovery could be had.

The judgment will be reversed, and a new trial ordered.

Blair, C. J., and Grant, Moore and Brooke, JJ., concurred.

An Employer Who Violates a Statutory Duty Imposed upon Him for the better protection of his employé cannot, according to the better view, invoke the doctrine of assumption of risks or contributory negligence when sued by the employé: Western Furniture etc. Co. v. Bloom, 76 Kan. 127, 123 Am. St. Rep. 123; Lenahan v. Pittson Coal Min. Co., 218 Pa. 311, 120 Am. St. Rep. 885; note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 891. When an employé operating an emery wheel temporarily removes a guard required by statute, and the wheel bursts and the fragments strike another employé engaged in other duties and ignorant of the failure to replace the guard, the employer is liable for the injury: Davidson v. Flour City Ornamental Iron Works, 107 Minn. 17, 131 Am. St. Rep. 433.

The Duty of Mine Owners to Prevent Injury to Their Employés is the subject of a note to Wellston Coal Co. v. Smith, 87 Am. St. Rep. 557.

Where the Negligence of an Employé and that of a Fellow-servant together produce injury to an employé, the master is liable therefor: Haskell & Barker Car Co. v. Przezdziankowski, 170 Ind. 1, 127 Am. St. Rep. 352; Kennedy v. Swift & Co., 234 Ill. 606, 123 Am. St. Rep. 113; Merrill v. Oregon Short Line R. R. Co., 29 Utah, 264, 110 Am. St. Rep. 695; Siegel-Cooper & Co. v. Trcka, 218 Ill. 559, 109 Am. St. Rep. 302; Fuller v. Tremont Lumber Co., 114 La. 266, 108 Am. St. Rep. 348; Farrell v. Eastern Machinery Co., 77 Conn. 484, 107 Am. St. Rep. 45; Grant v. Keystone Lumber Co., 119 Wis. 229, 110 Am. St. Rep. 883.

MILLER v. CITY OF DETROIT.

[156 Mich. 630, 121 N. W. 490.]

MUNICIPAL CORPORATIONS — Negligence — Streets — Statutes — Construction.—The presence of a dead limb of a tree within the limits of, or overhanging from private premises, a public highway, is not such a defect in the highway as to be within the intention of the legislature in its requirement that municipalities maintain and repair streets, etc., and respond in damages, and they are therefore not liable for injuries to a citizen caused by the falling on him of the dead branch of a tree growing in the highway. (p. 540.)

STATUTES—Construction.—There is a strong presumption in favor of a construction which will not work injustice. (p. 541.)

MUNICIPAL CORPORATIONS—Negligence—Streets.—1 Compiled Laws, sections 3441-3443, only requires the city to keep that part of its highways, streets and sidewalks used for actual traveling in reasonable repair, and does not cast on it the duty to trim trees growing between the sidewalk and the curb in a public street, so as to prevent them becoming a danger to passersby. (p. 540.)

MUNICIPAL CORPORATIONS—Streets—Duty to Trim Trees in.—The fact that a city ordinance forbids the injury or cutting of trees standing in a street by any person other than adjoining proprietors does not create any obligation of the municipality to trim trees so as to prevent them becoming dangerous. (p. 541.)

MUNICIPAL CORPORATIONS—Ordinances—City of Detroit. No duty to remove dead limbs from trees on a highway for the safety of passersby is imposed either by statute or the charter or ordinances of the city of Detroit. (p. 541.)

EVIDENCE — Judicial Notice — Trees Shedding Limbs.—Judicial notice will be taken of the fact that many trees annually shed large numbers of dead limbs. (p. 541.)

STATUTES — Construction.—Statutes in Derogation of the Common Law must be strictly construed, rights conferred therein should be express and not by implication, and liabilities cannot be enlarged by construction. The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. (p. 542.)

Samuel E. Jones, for the appellant.

Edmund Atkinson and P. J. M. Hally, for the appellee.

631 HOOKER, J. The admitted facts in this cause are that the plaintiff, while walking upon a sidewalk in the city of Detroit, was struck and injured by a dead limb, which fell from a tree over his head. The tree was growing in the public street, between the sidewalk and the curb, and it was admitted by counsel that the limb was five inches thick and fifteen feet long, and that it had been dead four years. The plaintiff brought this action for damages, alleging negligence. The learned judge directed a verdict for the defendant, and the plaintiff has appealed.

The statutes upon which plaintiff's right to recover must depend are 1 Compiled Laws, sections 3441-3443. We quote them:

"The People of the State of Michigan enact: That any 632 person or persons sustaining bodily injury upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, sidewalks, cross-walks and culverts on the same in reasonable repair, and in condition reasonably safe and fit for travel by the township, village, city or corporation whose corporate authority extends over such public highway, street, bridge, sidewalk, cross-walk or culvert, and whose duty it is

to keep the same in reasonable repair, such township, village, city or corporation shall be liable to and shall pay to the person or persons so injured or disabled just damages, to be recovered in an action of trespass on the case before any court of competent jurisdiction.

"If any horse or other animal, any cart, carriage or vehicle, or other property, shall receive any injury or damage by reason of neglect by any township, village, city or corporation, to keep in repair any public highway, street, bridge, sidewalk, cross-walk or culvert, the township, village, city or corporation whose duty it is to keep such public highway, street, bridge, sidewalk, cross-walk or culvert in repair shall be liable to and shall pay the owner thereof just damages, which may be recovered in an action of trespass on the case before any court of common jurisdiction: Provided, that in all actions brought under this act it must be shown that such township, village, or city has had reasonable time and opportunity after knowledge by or notice to such township, village or city that such highways, streets, bridges, sidewalks, cross-walk or culvert have become unsafe, or unfit for travel to put the same in the proper condition for use, and has not used reasonable diligence therein after such knowledge or notice.

"It is hereby made the duty of townships, villages, cities, or corporations to keep in reasonable repair, so that they shall be reasonably safe and convenient for public travel, all public highways, streets, bridges, sidewalks, cross-walks and culverts that are within their jurisdiction, and under their care and control and which are open to public travel, and when the means now provided by law are not sufficient to enable any township, village or city to keep its public highways, streets, bridges, sidewalks, cross-walks and culverts in good repair such township, village or city is hereby authorized to levy such additional sum upon the taxable property of such township, village or city not exceeding five mills on the dollar, in any one year, as [633] will enable such township, village or city to keep its public highways, streets, bridges, sidewalks, cross-walks, and culverts in good repair at all times. Highway commissioners, street commissioners, and all other officers having special charge of highways, streets, bridges, sidewalks, cross-walks, and culverts, and the care or repairing thereof are hereby made and declared to be the officers of the township, village, city, or corporation wherein they are elected or appointed, and shall be subject

to the general direction of such township, village, city or corporate authorities in the discharge of their several duties."

The title of this act is: "An act to provide for the recovery of damages for injuries caused or sustained by reason of defective public highways, streets, bridges, sidewalks, crosswalks, or culverts."

Section 50, subdivision 1 of 1 Compiled Laws, contains the provision: "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

Certainly it would not be the common understanding from this title that the presence of a dead limb of a tree within the limits of, or overhanging from private premises, a public highway, is such a defect in the highway as to be within the intention of the legislature in its requirement to maintain and repair streets, bridges, sidewalks, cross-walks, and culverts, and to respond in damages. If we look at the sections themselves, we shall find that they do not give a right of recovery for all injuries, but only such as are sustained by reason of neglect to keep the ways in repair and in condition reasonably safe and fit for travel—not to maintain a highway where the traveler shall be safe. The duty imposed is to keep ways in reasonable repair, so that they (the ways) may be reasonably safe and convenient for public travel, a stating of the purpose [634] or reason for the requirements made, not an enlargement of them. Evidently this statute was to require the local maintenance of the state's highways in a reasonably good and safe condition, and the payment of damages due to accidents caused by a failure to do these things required by statute, and not for accidents due to extraneous or other causes, or neglect. There is no legitimate inference that the traveler was to be protected from the inconveniences and dangers from snow and sleet and ice, nor that the legislature supposed it was imposing upon the local constituencies the burden of protecting travelers, at an expense of millions of dollars annually, against accidents, so rare that we have no judicial record of a similar accident in this state. Who can doubt that, had our highway officers attempted to expend public money in the inspection and trimming of trees, in conformity to plaintiff's contention regarding the meaning of this statute, the townships and villages

would have protested against so unjust an extension of the law relating to torts. The requirement, if made, would have been burdensome in proportion to its benefits. There is a strong presumption in favor of a construction which will not work injustice: Osborn v. Charlevoix Circuit Judge, 114 Mich. 655, 72 N. W. 982; 26 Am. & Eng. Ency. of Law, 2d ed., p. 646

We may take judicial notice that many trees annually shed large numbers of dead limbs. Usually they are small in proportion to the limb in this case, but many are large enough to seriously injure a person upon whom they should fall. They are all within this rule contended for; and never in the history of the country has there been an attempt to compel municipalities or private persons to assume the dangerous and expensive burden of anticipating and performing the function, so well and so far so safely performed by nature, of maintaining a living tree in a safe condition. There is nothing in this statute that imposes a duty as to trees, nor is there any reason for saying that the ordinances cited impose a liability. These ordinances undertake to punish the injury or cutting of [635] trees standing in the street by any person other than adjoining proprietors. Nor does defendant's charter, which gives the city power to direct and regulate the planting, and to provide for the preservation of ornamental trees, impose any such duty or liability as those contended for. We have held that this statute imposes a duty to remove some kinds of dangerous obstructions from a highway, after notice, but this is upon the theory that they constitute defects in the surface of the roadway itself, and upon no other theory, and this has been held not to include a duty to protect against such temporary obstructions as are due to natural causes: McKellar v. City of Detroit, 57 Mich. 158, 58 Am. Rep. 357, 23 N. W. 621; McArthur v. City of Saginaw, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313; Kannenberg v. City of Alpena, 96 Mich. 53, 55 N. W. 614; Gavett v. City of Jackson, 109 Mich. 408, 67 N. W. 517, 32 L. R. A. 861; McEvoy v. City of Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006; Thompson v. West Bay City, 137 Mich. 94, 100 N. W. 280.

Another reason forbidding the construction urged is that the language of the statute clearly indicates that it is to the physical highway that it refers in its method of construction, maintenance, defects, and repair. This is indicated, not only by the general words, which, as already stated, should be understood to mean no more, and the rule that "a

statutory liability, created in derogation of the common law cannot be enlarged by construction (see City of Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815; Keyes v. Village of Marcellus, 50 Mich. 439, 45 Am. Rep. 52, 15 N. W. 542; Williams v. City of Grand Rapids, 59 Mich. 51, 26 N. W. 279; O'Leary v. Board of Fire & Water Commrs. of Marquette, 79 Mich. 281, 19 Am. St. Rep. 169, 44 N. W. 608, 7 L. R. A. 170), but also by the mention of various specific portions of the way, such as sidewalks, culverts and bridges, which tend to limit the word "street." The case of City of Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815, is in point. This statute as originally passed (Act No. 244, Pub. Acts 1879, 1 Howell's Annotated Statutes, sec. 1442) was practically identical with its present provisions, except that the word "sidewalks" was not included. In the case cited it was held that there was no liability for accidents caused by a [636] defective sidewalk, and the substantial change made by the present statute was the insertion of that word. Doubtless the decision cited was the occasion for the amendment. The court said:

"We have but little doubt that, if the liability had been created for injuries sustained in consequence of a failure to keep in repair the highways and streets, these terms would have included all within the limits of the line thereof, and thus the sidewalks, as well as the bridges, cross-walks and culverts. The special terms used do not enlarge, but limit, the force of the general words used. In village and city charters express provisions relating to sidewalks will always be found, and the omission of such in this act is very significant.

"As already said, the city would not be liable in the absence of this statute, which creates the liability, and we cannot by construction enlarge the liability. Where a statute attempts, in derogation of the common law to create a liability, we cannot go beyond the clearly expressed provisions of the act. Such statutes are not to be extended or enlarged in their scope by construction."

Such a construction would not have been possible if the plaintiff's contention is correct, and the court would have been obliged to hold that the general language was broad enough to include sidewalks and all other portions of the highway.

This is a statute in derogation of the common law, as we have said. That it must be strictly construed for that reason is shown by many cases in our reports. The liability contended for must rest on implication, and in this connection

the case of Bandfield v. Bandfield, 117 Mich. 82, 72 Am. St. Rep. 550, 75 N. W. 287, 40 L. R. A. 757, has application. We there said:

"No such right is conferred by our statute, unless it be by implication. The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations. The rule is thus stated in 9 Bacon's Abridgment, title 'Statute,' I (4), 245: 'In all doubtful matters, and where the expression is in general [637] terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law farther or otherwise than the act expressly declares. Therefore, in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had had that design, they would have expressed it in the act.' "

But one case—McGarey v. City of New York, 89 App. Div. 500, 85 N. Y. Supp. 861—has been cited where a recovery was sought upon a similar injury, and that was not a decision of a court of last resort, and was made by a bare majority of the judges who sat. Moreover, it was in a state that recognized a common-law right of recovery of private damages whenever a duty was imposed upon a municipal corporation, a rule which does not obtain in this state.

Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332, contains an elaborate discussion of the question, and a review of the American cases which is summed up in the following language:

"There is no case in which the neglect of a duty, imposed by general law upon all cities and towns alike, has been held to sustain an action by a person injured thereby against a city, when it would not against a town. The only decisions of the state courts, in which the mere grant by the legislature of a city charter, authorizing and requiring the city to perform certain duties, has been held sufficient to render the city liable to a private action for neglect in their performance, when a town would not be so liable, are in New York since 1850, and in Illinois. The cases in the supreme court of the United States in which private actions have been sustained against a city for neglect of a duty imposed upon it by law are of two classes: (1) Those which arose under the peculiar terms of special charters, in the District of Colum-

bia, as in Weightman v. City of Washington, 1 Black, 39, 17 L. ed. 52, and Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440, or in a territory of the United States, as in Nebraska City v. Campbell, 2 Black, 590, 17 L. ed. 271. (2) Those which, as in Mayor etc. of New York v. Sheffield, 4 Wall. 189, 18 L. ed. 416, and Chicago City v. Robbins, 2 Black, 418, 17 L. ed. 298, arose in New York or in Illinois, and in which the general liability of the city was not denied or even discussed, and apparently [638] could not have been, consistently with the rule by which the supreme court of the United States, upon questions of the construction and effect of the constitution and statutes of a state, follows the latest decisions of the highest court of that state, even if like words have been differently construed in other states. In the absence of such binding decisions, we find it difficult to reconcile the view, that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon it, with the doctrine that the purpose of the creation of municipal corporations by the state is to exercise a part of its powers of government—a doctrine universally recognized, and which has nowhere been more strongly asserted than by the supreme court of the United States.

"But, however it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone; and breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby": See, also, 2 Dillon on Municipal Corporations, 4th ed., sec. 997 et seq.

It is undeniable that many of the state courts make a distinction between municipal corporations proper and quasi-municipal corporations, implying liability on the part of the former when a public duty is imposed, while such liability is not implied against the latter. New York is one of these

states. That this is illogical is shown by the cases of Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332, and City of Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450, and is stated to be so by Mr. Dillon: 2 Dillon on Municipal Corporations, [639] 4th ed., secs. 1022-1024. This subject is alluded to here, to emphasize the fact, which appears to be conceded, that the plaintiff's claim in this case must vest on a statute in derogation of the common law, and for the further purpose of calling attention to the fact that the only similar case to the present one (McGarey v. City of New York, 89 App. Div. N. Y. 500, 89 N. Y. Supp. 861), cited by counsel is based on an entirely different view of the common law, as is also the case of Danaher v. City of Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592, cited therein, and therefore those cases are not authority in this state, being fundamentally opposed to the established principles here. There is much danger in following precedents from other states without taking note of the differences in conditions underlying them. We have heretofore said that many departures from sound principles can be traced to such cause.

The learned circuit judge did not err in his interpretation of this statute, and his judgment should be affirmed.

Blair, C. J., and Grant, Montgomery, Ostrander, Moore, McAlvay and Brooke, JJ., concurred.

The Liability of Municipal Corporations to Persons Injured in Public Streets is the subject of a note to Dudley v. City of Flemingsburg, 103 Am. St. Rep. 257. A municipal corporation is answerable to a traveler injured on one of its public streets, under its control, by the explosion of a steam boiler beneath the sidewalk over which he was walking, there erected and operated for three months, under conditions in violation of one of its ordinances: Beall v. City of Seattle, 28 Wash. 593, 92 Am. St. Rep. 892. But if an iron pipe attached to the side of a building adjoining the street and abutting upon the sidewalk, in falling, kills a person on the sidewalk, but there is no evidence of notice on the part of the city of the defective and dangerous condition of the pipe, the city is not liable: Mitchell v. Brady, 124 Ky. 411, 124 Am. St. Rep. 408.

The Maintenance of Trees in a Street for purposes of ornament and shade is a proper street use: City of Paola v. Wentz, 79 Kan. 148, 131 Am. St. Rep. 290, and cases cited in the cross-reference note thereto.

HODGINS v. BAY CITY.

[156 Mich. 687, 121 N. W. 274.]

MUNICIPAL CORPORATIONS—Negligence in Electric Light Plant.—A city which provides electric light to its inhabitants for remuneration is liable for the negligence of its employés in not insulating dangerous wires, and can claim exemption from liability only on the ground of being an agency of local government for the public purpose of benefit to the community when furnishing the service for lighting its public streets, places and buildings. (pp. 547–550.)

MUNICIPAL CORPORATIONS—Negligence of Fire Department.—A municipality is not responsible for negligent injuries to persons or property committed by members of a fire department when engaged in work pertaining exclusively to the extinguishment of fires. (p. 549.)

CONTRIBUTORY NEGLIGENCE — Municipal Corporations — Safety of Appliances—Right to Rely upon.—A lineman in the employ of a telephone company, whose duty it is to climb poles on which are strung the lighting wires of the municipal corporation is entitled to regard the wires as safe and properly insulated and his nonexamination of their dangerous conditions is not contributory negligence. (p. 550.)

NEGLIGENCE—Safety of Appliances—Instruction to Jury.—An instruction that if the jury found that the place where deceased was killed was then in a defective condition and became so after its construction, unless they found further that such condition had existed long enough to have enabled the defendant by reasonable diligence to have made an inspection, discover the defect, and make the repairs, they should find for the defendant, amply protects defendant's rights in an action for so negligently stringing and maintaining its electric wires as to cause the death of a lineman of another company whose duties took him into immediate contact with them. (p. 553.)

CONTRIBUTORY NEGLIGENCE — Safety of Appliances — Need for Inspection.—An Instruction to the Jury that deceased was not called upon to examine the electric wires of the defendant to see if they were well insulated, but had a right to assume that they were; and that unless the jury found that the danger therefrom was so patent that it should have excited his attention and been seen by him if he were ordinarily careful, that deceased could not be charged with notice of the danger, but only with such danger as might arise from a properly insulated wire; and that his degree of care should be commensurate with his experience and knowledge of the perils of the wires or he would be guilty of contributory negligence, is so fair a charge in an action for negligent maintenance of electric wires that the jury could not have been misled into believing that the question of due care on deceased's part was disregarded by the court. (pp. 552–554.)

TRIAL—Charge to Jury—Erroneous but not Prejudicial.—Where considering the charge to the jury in globo the court is satisfied that though technical errors were committed they were not greatly prejudicial, and that otherwise the case was fairly and impartially submitted to the jury and the verdict is amply supported by the evidence, a motion for a new trial will be denied. (p. 554.)

S. G. Houghton for the appellant.

Pierce & Kinnane and De Vere Hall, for the appellee.

888 BLAIR, C. J. James H. Hodgins, the plaintiff's husband, lost his life on the 14th of September, 1906, through a shock received from an electric wire erected, owned, and maintained by defendant. Deceased, at the time of his injury, was in the performance of his duty as an employé of the Valley Telephone Company, the owner of the pole upon which he was working. The defendant had reserved the right by ordinance to string, and had strung, two primary electric light wires upon this pole. The first cross-arm on the pole was used by the Bay City Traction and Electric Company. The second cross-arm was used by the defendant. The third and fourth cross-arms were used by the Valley Telephone Company. In doing the work he was engaged in, deceased stood upon the first cross-arm, astride of the city primary wire nearest the pole, said wire and cross-arm being near or slightly above his knees. The iron tie wire holding the primary wire against the glass insulator was imbedded into, and had cut through, the insulation of the primary wire, and a portion of the insulation was broken off the tie wire near the end. While deceased was grounded, he in some way came in contact with the primary wire and received a fatal shock. Plaintiff recovered judgment, and defendant brings the record to this court for review, insisting that a verdict should have been directed in its favor for the following reasons:

889 (1) That there is no common-law or statutory liability for such damages against municipal corporations in this state, and as a governmental agency defendant cannot be held liable in this suit.

(2) That decedent assumed the risk in going upon the cross-arms.

(3) That decedent was guilty of contributory negligence as a matter of law.

(4) Defendant was not responsible for such unnatural and improper condition of said wire.

Defendant also contends:

(5) That the court erred in charging the jury both as to the law and the facts in this case.

(6) The court erred in denying defendant's motion for a new trial for the reasons therein contained.

1. At the time of the accident, the defendant was, and for some time had been, engaged in furnishing electric lighting to its inhabitants for compensation, as well as in lighting its streets, public places and buildings. The lamps used for

street lighting were the series arc lamps which were operated by the direct current. For all the commercial lighting the alternating system was used. Separate dynamos and separate wires were used for the two systems. The defective wire which caused the death of Mr. Hodgins was carrying the alternating current and was part of the commercial lighting system. Defendant argues that the electric lighting department, like the fire department, of a municipality, is an agency of local government for the public purpose of benefit to the local community, and the rule that exempts the municipality from liability for the negligence of members of the fire department logically extends to the electric lighting department. We do not think the cases cited by counsel require such a conclusion.

In Mitchell v. City of Negaunee, 113 Mich. 359, 67 Am. St. Rep. 468, 71 N. W. 646, 38 L. R. A. 157, the question before the court was: "Can the legislature authorize municipalities to own [690] electric lighting plants which shall furnish not only the lights needed by the municipality but lights to its citizens?"

It was held that light, like water, is a necessity for all, and the furnishing thereof was so far for a public purpose as to sustain the power of the legislature to confer upon municipalities the right to furnish both under proper restrictions. In support of its conclusion, the court quoted at length from Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487, and cited Indiana and Ohio cases. The decisions in Massachusetts and Indiana (see Dickinson v. City of Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A., N. S., 664, and Aiken v. City of Columbus, 167 Ind. 139, 78 N. E. 657, 12 L. R. A., N. S., 416 make it clear that, in holding that the furnishing of such a present day necessity as electric light is within the public purpose necessary to authorize the power of taxation, it was not intended to affect the rules of liability pertaining to the exercise of such franchises. Mitchell v. City of Negaunee, 113 Mich. 359, 67 Am. St. Rep. 468, 71 N. W. 646, 38 L. R. A. 157, contains no implication that the public purpose authorizing the delegation of the power of taxation places the municipality in the category of governmental agencies discharged from liability for the negligence of its officers and employés. In Davidson v. Hine, 151 Mich. 294, 123 Am. St. Rep. 267, 115 N. W. 246, 15 L. R. A., N. S., 575, 14 Ann. Cas. 352, it was held that a city fire department is a local government agency and not an agency of the state

government, and that an act of the legislature authorizing the governor to appoint the members of a bureau of safety to have charge of such fire department was unconstitutional, as being in violation of the constitutional right of self-government conferred upon municipalities. It was contended in that case that the holding of this court in Brink v. City of Grand Rapids, 144 Mich. 472, 108 N. W. 430, that the city was not responsible for the negligence of the employés of the fire department, was conclusive that such department was an agency of the state and not of the local government. It was said in reply to this contention that the case of Brink v. City of Grand Rapids rests upon the proposition that: [691] "A municipality is not responsible for negligent injuries to persons or property committed by members of a fire department when engaged in work pertaining exclusively to the extinguishment of fires. It cannot be said that a municipality is responsible for all the negligence of its officers when they are engaged in performing local governmental duty, and therefore it is not true that exemption from such responsibility proves that they are not performing a local governmental duty."

It was not intended by that decision to overrule Ostrander v. City of Lansing, 111 Mich. 693, 70 N. W. 332, and cognate cases. In the latter case the city was exercising its local governmental functions in the construction of a public sewer and was held liable for the negligence of its employés; it appearing that the charter of the city of Lansing contained a provision authorizing the obtaining of revenue from such sewers.

In Stevens v. City of Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777, the distinction is stated, quoting the language of Chief Justice Nelson, in Bailey v. Mayor etc. of New York, 3 Hill (N. Y.), 531, 38 Am. Dec. 669, as follows: "If granted for public purposes exclusively, they belong to the corporate body in its public political or municipal character; but if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

Although it was said in Davidson v. Hine, 151 Mich. 294, 123 Am. St. Rep. 267, 115 N. W. 246, that "a municipal fire department is indistinguishable from a system of municipal waterworks which is authoritatively determined to be an

agency of municipal government," and that Justice Cooley, in delivering the opinion of the court in People v. Detroit Common Council, 28 Mich. 228, 15 Am. Rep. 202, clearly recognizes that "in Michigan the doctrine that a municipality is responsible for the negligence of its officers when engaged in performing [692] a local governmental duty does not obtain," it was only intended thereby, as in the Brink case (144 Mich. 472, 108 N. W. 430), to exclude liability when the function exercised was for the exclusive benefit of the local public, without private advantage or emolument to the corporation. It was not intended to wholly abolish the distinction stated by Chief Justice Nelson in Bailey v. Mayor etc. of New York, 3 Hill (N. Y.), 531, and cited with approval by Justice Cooley in People v. Detroit Common Council. We are therefore of the opinion that the municipality, in furnishing electric light, is discharged from liability for negligence of its officers, agents, and employés when furnishing the service for lighting its public streets, public places, and buildings, and that it is liable for such negligence in furnishing light to its inhabitants for remuneration.

2. This point was abandoned upon the oral argument.

3. The pole upon which decedent was working belonged to his employer, the Valley Telephone Company, and the right of the city to use the pole was derived from the ordinance, which provided that: "The city shall have the right to use any or all poles erected by the Valley Telephone Company, within the corporate limits of the city, for stringing fire-alarm wires, or other wires, the property of said city."

Decedent owed no duty to defendant. On the contrary, defendant, knowing that decedent's duties would require him to work upon his employer's cross-arms and wires above its own, and knowing the extremely dangerous current its wires carried, was charged with the highest degree of care in furnishing a safe wire in the first instance and in making sufficient inspections and of sufficient frequency to keep the wires in a reasonably safe condition; and in going upon the pole to perform his work decedent had a right to rely to some extent upon the defendant's discharge of its duty. Considered in the light of these principles, we do not think it can be said, as a matter of law, [693] that decedent was guilty of contributory negligence. Mr. Hodgins was a man of long experience in this line of work. His employer's manager testified: "He was one of the most experienced men in that line I have ever known or ever had work for me. I have always

thought he was very careful and prudent; sometimes thought he carried it a little too far."

There was competent testimony tending to show that decedent was doing his work in a proper manner, and, unless the testimony compels the conclusion that he was negligent in not discovering the dangerous condition of the wire, the question of his contributory negligence was for the jury. The primary wire which caused his death had been erected less than two months before, and the insulation on the wire was generally in good condition, and, except for the break in the insulation of the primary wire and of the tie wire where it was tied to the insulator, the wire was harmless. Decedent was engaged in stringing a heavy cable containing two hundred and four telephone wires, and at the time of his death was endeavoring to make a proper bend in the cable so as to bring it down the pole to eventually connect with the Valley Telephone Company's office. It was a bright, cloudless day, and had been dry during the whole day. His manager testified: "He would climb with his front to the pole. I know where the offending place was that led to his death on the wire. In climbing up the pole as I have described, this place would be back of him, and in this position he would practically have no opportunity to discover the defects then in the construction at that point other than by inspection of the wires as appears here. If there were two thousand two hundred volts in that wire, and the insulation on it was correct, there would be no danger in my putting my hand on it. The danger arises when the insulation is broken or weather-soaked on account of age and the insulating properties being gone out of it."

He also further testified that he examined the wire about half an hour after the accident occurred.

694 "I made a very close examination, got right up close to it, and examined it very carefully. The burning I could not see until I got very close to it. I might have noticed it two or three feet away if my attention had been called to it. It was cut into the feed wire to a certain extent. You could see that on any wire that was indented. The condition of cutting in along this wire was no more than I would expect to find at any point. The burning indicated that there was a leak or contact, and, if the appearance had not indicated the burning, I could not have told there was anything wrong there."

He and others made a "magneto bell test" the next day, which demonstrated that the insulation on the tie wire and feed wire was cut clear through at that point, and the wires themselves were in actual contact. He also testified that he should consider the insulation on such a wire "absolutely safe for three months." We think the question of decedent's contributory negligence was clearly a question of fact for the jury.

4. Defendant contends: That the testimony of the witnesses McCullough and Crampton shows that they were the persons who made the ties on said wire in July, 1906, and that they would not leave the ends of the tie wire in the condition they were at the time of the accident; that Camp and Kerzrock, employés of the Valley Telephone Company under Mr. Hodgins, testified that its employés moved the city feed wire for their own convenience when working there; that, in view of these facts, it is unreasonable to presume that the line was originally tied as found the day after the accident, and it is a reasonable presumption that Mr. Hodgins knew about his men moving and handling the wires; and that the court erred in instructing the jury that there was nothing to charge decedent with notice of any change made in tying the line. There was competent testimony that, if the tie wire had been changed to the other side of the insulator and retied, the marks of such change would show upon the wires and could readily be detected, that there were no such marks, and, from the appearance of the wire and tie, when examined [895] after the injury, no change had been made after it was erected. McCullough testified that he did not make the tie in question, to his knowledge, that Crampton and Quackenbush worked with him, and they put up the line from Linn and Midland streets across the river to Saginaw street, etc. Crampton testified that he could not say who did the work on that pole and denied that he tied the wire as it appeared after the accident. Quackenbush, the man who worked with McCullough and Crampton, was not called, and, in view of the testimony of Crampton, McCullough, and the experts, the logical inference is that Quackenbush made the tie as it was found after the accident. The testimony did not tend in any way to show notice of any change on the part of decedent. The court instructed the jury, as requested by defendant: "If you find that the place where deceased was killed was in a defective condition at the time, and became so after the original construction, at the time he met his death, unless you

further find that such condition had existed for such a time as would have enabled the defendant by the use of reasonable diligence to make an inspection, discover the defect, and make the repairs, then the defendant is not liable."

This request fully protected defendant's rights so far as the record warranted the submission of a claim of a change in the tie after the original attachment to the insulator.

5. The fourteenth assignment of error is as follows: "Fourteenth. The court erred in charging the jury as follows: 'Deceased was not called upon before entering upon his work on the pole to examine or inspect the wire and tie on defendant's line at the place in question to learn whether it was properly insulated. Being authorized and required to work upon the pole, he would have a right to assume and believe that defendant had properly constructed, maintained, and inspected it. And unless you find that condition and danger arising from such defect was one so open and plain that it would naturally attract his attention and should have been seen by him in the exercise of ordinary care in and about his work, then I say to [696] you that he would not be charged with either knowledge or notice of the true condition or danger. He would only stand charged with knowledge and notice of the dangers incident to a wire of equal voltage, similarly situated and properly tied and insulated.' "

Subsequently to the giving of this instruction, the court charged the jury as follows: "The degree of care and caution that plaintiff's decedent was required to observe and exercise when he went upon this pole in question was the care and caution that an ordinarily prudent man of twenty years' experience with electric wires and cables, knowing the extremely dangerous character of such wires carrying a high voltage, would ordinarily observe and exercise, having regard to the insulation ordinarily employed. Plaintiff's decedent, because of his experience and knowledge of the dangerous character of electric wires carrying a high voltage of electricity, was called upon to use and exercise greater care than a person who never had such experience or knowledge of the extremely dangerous character of such wires. His degree of care must be commensurate with his experience and knowledge of the dangerous character of electric wires carrying a high voltage of electricity, and if you find that decedent, under the circumstances as I have just stated, failed in such degree of care, for his own safety, he would be guilty of contributory negligence, and plaintiff could not recover. Plaintiff's decedent

was a man of several years' experience with electricity, electric wires, telephone wires, cross-arms, etc., and must have known the result of coming in contact with live wires, as well as the purpose and effect of the insulation, and when he went up on this telephone pole in question and out upon the cross-arm carrying these electric wires, I charge you that it was his duty before going out onto such cross-arm and over these electric wires to observe such conditions as were apparent and would naturally attract the attention of a man of ordinary caution under the conditions present, and if by looking he would have discovered that the insulation was stripped off from the tie wire and the tie wire had cut the insulation on the main wire, and that this made the place extremely dangerous, and if he failed in such duty, I then charge you he was guilty of contributory negligence, and in that event your verdict should be no cause of action."

697 Considering the instructions together, we do not think the jury could have been misled into believing that "the question of due care on the part of deceased was wholly disregarded."

We have considered the remaining assignments of error, and, considering them in connection with the entire charge, we are satisfied that, if technical errors were committed, they were not sufficiently prejudicial to defendant to require a reversal. Upon the whole the case was fairly and impartially submitted to the jury, and the verdict is amply supported by the evidence.

The judgment is affirmed.

Grant, Montgomery and Ostrander, JJ., concurred.

Hooker, J., concurred in the result.

Electric Companies are Held to the Highest Degree of Care Practicable to avoid injury to persons who may, accidentally or otherwise, come in contact with their wires: Conrad v. Springfield Ry. Co., 240 Ill. 12, 130 Am. St. Rep. 251; Wilbert v. Sheboygan Light etc. Co., 129 Wis. 1, 116 Am. St. Rep. 931; Guinn v. Delaware etc. Tel. Co., 72 N. J. L. 276, 111 Am. St. Rep. 668, and cases cited in the cross-reference note thereto. As to the application of this rule to municipal corporations which attempt to operate electric plants, see Tisher v. New Bern, 140 N. C. 506, 111 Am. St. Rep. 857; note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 535. In Eaton v. City of Weiser, 12 Idaho, 544, 118 Am. St. Rep. 225, it is affirmed that a city engaged in the enterprise of manufacturing and selling electric light to its inhabitants is not engaged in a public, governmental duty, and is held to the same responsibility for injuries received on account of the negligent conduct of its officers as would a private individual running an opposition plant in the same municipality.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

PROCTOR v. NANCE.

[220 Mo. 104, 119 S. W. 409.]

NAMES—Proceedings Against Person by His Initials.—A publication and judgment in a tax suit against "R. L. Hall," and a sheriff's deed in pursuance thereof, do not convey title to the purchaser where the title of record is in "Robert Lee Hall." (p. 559.)

TAX SALE—Ratification by Receiving Proceeds.—Where a tax sale is ineffectual because the proceedings were against the owner by his initials instead of his full name, but he demands and receives the surplus of the sale from the county treasurer, he, and his grantees with notice, are estopped to deny the validity of the sale and deed, and cannot avoid the effect of the ratification by showing that he is an ignorant man and did not appreciate the legal significance of his act. (pp. 560–563.)

TAX SALE—Avoiding Ratification and Refunding Surplus.—Where an owner of land has ratified an invalid tax sale thereof by demanding and receiving the surplus from the county treasurer, the rights of the parties become fixed as of that time, and he, and his grantees with notice, cannot avoid the effect of his ratification by tendering back the amount to be repaid to the county treasurer. (p. 562.)

John Morgan Atkinson, for the appellant.

Thomas F. Lane and Alfred Perkins, for the respondents.

107 GANTT, P. J. This is a suit brought under section 650, Revised Statutes of 1899, to quiet the title to the southwest quarter of the northwest quarter of section 28, township 23, range 3 east, in Ripley county, Missouri.

The defendants were both personally served with the writ of summons. The petition alleges that the plaintiff is the owner in fee simple of, and claims title to, the said forty acres of land, and that the same is not in the actual possession of any person or persons, but is wild and uncultivated; that the defendants claim some title and estate in said real estate, the

nature and character of which is unknown to plaintiff, and cannot be described except that it is adverse and prejudicial to plaintiff. The prayer was that the court should try, ascertain and determine the title and interest of the plaintiff and of the defendants respectively, and by its decree adjudge the same.

The defendant Smith disclaimed any interest or title in the land. The defendant Nance filed the following amended answer:

"Now at this time comes defendant, and by leave of court first had and obtained, files his amended answer to plaintiff's petition, and denies each and every allegation therein contained.

108 "Further answering, defendant says that he is the owner of the land described in said petition in fee simple.

"Further answering, defendant says that plaintiff is estopped from setting up or claiming any right, title or interest in or to said land, because at the time he obtained the quitclaim deed under which he claims, signed by Robert Lee Hall, said land had prior thereto been legally sold for delinquent and back taxes, and a sheriff's deed made and delivered therefor to this defendant; that at the time plaintiff took the quitclaim as aforesaid from Robert Lee Hall, he knew he was the same person mentioned in the proceedings to enforce the state's lien for delinquent and back taxes, and called in said proceedings R. L. Hall, and that defendant's sheriff's deed was recorded in the deed records of Ripley county in book 5 at page 421, on the seventeenth day of March, 1905, and that plaintiff took said quitclaim deed for a nominal consideration, and with full notice of all the facts surrounding the making of said sheriff's deed under which this defendant holds.

"Defendant further says that there was a surplus arising from the sale of the said land by the sheriff under the tax proceedings before mentioned in the sum of four dollars and seventy-five cents, which was paid over to one Jane Hall upon the order of R. L. Hall, who was the same person as Robert Lee Hall, and the same person who was sued in the tax proceedings aforesaid.

"Defendant further says that plaintiff well knew the fact that R. L. Hall or his assigns had received the surplus money arising from the sale aforesaid, when he received the quitclaim deed aforesaid from the said Hall, and then and there knew that the said Hall had recognized the validity of the

service and notice in the tax sale, and the judgment and sale thereunder.

"Wherefore defendant prays the court to adjudge, order and decree that the defendant has the full legal and equitable title in and to said land described in [109] plaintiff's petition, and that plaintiff is forever estopped from setting up or claiming any right, title or interest in or to said land, and for costs of this suit."

To which plaintiff filed the following replication:

"Now, at this day comes the plaintiff, and for his amended reply to the new matter set up in the answer of defendant James M. Nance herein, denies each and every allegation thereof, except those which are hereinafter set out and specifically admitted.

"Plaintiff further replying admits that there was a surplus of four dollars and seventy-five cents derived from the sale of the land in this suit by the sheriff of Ripley county, and that said sum was paid over by said sheriff to the county treasurer and credited by said treasurer to the surplus trust fund of said county, and that said surplus was paid to one Jane Hall on the order of Robert Lee Hall, the grantor under whom the plaintiff claims title; but plaintiff states and avers the fact to be that at the time the said Robert Lee Hall authorized the payment of said surplus he had knowledge or information that the said sale of land in this suit by said sheriff and the order of publication therein was void, and that said sale did not pass any title from said Hall; that said Hall is an uneducated person, and by accepting said surplus did not thereby intend to ratify said illegal sale of a valuable tract of land for a mere nominal sum of four dollars and seventy-five cents.

"Plaintiff further replying states and avers that at the time he bought the land in suit he had no knowledge or information that there was any surplus from said sale, or that said Robert Lee Hall had ever authorized the refund of said surplus, and that neither the said Robert Lee Hall nor this plaintiff should in equity be estopped from claiming said land by reason of the refund of said surplus; but this plaintiff for said Robert Lee Hall and himself hereby tenders into court the said surplus of four dollars and seventy-five cents, being the amount refunded to said Hall as aforesaid, and asks the court [110] to order same paid by the clerk of this court to the county treasurer that same may be credited to the surplus trust fund of said county. Plaintiff, having fully

replied, prays for judgment in accordance with the prayer of his petition."

On the trial it was admitted that Robert Lee Hall was and is the common source of title to said tract of land. It was then stipulated between counsel for the plaintiff and the defendant that the matters pleaded in the amended replication were true, and might be considered as evidence in the case subject to an objection to the relevancy of the matters therein stated because they constituted no defense in law and no estoppel.

Plaintiff then introduced a quitclaim deed from Robert Lee Hall to plaintiff of date March 18, 1905, recorded March 30, 1905, in the deed records of Ripley county, whereby Robert Lee Hall in consideration of two dollars and other valuable considerations to him paid by plaintiff, the receipt of which was acknowledged, remised, released and quitclaimed unto the plaintiff the said forty acres of land. Plaintiff also made a tender in open court of four dollars and seventy-five cents, being the amount refunded said Robert Lee Hall under the tax sale.

The defendants to maintain the issues on their part offered and read in evidence a sheriff's deed of date April 7, 1903, and filed for record March 17, 1905, and recorded in book number 5, page 421, of the deed records of Ripley county by Neely Moore, sheriff of Ripley county, to James N. Nance, conveying the land in controversy.

This deed recited the judgment of the circuit court of Ripley county of the sixth day of December, 1902, in favor of the state of Missouri at the relation and to the use of John H. Nunnelee, collector of the revenue of Ripley county, against R. L. Hall, for the sum of thirty dollars and thirty-seven cents, for certain delinquent state, county and special taxes and interest assessed and found by the court to be unpaid upon the southwest quarter of the [111] northwest quarter of section 28, township 23, range 3 east, for the years 1896, 1897, 1898, 1899 and 1900. The said taxes and interest thereon, clerk's costs, attorney's fees and collector's commissions amounted to thirty dollars and thirty-seven cents, and the court costs of said suit amounted to twenty-two dollars and fifty-eight cents, all of which were decreed to be a lien in favor of the state upon said real estate. The deed then recited the issue of a special execution and order of sale on said judgment against said R. L. Hall of date the third day of February, 1903, and a levy of the said execution by the said sheriff

on the 30th of February, 1903, upon the said real estate, and the giving of the notice of the time and place of sale as the law directs, and the offering of the said land for sale on the seventh day of April, 1903, at the courthouse of said county, at the April term, 1903, and that James Nance was the highest bidder for the said real estate for the sum of seventy-four dollars, and that the same was stricken off and sold to said Nance for that sum, in consideration of which the said sheriff assigned, transferred and conveyed said land to the said Nance. The deed was duly acknowledged in open court at the April term, 1903.

To the introduction of this deed the plaintiff objected for the reasons that the deed on its face purported to convey the title of R. L. Hall and not the title of Robert Lee Hall, who was the admitted common source of title, and because the order of publication in the said tax suit was against R. L. Hall while the record title was in the name of Robert Lee Hall, and for the further reason that the deed on file does not set out the taxes separately for each year for which the same was sold.

Plaintiff then offered in evidence the order of publication in the said tax suit, which was directed to R. L. Hall, as defendant, and otherwise was in the usual form and recited that the defendant was a nonresident of the state of Missouri, so that the ordinary process of law could not be served upon him.

112 The tax-bill filed as an exhibit was against R. L. Hall dated August 4, 1902, for the taxes for the years 1896, 1897, 1898, 1899 and 1900, and was in due form except being against R. L. Hall.

At the close of the testimony the plaintiff requested the court to declare that under the law and the evidence the finding must be for the plaintiff, and that the facts set out and admitted did not constitute an equitable estoppel, which the court refused to do, but rendered judgment for the defendant. In due time the plaintiff filed his motion for a new trial, which was overruled by the court.

1. As it is conceded that Robert Lee Hall was the owner of the land in suit and the record title to the said land was in Robert Lee Hall, and plaintiff introduced a quitclaim deed from the said Robert Lee Hall conveying said land to plaintiff in due and regular form, it is at once apparent that this controversy is narrowed down to the effect to be given the sheriff's deed to the defendant Nance under the judgment

for taxes against R. L. Hall. In view of the numerous decisions of this court, beginning with Skelton v. Sackett, 91 Mo. 377, 3 S. W. 874, it must be held that the order of publication and the judgment rendered thereon and the sheriff's deed in pursuance thereof did not convey the title of Robert Lee Hall to the land in suit, as the said Hall was designated only as R. L. Hall, unless the said Robert Lee Hall and the plaintiff are estopped by the other facts appearing in the record to be now noticed: Turner v. Gregory, 151 Mo. 100, 52 S. W. 234; Vincent v. Means, 184 Mo. 327, 82 S. W. 96; Spore v. Ozark Land Co., 186 Mo. 656, 85 S. W. 556; Gillingham v. Brown, 187 Mo. 181, 83 S. W. 1113; Burkham v. Manewal, 195 Mo. 500, 94 S. W. 520.

2. This brings us to the question of estoppel pleaded by the defendant Nance in his answer, and admitted in the reply of the plaintiff.

[113] From these admissions in the pleadings it appears that out of the purchase money paid by the defendant Nance for said land at the sheriff's sale, all the taxes were satisfied and all the costs, and that there remained a surplus of four dollars and seventy-five cents, and this sum the sheriff paid into the county treasury and was credited by the treasurer to the surplus trust fund of said county, and afterward the said R. L. Hall gave his order upon the county treasury for the said sum of four dollars and seventy-five cents to Jane Hall, and the same was paid to her by the treasurer, and this was all done before the said Robert Lee Hall made his quitclaim deed to the plaintiff in this case for the said land.

The plaintiff in this court is in the same position that Hall, his grantor, would occupy if he had brought the suit. As the defendant's deed had been duly recorded, plaintiff took with full notice thereof, and while he avers in his replication that he had no knowledge that there was any surplus from said sale, or that Hall had given the order to Jane Hall for said surplus, he does not deny that he had notice of the defendant's deed, besides his claim to the land is merely by virtue of a quitclaim deed, and he is not an innocent purchaser without notice.

To obviate the effect of Hall demanding and receiving the surplus of the purchase money paid by the defendant Nance at the sheriff's sale, plaintiff pleads that Hall at the time he gave the order for said surplus had no knowledge that the sale was void, and that Hall was an uneducated person and did not intend to ratify said sale by receiving

said surplus. But the very character of the transaction of taking the surplus of the sale necessarily advised Hall that his land had been sold, and that this was a part of the purchase money paid by the defendant at the execution sale. It carried notice upon its face, or at least was of that unequivocal nature that it put Hall upon inquiry as [114] to the source of that surplus and why it was there in the treasury for him, and it must be held that he had notice that his land had been sold for the taxes under the tax judgment. He had the option to refuse to take down this surplus and bring his action to remove the cloud from his title, or he could ratify the sale even though it was a void judgment, and thereby estop himself from disputing the validity of the proceedings under which the land had been sold.

In Austin v. Loring, 63 Mo. 19, the judgment was void for want of jurisdiction before the land was sold under the judgment and the defendant demanded and received from the sheriff the surplus of the proceeds of the sale after the satisfaction of the judgment. After that, as in this case, he conveyed the land by quitclaim to a third party, and this court, speaking through Wagner J., of that transaction, said: "But no person will be allowed to adopt that part of a transaction which is favorable to him, and reject the rest to the injury of those from whom he derived the benefit. When those who are entitled to avoid a sale adopt and ratify it, equity will estop them from afterward setting it aside. When a sale of land is made, no person can be permitted to receive both the money and the land. And it has been held, in the application of this principle, that it makes no difference whether the proceedings under which the sale occurs are voidable or wholly void, in consequence of the want of jurisdiction. In 2 Smith's Leading Cases, fifth American edition, page 662, the author says that when those who are entitled to avoid a sale adopt and ratify it, by receiving the whole or any part of the purchase money, equity will preclude them from setting it aside subsequently for reasons that are too plain for statement: Stroble v. Smith, 8 Watts, 280; Commonwealth v. Shuman's Admrs., 18 Pa. 343; Smith v. Warden, 19 Pa. 424. 'When a sale is made of land,' said Lewis, J., in Smith v. Warden, 'no one can be permitted to receive both [115] the money and the land. Even if the vendor possessed no title whatever at the time of the sale, the estoppel would operate upon a title subsequently acquired.

It was held by this court, in Commonwealth v. Shuman's Admrs., 18 Pa. 343, that equitable estoppels of this character apply to infants as well as to adults, to insolvent trustees and guardians as well as to persons acting for themselves, and have place as well when the proceeds arise from a sale by authority of law as when they spring from the act of the party. A party will not be allowed to indulge in bad faith and make innocent purchasers the sport of his tricks. When a sale is void, the reception of the purchase money renders it valid: Adlum v. Yard, 1 Rawle, 163, 17 Am. Dec. 608; Furness v. Ewing, 2 Pa. 479. These principles are founded on elevated morals, common honesty and pure good faith, and are coextensive with the principles of the mischief which they are designed to counteract. Where a party has taken the fruits of a judicial proceeding, he should not afterward be heard to question it. Though an estoppel may debar the truth in a particular case, yet, as was said by the supreme court of the United States in Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703, it imposes silence on the party only when in conscience and honesty he should not be allowed to speak.' "

In this case the defendant Nance had the means of knowing whether the proceedings in the tax case were valid or void, and so far bid at his peril, but he paid his money in good faith, and Hall, with knowledge that the defendant had bought and paid for the land and that this purchase money had gone to the satisfaction of the taxes on the land, demanded and received the surplus from the treasury, and thus must be held to have ratified the sale. The doctrine announced in Austin v. Loring, 63 Mo. 19, has recently been reaffirmed and approved by this court in bank, at this term of this court, in the case of Cape Girardeau etc. [116] R. R. Co. v. Southern Illinois etc. Bridge Co., 215 Mo. 286, 114 S. W. 1084.

The attempt of the plaintiff herein to avoid the effect of taking down this surplus and ratifying the sale by tendering back the amount of the surplus into court to be repaid to the county treasury was futile, as the rights of the parties were fixed when the sale was ratified by the demanding and receiving of said surplus by Hall, the grantor for the plaintiff herein. Nor do we think the plea that Hall was an uneducated person and did not intend by receiving the surplus to ratify the sale can avail the plaintiff in this case. There is not the slightest pretense that the defendant Nance, or,

for that matter, any other person, made any false representation to Hall to induce him to accept said surplus, and in the absence of some overreaching of him in this matter, his ignorance of the law cannot be allowed to nullify his act in taking a part of the purchase money.

In our opinion the defendant Nance is entitled to the benefit of this principle of estoppel in this case. The record discloses that he paid seventy-four dollars, which was applied in part to the payment of taxes for five years, which Hall had neglected to pay, and the plaintiff stands in the attitude of having given only two dollars for this tract of land with full knowledge that defendant Nance had bought and paid his money to satisfy said taxes and costs. We think the doctrine announced in Austin v. Loring, 63 Mo. 19, is just and equitable, and should apply to the facts of this case, and accordingly the judgment of the circuit court is affirmed.

Burgess and Fox, JJ., concur.

PROCEEDINGS AGAINST PERSONS BY THE INITIALS TO THEIR CHRISTIAN NAMES, OR BY LESS OR OTHER THAN THEIR FULL CHRISTIAN NAMES.

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I. What Constitutes a Name.

a. In General.—Since the days of William the Conqueror, by the common law a person's full legal name consists of a Christian or given name and a surname or patronymic: State v. Webster, 30 Ark. 166; Scofield v. Jennings, 68 Ind. 233; Stever v. Brown, 119 Mich. 196, 77 N. W. 704; Enswold v. Olson, 39 Neb. 59, 42 Am. St. Rep. 557, 57 N. W. 765, 22 L. R. A. 573; Slingluff v. Gainer, 49 W. Va. 7, 37 S. E. 771; and in a great majority of the states, as will presently be seen, the law from William of Norman as just stated continues down to the present day.

b. **History and Origin of the Rule.**—The proper or lawful names of persons is a subject to which legal writers have paid but little attention, and the works commonly referred to on matters of general knowledge are exceedingly barren of information upon the subject of personal nomenclature. Realizing this fact, the court of common pleas of New York, in Petition of Snook, 2 Hilt. 566, entered into an exhaustive examination of the subject, and from the very able and elaborate opinion rendered in that case a clear statement as to the origin of the usage that now prevails in respect to names may be obtained. "A man's name," said Judge Daly, "is the mark or indicia by which he is distinguished from other men. By a practice now almost universal among civilized nations, it is composed of his Christian or given name and his surname. The one is the name given to him after birth, or at baptism; the other is the patronymic derived from the common name of his parents. In the case of illegitimates they take the name or designation they have gained by reputation. The Christian or first name is, in the law, denominated the proper name, and a party can have but one, for middle or added names are not regarded.

"Formerly, the Christian name was the more important of the two. 'Special heed,' says Coke, 'is to be taken of the name of baptism, as a man cannot have two, though he may have divers surnames': Coke's Littleton, 3, a (m).

"Indeed, anciently in England, there was but one name, for surnames did not come into use until the middle of the fourteenth century, and even down to the time of Elizabeth they were not considered of controlling importance. Thus, Chief Justice Popham, in Brittain v. Wrightman (Poph. 56), speaking of grants, declares that 'the law is not precise in the case of surnames, but for the Christian name,' he says, 'this ought always to be perfect'; and throughout the early reports the Christian name is uniformly referred to as the most certain mark of the identity of the individuals in all deeds or instruments. Greater importance being attached to the Christian name arose from the fact that it was the designation conferred by the religious rite of baptism, while the surname was frequently a chance appellation, assumed by the individual himself, or given to him by others, for some marked characteristic, such as his mental, moral, or bodily qualities, some peculiarity or defect, or for some act he had done which attached to his descendants, while sometimes it did not. The insufficiency of the Christian name to distinguish the particular individual, where there were many bearing the same name, led necessarily to the giving of surnames; and a man was distinguished, in addition to his Christian name, in the great majority of cases, by the name of his estate, or the place where he was born, or where he dwelt, or from whence he had come, as in the name 'Washington,' originally 'Wessyngton,' which, as its component parts indicate, means a person dwelling on the meadow land, where a creek runs in from the sea, or else from his calling, as John the smith, or William the tailor, in time abridged to John Smith and William

Taylor. And as the son usually followed the pursuit of the father, the occupation became the family surname, or the son was distinguished from the father by calling him John's son, or William's son, which, among the Welsh, was abridged to 's,' as Edwards, Johns or Jones, or Peters, which, as familiar appellations, passed into surnames. The Normans added 'Fitz' to the father's Christian name, to distinguish the son, as Fitz-herbert or Fitz-gerald. And among the Celtic inhabitants of Ireland and Scotland, where each separate clan or tribe bore a surname, to denote from what stock each family was descended, 'Mac' was added to distinguish the son, and 'O' to distinguish the grandson; and generally, where names were taken from place to place, the relation of the individual to that place was indicated by a word put before the name, like the Dutch 'Van' or French 'De,' or a termination added at the end, which additions were in time merged into and formed but one word, until, from these various prefixes and suffixes, numerous names were formed and became permanent. So, as suggested, something in the appearance, character, or history of the individual gave rise to the surname, such as his color, as black John, brown John, white John, afterward transposed John Brown, etc.; or it arose from his bulk, height, or strength, as Little, Long, Hardy, or Strong; or his mental or moral attributes, as Good, Wiley, Gay, Moody, or Wise; or his qualities were poetically personified by applying to him the name of some animal, plant, or bird, as Fox or Wolf, Rose or Thorn, Martin or Swan; and it was in this way that the bulk of our surnames that are not of foreign extraction originated and became permanent. They grew into general use without any law commanding their adoption or prescribing any course or mode respecting them. In the fourth year of the reign of Edward IV an act was passed compelling every Irishman that dwelt within the English pale to take an English surname, and enacting that it should be the name of some town, or of some color, as black or brown, or of some act or occupation, or of some office, which led to an extensive change of names in that part of Ireland, as a noncompliance was attended with a forfeiture of goods. But, though for several centuries the practice of giving or assuming surnames was general, it extended little further than the particular individual of which it was the designation or mark. His descendants adopted it or not, at pleasure, or he assumed a new name himself, or others conferred upon him some characteristic appellation, which adhered to him and his descendants. This fluctuation and change, however, was materially arrested by a statute, passed 1 Henry V, chapter 8, called the statute of additions, which required not only the name of the individual to be inserted in every writ or indictment, but, in addition, his calling, his estate or degree, and the town, hamlet, or place to which he belonged. And in the reign of Henry VIII, Cromwell, the secretary of the king, established a regulation by which a record was required to be kept in every parish of births, marriages and deaths; a regulation which, in connection with the previous act, operated to check the caprice of individuals in the matter of their

v. Buckley, 145 Mass. 181, 13 N. E. 368; Parker v. Parker, 146 Mass. 320, 15 N. E. 902; Carney v. Bigham, 51 Wash. 452, 99 Pac. 21, 19 L. R. A., N. S., 905. Thus, an indictment against "Thomas H. Perkins" which describes him as "Thomas Perkins" is defective on account of the mistake in the Christian name: Commonwealth v. Perkins, 1 Pick. 388.

And a discharge of an insolvent named "Edward P. Smith" will bar a claim against him by the name of "Edward Smith," although the plaintiff knew him only by the latter name, and did not know of the proceedings in insolvency: Hubbard v. Smith, 4 Gray, 72.

And in Parker v. Parker, 146 Mass. 320, 15 N. E. 902, it was held that the name "E. T. Shepard" imported a different person from "E. S. Shepard," the court saying: "In this commonwealth a middle name or initial is held to be a part of the name of a person, and cannot be disregarded."

But from the later case of Masonic Building Assn. v. Brownell, 164 Mass. 306, 41 N. E. 306, there would seem to be some disposition on the part of the Massachusetts court to modify the rule so clearly established by the earlier cases; for it was here held, in proceedings attacking the validity of an assessment, that a mistake in the middle initial of a name, or giving it a middle initial when it has none, in describing the person whose estate is assessed for a betterment, is not such an error as will defeat the assessment, it not appearing that there is more than one person of the same first name who owns land on the street for the widening of which the assessment is laid.

In Carney v. Bigham, 51 Wash. 452, 99 Pac. 21, 19 L. R. A., N. S., 905, plaintiff sought to recover possession and quiet title to certain lots in the city of Seattle, of which defendant had possession and was claiming under a tax deed issued by the county in a tax foreclosure proceeding. It appeared that prior to the issuance of the tax deed to defendant the property stood of record in the name of the plaintiff, "John E. Carney," and was listed for taxation under the name "J. E. Carney." The certificate of delinquency under which defendant acquired the tax title recited the name of the person to whom the property was assessed as "J. G. Carney," instead of "J. E. Carney," and the proceedings to foreclose the certificate of delinquency were brought against "J. G. Carney. The true owner, John E. Carney, was not personally served with the summons in the foreclosure proceedings, and service was made by publication. It was held that the foreclosure proceedings were invalid, and a judgment in favor of plaintiff was affirmed. In reply to the contention that the middle initial was no part of a person's name, and hence no part of the name inscribed upon the assessment-roll or in the certificate of delinquency, the court said: "At common law it is true that a legal name consisted of one given name and one surname or family name, and mistakes in a middle initial or a middle name were not regarded as of consequence. But since the use of initials, instead of a given name, before a surname, has become a common practice, the necessity that these initials be all given and correctly given in court proceedings

has become of importance in every case, and in many absolutely essential to a correct designation of the person intended."

The courts of Maine, New Jersey and Virginia have also shown a disposition to attach importance to the middle name or initial in judicial proceedings. Thus, in Dutton v. Simmons, 65 Me. 583, 20 Am. Rep. 729, it was held that the certificate by an officer to the register of deeds of an attachment of the real estate of Henry "M." Hawkins, when the name of the defendant in the writ is Henry "F." Hawkins, is such a misdescription of the person sued as will render the attachment void.

And in Bowen v. Mulford, 10 N. J. L. 230, where summons was issued in the name of John Mulford, plaintiff, but in the state of the demand the plaintiff's name was given as John "S." Mulford, a judgment rendered against the defendant by default was reversed, the court saying that "the introduction of a letter or name between the Christian and surname is very common, for the purpose of distinction; and in the use and understanding of the people at large, and therefore in presumption of fact John Mulford and John S. Mulford are not the same, but different persons."

Likewise in Ming v. Groatkin, 6 Rand. (Va.) 551, it was held that a suit instituted in one name will not justify a declaration and judgment in another; and hence when a plaintiff has two baptismal names, and a mistake is made in the second or middle name, it is a misnomer, and is a fatal error, not only on a plea in abatement, but on judgment by default.

So, also, in a recent case from the Texas court of civil appeals, that court shows an inclination to break away from the old rule, for in Wicker v. Jenkins, 108 S. W. 188, the court said: "There is a familiar rule of common law which disregards the middle initial, or middle name, of a party to an instrument, and looks alone to the first initial, or the first Christian name, for identification. This grew out of the former custom of having only one Christian name. Since the use of more than one Christian name has become almost a universal custom among the English-speaking race, the rule has lost much of the reason upon which it was originally based"; and it was held in this case that a judgment which stated the name of the plaintiff as W. "B. F." Wicker instead of W. "F. B." Wicker, as it should have been, did not fix a lien on the land of the latter.

III. Abbreviations.

It has been doubted whether, in judicial proceedings, abbreviations of surnames can be recognized by the courts: Fenton v. Perkins, 3 Mo. 144; though in State v. Kean, 10 N. H. 347, 34 Am. Dec. 162, it was held that an abbreviation of the surname "MacKusic" by spelling it "McKusic" is proper.

But with regard to proper names, the general rule is that the courts will take judicial notice of the ordinary and commonly used abbreviations of Christian names: Goodell v. Hall, 112 Ga. 436, 37 S. E. 725; Feld v. Loftis, 140 Ill. App. 530 (affirmed in 240 Ill. 105, 88 N. E.

281); Kemp v. McCormick, 1 Mont. 420. Thus, "Thos." will be recognized as an abbreviation for "Thomas"; Studstill v. State, 7 Ga. 2; "Eliza" for "Elizabeth": Goodell v. Hall, 112 Ga. 436, 37 S. E. 725; "Jos." for "Joseph": Feld v. Loftis, 140 Ill. App. 530 (affirmed in 240 Ill. 105, 88 N. E. 281); and where a relator was promiscuously called "Susanna" and "Susan" in the declaration, it was held there was no variance: Trimble v. State, 4 Blackf. (Ind.) 435. So, too, in Exendine v. Morris, 8 Mo. App. 383, it was held that where no question of identity was raised, "Ellen" would be recognized as an abbreviation of "Eleanor." And "Rich." for "Richard" is an immaterial variance: State v. Dobson, 16 S. C. 453; and "Barney" will be recognized as an abbreviation for "Barnabas": McGregor v. Balch, 17 Vt. 562. Likewise in Chrash v. O'Connor, 41 Wash. 360, 83 Pac. 238, a certified copy of a deed, signed by "Fannie C.," as wife of the grantor, was held properly admitted in evidence, although the true name of the grantor's wife was "Frances C.," without proof that "Fannie C." and "Frances C." were one and the same person; especially when the notary's certificate stated that "Fannie C.," who executed the deed, was the wife of the grantor.

It seems, however, that abbreviations of Christian names will not be judicially noticed, unless the abbreviation is such as is universally recognized. Thus in Curtis v. Marro, 29 Ill. 508, the court refused to recognize "Bart." as an abbreviation for "Bartholomew"; and in Thursby v. Meyers, 57 Ga. 155, it was held that it was a question for the jury whether the name "Mord. Myers," as used in a written instrument, is an abbreviation of "Mordecai Myers."

Also in the late case of Ohlmann v. Clarkson Sawmill Co., 222 Mo. 62, 133 Am. St. Rep. 000, 120 S. W. 1155, the question was whether a judgment rendered in tax foreclosure proceedings against "Mike" Ohlmann devested the title of Michael Ohlmann, who was the record owner of the property, service being had by publication, and it was held that it did not. The court was of the opinion that if the law tolerated slovenliness or pranks in regard to the abbreviation of Christian names, then slovenliness and pranks might ripen into a custom and open the door to great mischief. "We cannot find it ever ruled by any respectable court," said Lamm, P. J., "that 'Mike' is a universally known abbreviation of 'Michael.'"

IV. Derivations and Corruptions.

Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously and according to common usage to be the same, though differing in sound, the use of one for the other is not a material misnomer: Jones' Estate, 27 Pa. 336; Gordon v. Holiday, Fed. Cas. No. 5610, 1 Wash. C. C. 285. Thus, in Galliano v. Kilfoy, 94 Cal. 86, 29 Pac. 416, the return of a writ showed that personal service was made on Rose K., one of the defendants; and upon this return default was entered against "Rosa" K., a defendant in the action. It was held that the return and the default were prima facie regular, "Rose" and "Rosa" being substantially the same name.

But in Garrison v. People, 21 Ill. 535, it was held that "Henry" and "Harry" are distinct names, and it cannot be assumed that one is a corruption of the other. So, also, "May" and "Mary" are distinct names, and a court cannot presume that a summons issued against May I. and returned served upon Mary I. was served upon the right person: Kennedy v. Merriam, 70 Ill. 228.

But when one whose Christian name is "Elizabeth H. Turner" declares on a note payable to "Lizia H. Turner," and the note produced in evidence corresponds to the name in the declaration, it will be presumed that "Lizia" is a contraction of "Elizabeth": Wilson v. Turner, 81 Ill. 402.

So, too, a plea in abatement to a writ because the "w" in the defendant's name "Conaway" was written "v," is unavailing, the objection being too trifling: Conaway v. Hays, 7 Blackf. (Ind.) 159. And when in a criminal prosecution the defendant's name is given as "Ben," it will be assumed that it is his full Christian name: Burton v. State, 75 Ind. 477. So, too, "Josier" for "Josiah" is not a misnomer, since the spelling is that of the vulgar pronunciation: Schooler v. Ashurst, 3 A. K. Marsh. 492.

And when a petition by a guardian for license to sell property of his ward designates the ward as "Polly Sowle," though her real name is "Mary Sowle," and she is otherwise sufficiently described to identify the person, the designation is sufficient: Sowle v. Sowle, 10 Pick. 376. Also, when there is no doubt as to the identity of the person designated, an error in spelling the name "Miner" as "Minner" is immaterial: Jackson v. Boneham, 15 Johns. (N. Y.) 226.

And in Burley v. Griffith, 8 Leigh (Va.), 442, the declaration charged the escape of a slave named "Bill," and the warrant was for the commitment of a slave called "William Lee," but it was held that the variance was immaterial.

But a decree of divorce from a woman named Wilhelmina G. based upon constructive service by publication, without actual notice, is void, if the name given in the complaint, warning order and decree is Minnie G., a name by which she was never known: Grober v. Clements, 71 Ark. 565, 100 Am. St. Rep. 91, 76 S. W. 555.

V. Assumed Names.

From our review of the history and origin of names we learned that it is merely a custom for males to assume the names of their parents, but that it is not obligatory nor punishable to adopt another name; hence it is generally held that a person may adopt any name in which to transact business, and may sue and be sued by such name: Graham v. Eiszner, 28 Ill. App. 269; Union Brewing Co. v. Interstate Banking and Trust Co., 240 Ill. 454, 88 N. E. 997; Clark v. Clark, 19 Kan. 522; Haywood v. State, 47 Miss. 1; Sparks v. Dispatch Transfer Co., 104 Mo. 531, 24 Am. St. Rep. 351, 15 S. W. 417, 12 L. R. A. 714; In re Snook, 2 Hill (N. Y.), 566; England v. New York Pub. Co., 8 Daly (N. Y.), 375; Gotthelf v. Shapiro, 120 N. Y. Supp. 210. Thus, where a married woman deserted her hus-

band and eloped with a man, and was commonly known in the community in which she lived after the elopement by the name of her paramour, with whom she lived as a wife, she can sue or be sued in such adopted name: Clark v. Clark, 19 Kan. 522.

VI. Names in Common Use.

Since the object and purpose of describing a person by his name is to identify him, the general rule is, that one may be designated in legal proceedings by the name by which he is commonly known, although not his true name: Washington v. State, 68 Ala. 85; Wilson v. State, 69 Ga. 224; Lucas v. Farrington, 21 Ill. 31; Parmelee v. Raymond, 43 Ill. App. 609; Conaway v. Hays, 7 Blackf. (Ind.) 159; Frye v. Hinkley, 18 Me. (6 Shep.) 320; Commonwealth v. Trainor, 123 Mass. 414; Gillespie v. Rogers, 146 Mass. 610, 16 N. E. 711; Commonwealth v. Seeley, 167 Mass. 163, 45 N. E. 91; Lancy v. Snow, 180 Mass. 411, 62 N. E. 735; Kendrick v. Kendrick, 188 Mass. 550, 75 N. E. 151; Hibernia Ins. Co. v. O'Connor, 29 Mich. 241; Lyons v. Rafferty, 30 Minn. 526, 16 N. W. 420; McBeth v. State, 50 Miss. 81; Van Vorhis v. Budd, 39 Barb. (N. Y.) 479; Cooper v. Burr, 45 Barb. (N. Y.) 9; Goodnow v. Tappan, 1 Ohio, 60; City Council of Charleston v. King, 4 McCord (S. C.), 487; Owen v. State, 7 Tex. App. 329; Taylor v. Commonwealth, 20 Gratt. (Va.) 825.

Thus, in Reddick v. State, 25 Fla. 112, 433, 5 South. 704, defendant was indicted for the murder of "Churchill," and there was evidence that the name of deceased was "Churchwell," and other evidence that deceased was as well known by the name of "Churchill" as by "Churchwell," his true name; it was held that independent of the names being idem sonans, there was no error in the verdict of conviction.

And in Lancy v. Snow, 180 Mass. 411, 62 N. E. 735, it was held that where there is evidence in proceedings involving the validity of a tax sale of real estate, that the owner was as well known by the name of Maria Lancy as Maria S. Lancy, the tax proceedings will not be set aside because the owner is described therein by the former name.

So, also, in Hommel v. Devinney, 39 Mich. 522, a deed purporting to have been made by "William Hommel" was sustained as the deed of "Wendelin Hommel," on evidence that the grantor was known by the former name and answered to it. "It surely will not be contended here," said the supreme court of South Carolina in an early case, "that a man may not take any name he pleases, and if he by his own conduct renders it doubtful what his real name is, the fault is his, and let the consequences be also his": City Council of Charleston v. King, 4 McCord (S. C.), 487. And the question is not whether a defendant was as well known by one name as by the other at the time of the trial, but whether such was the case when the indictment was preferred: Noble v. State, 139 Ala. 90, 36 South. 19. But one cannot be sued by his surname and title of courtesy without his

Christian name, although he is commonly known by his title of courtesy: Labat v. Ellis, 1 N. C. 172.

The rule, however, which permits a person to be designated in legal proceedings by either of two names, when he is commonly known by both, does not require that he should be known by one name equally as well as by the other, but only that he be known by both: State v. Dresser, 54 Me. 569; Kendrick v. Kendrick, 188 Mass. 550, 75 N. E. 151; Young v. Jewell, 201 Mass. 385, 87 N. E. 604. In the last case cited the court said: "It is said in many of the earlier cases that the person in question must be known by one name as well as by the other. That means that he must be known by both names, not that he must be equally well known by both names."

In Kendrick v. Kendrick, 188 Mass. 550, 75 N. E. 151, the validity of a decree of divorce granted in Texas was attacked upon the ground that the Texas court had no jurisdiction because of the misnomer of the wife. The true name of the wife was "Bethiah," but she was designated in the libel and notice as "Bertha." The Texas court found that she was called "Bertha" by her husband and was known by that name in her family at least, though there was no finding that she was so known outside of the family. It was held by the Massachusetts court that this finding was sufficient to bring the case within the rule permitting a person to be designated by either of two names by which he is known.

The supreme court of Texas, speaking to the rule, said: "By this it is not meant that the indictment could not be sustained without showing that the person was as exclusively or as familiarly known by the name used in the indictment as by any other; for this would not be necessary. It would be enough to show that the person was as certainly known to friends and acquaintances of the vicinity by the name used in the indictment as by any other": Bell v. State, 25 Tex. 574.

VII. Initials.

a. **In General.**—Whether a person can be designated in legal proceedings by the initials only of his Christian name is a question not entirely free from difficulty. Some of the states adhere to the old English doctrine, and hold that an initial is no part of a name, and that the full Christian name must be given. "If it were true," said the supreme court of Arkansas, "that individuals were subject to be sued by certain initials or even abbreviations, instead of their real name, it would introduce endless confusion into judicial proceedings. It would be the means of subjecting parties to all the labor and expense of preparing to meet the merits of an action without any writ, in reality, ever having been instituted against them. If every name had but one initial or abbreviation to indicate and serve as a substitute for the full and real one, the consequences apprehended might not follow; but when we reflect that so many persons use the same initials and abbreviations, and that the names indicated thereby are wholly different, it is easy to conceive the confusion and perplexity which would ensue from such a practice": Wilson v. Shannon, 6 Ark.

196; and it was accordingly held in this case that when the defendant, whose true name was George Turner, was sued as Geo. Turner, a demurrer to the defendant's plea of misnomer was erroneously sustained.

And in Norris v. Graves, 4 Strob. (S. C.) 32, plaintiff sued by the name of A. O. Norris. Defendant pleaded in abatement that this was not his true Christian name, which was Andrew O. Norris. It was held that A. O. was no name at all, and furthermore, that this defect was not cured by the plaintiff's replication that he was known by one name as well as the other, since the plaintiff must know and state his true name, though such replication would be good when a plaintiff mistakes the defendant's name. Two exceptions, however, were recognized in this case: First, that if the note had been payable to A. O., the plaintiff, then this might have precluded the defendant's plea; or second, that if the note had been signed by A. O., then as a defendant he might have been so sued.

The courts of Indiana also adhere to the doctrine that in actions brought in that state the Christian names of the parties must appear, and that the use of initials is not sufficient: Vawter v. Gilleland, 55 Ind. 278; Bascom v. Toner, 5 Ind. App. 229, 31 N. E. 856.

And in New Jersey, also, it is held that parties to actions must be designated by their full Christian names, and not initials, except when the action is upon a written instrument in which the parties are designated by the initial letter or letters, or some contraction of the Christian name: Elberson v. Richards, 42 N. J. L. 69. Thus, in the recent case of McGrew v. Steiner (N. J.), 71 Atl. 1122, it was held that an affidavit on attachment which stated only the initials of the Christian name of the defendant debtor was fatally defective, and not subject to amendment, because, as said by the court, "no defendant was named in a legal sense, as initials cannot be used for the Christian names of the parties to actions except when the statute authorizes it."

There are other cases which, while not saying that the designation of parties to an action by the initials of their Christian name or names is insufficient in all cases, hold that where the title to property is involved, the record owner must be sued and notified by his full Christian name, if the title stands of record in his full Christian name. Such is the ruling in the principal case: Proctor v. Nance, 220 Mo. 104, ante, p. 555, 119 S. W. 409; and this but follows the rule sustained by the earlier cases from that state of Turner v. Gregory, 151 Mo. 100, 52 S. W. 234, and Ripple v. Ozark Land & Lumber Co., 93 Mo. App. 41.

Prior, however, to the decision in the principal case (ante, p. 555) the law on this subject was in an unsettled condition in the state of Missouri; for though in Skelton v. Sackett, 91 Mo. 377, 3 S. W. 874, it was held in a tax case that an order of publication to Q. R. Noland was insufficient to give jurisdiction of Quinces R. Noland where the record title was in Quinces R. Noland; yet in Mosley v. Riley, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721, it was held that

a judgment for taxes based on a petition and order of publication against a defendant by his initials was good, and that a sale of the land pursuant to said judgment passed the title.

And the ruling in the principal case (ante, p. 555) is strongly sustained in a very recent case from Nebraska, which in its essential features is identical with the principal case. In Butler v. Smith, 84 Neb. 78, 120 N. W. 1106, the record title to the land in dispute formerly stood in the name of Clement L. Boon, who conveyed it to W. W. mortgaged the land to P. and reconveyed it to Boon, subject to the mortgage. Boon failed to pay the taxes or the mortgage, but quitclaimed the land to plaintiff and left the state. One D., to whom the mortgage had been assigned, brought suit to foreclose his lien, designating the defendant Boon by his initials only, and bought the land at judicial sale under the decree of foreclosure. Service was perfected upon Boon by publication only. Defendant in the present suit derived title by mesne conveyances from D. The lower court held that Boon's title was devested and the right to redeem terminated by the foreclosure suit, and awarded judgment for defendant; but this was reversed on appeal, and it was held that as Boon was not sued on a written instrument signed by himself, the judgment rendered in the foreclosure suit in which he was designated by his initials only, based on constructive service, did not devest his right to redeem, and the judgment of the lower court was accordingly reversed.

And there are other cases which, though not going so far as to hold that the giving of mere initials in legal proceedings makes them void, strongly condemn the practice of using the initials of Christian names, and hold that it is better in judicial process and other legal documents to designate the parties by their full Christian names: Slingluff v. Gainer, 49 W. Va. 7, 37 S. E. 771; and the supreme court of the United States has said that that court would not countenance the loose practice now so common of using initials instead of full Christian names in legal proceedings: Monroe Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. Rep. 217, 37 L. ed. 72; Walton v. Marietta Chair Co., 157 U. S. 342, 15 Sup. Ct. Rep. 626, 39 L. ed. 725.

But in some jurisdictions it is held that a Christian name is sufficiently indicated by the use of the initials: Minor v. State, 63 Ga. 318; Eaves v. State, 113 Ga. 749, 39 S. E. 318; Minchew v. Nahunta Lumber Co., 5 Ga. App. 154, 62 S. E. 716; Ferguson v. Smith, 10 Kan. 396; State v. Taggart, 38 Me. 298; Pearce v. Albright, 12 N. M. 202, 76 Pac. 286; Gottleib v. Alton Grain Co., 87 App. Div. 380, 84 N. Y. Supp. 413 (affirmed in 181 N. Y. 563, 74 N. E. 1117). The cases which uphold this doctrine proceed upon the theory that the use of initials preceding a surname has become such a common practice that there can be no presumption that particular men are less known by their initials than by their given or Christian names in full. In State v. Eaves, 113 Ga. 749, 39 S. E. 318, where it was held that an indictment was sufficient which designated the accused by the

initials of his Christian name only, the court said: "We are aware that in some of the states it has been held that an indictment setting forth by initials only the Christian name of the accused is subject to a plea in abatement. We think, however, that these cases should not now be followed. They are based upon English cases of early date, and the reasons for them do not apply at the present time. In this state men are commonly known by the initials of their Christian names as well as they are by those names in full. Such initials, followed by the surname in full, are held to constitute a sufficient description when used in deeds, wills and other writings. Signatures and addresses in this form are in much more frequent use than those setting forth the full name. We cannot see why the same reason by which such a statement of a name is held good in a deed should not be applied in case of a criminal indictment. If, as a matter of fact, the grand jury intended to indict some person other than the one arrested and put upon trial, this can be shown under a plea of not guilty. The person arrested would be in a position exactly similar to that of a person arrested for another person against whom an indictment has been found, giving his full name, which is identical with respect to the Christian name as well as the surname with that of the person arrested. The substantial question, after all, is as to the identity of the person indicted and the one on trial. If there is no such identity, an acquittal must follow, for there would be a failure to make out the charge. If the person is the same, then a conviction should not be postponed or averted by showing merely that the grand jury described the accused without giving more than the initials of his Christian name."

The same rule was applied in civil proceedings in the recent case of Minchew v. Nahunta Lumber Co., 5 Ga. App. 154, 62 S. E. 716, where it was held that an action may be properly instituted by employing the initials instead of the full Christian name of the defendant, notwithstanding the common-law rule of practice to the contrary.

Likewise, in Ferguson v. Smith, 10 Kan. 396, the rule was applied in a civil case, where neither an order of attachment nor any of the other papers in the case designated the defendant by his Christian name, but only by his initials. In reversing an order dissolving the attachment upon this ground, the supreme court said it thought giving the initials only of the Christian name was sufficient. "The reason upon which a different rule was once founded in England has never existed in this state. And when the reason for the rule has ceased, the rule itself should cease cessante ratione legis cessat ipsa legis. The full Christian name is now seldom written anywhere. Search the records of our courts, our statutes, the list of members of the legislatures, election returns, written contract, and other written instruments, newspapers, etc., and everywhere it will be found that as a rule the initials only of the Christian name are used."

And in Gottlieb v. Alton Grain Co., 87 App. Div. 380, 84 N. Y. Supp. 413, it was held that a foreign judgment obtained against

"W. B." Gottlieb was enforceable against the defendant, though his name was "William B." Gottlieb, notwithstanding he was served by publication only, the court saying that "the technical rules formerly applied to such questions having given way to more liberal views"; and this judgment was affirmed by the court of appeals (181 N. Y. 563, 74 N. E. 1117).

And there are other cases which, while not sanctioning the use of initials in place of the full Christian name, hold, nevertheless, that when there is no reasonable doubt as to the identity of the person intended, the designation of such person merely by the initials of his Christian name will be sufficient. Thus, a complaint made by "Freewauld C. Thayer," but signed by "F. C. Thayer," is sufficient when it is certified by the clerk of the court to which it is addressed to have been "received and sworn to before said court": Commonwealth v. Intoxicating Liquors, 142 Mass. 470, 8 N. E. 421; and the fact that notice to take depositions give only initials and the deposition was subscribed by the witness by his full Christian name, the first letters being the same as the initials in the notice, does not make extrinsic proof necessary to identify the witness: Walters v. Rock (N. D.), 115 N. W. 511.

b. **Single Letters as Full Christian Names.**—In still other jurisdictions the use of single letters preceding a surname is upheld in legal proceedings upon the ground that a Christian name may consist simply of single letters, and the court will not assume that single letters preceding surnames are not the full Christian names of the persons designated, rather than initials of names. This was one of the grounds given by the court for sustaining the judgment in the case of Gottlieb v. Alton Grain Co., 87 App. Div. 380, 84 N. Y. Supp. 413, as well as the other one that the use of initials in designating the Christian name was sufficient; and other cases which sustain this rule are Taylor v. Insley, 7 Colo. App. 175, 42 Pac. 1046; Tweedy v. Jarvis, 27 Conn. 42; State v. Cameron, 86 Md. 196, 29 Atl. 984; Hewlass v. Abbott, 28 Mich. 270; Stevens v. Brown, 119 Mich. 196, 77 N. W. 704; Wilthaus v. Ludecus, 5 Rich. (S. C.) 326; Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71.

These cases, however, do not decide that the initials of a person's Christian name can be used in legal proceedings, instead of the true full Christian name, but only that in the absence of any showing that single letters preceding a surname are not themselves the only Christian name which the person has, the court will not presume that he has any other. This question was very fully discussed by the court of appeals of Colorado in Taylor v. Insley, 7 Colo. App. 175, 42 Pac. 1046, when defendant's counsel unjustly insisted upon a motion to strike the complaint in a suit on a contract, brought by "H. M." Insley, upon the ground that "H. M. Insley" was no name at all, and consequently there was no plaintiff. In overruling the motion the court said that most of the authorities cited in support of the defendant's contention were those at common law, commencing with

Coke on Littleton and coming down through Bacon's Abridgment, and that no doubt there was a presumption of law that every person had both a Christian and surname; but no authority is cited to show that "H. M." may not be the Christian name and all there is of it. I know of no good reason, legal or otherwise, why parents may not select any letter or letters of the alphabet as the name of a child; and, although the legal presumption is that each individual has a Christian and surname, there is no legal presumption, when a man sues as "H. M." that that is not all there is of it, unless the fact is brought to the knowledge of the court by a plea in abatement, or in some manner that will inform the court, not only that the letters used are initials but what the name is; in the language of the books, "give the plaintiff a better writ."

According to the foregoing authorities it makes no difference whether the single letter or letters which precede the surname be vowels or consonants.

c. **Initials as Abbreviations of Christian Name.**—The supreme court of Illinois in a comparatively recent case announced a doctrine somewhat different from that stated in any of the cases we have cited with regard to the use of initials in legal proceedings. The rule announced by this court is that, while a letter of the alphabet does not constitute a name, yet the initial letter of the Christian name is so commonly used that it is to be regarded, not as the name of some other person, but as an abbreviation of the Christian name of the person intended. Thus, in Illinois Cent. R. Co. v. Hazenwinkle, 232 Ill. 224, 83 N. E. 815, 15 L. R. A., N. S., 129, the railroad company sought by ejectment to recover possession of certain land from defendant. The company's title rested upon a judgment it obtained in condemnation proceedings. At the time of the condemnation proceedings the title to the land in dispute stood of record in one Joseph F. Burtis, a nonresident. The notice in the condemnation suit was given to J. H. Burtis, a nonresident. Defendant in the present suit claimed this notice was insufficient; that the court acquired no jurisdiction over the owner, Joseph F. Burtis, and the decree rendered in the condemnation proceedings was void. It was shown by the defendant that there was a Jacob H. Burtis who lived in the township where the land was situated, and claimed that the notice must have been served upon him and not upon the real owner, Joseph F. Burtis. It was held that so far as the condemnation proceedings were concerned, the plaintiff's title was established.

The reasons given by the court for this ruling were, first, that the erroneous insertion of the middle initial "H." instead of "F." was immaterial, because the law recognized no middle name, and, second, that the letter "J." was to be regarded as an abbreviation of a Christian name beginning with that letter, and was no more an abbreviation of Jacob than of Joseph, and since the notice was served on a nonresident, and the plat showed that Joseph F. Burtis, a non-

resident, was the owner, the initial "J" in this case would be regarded as an abbreviation of Joseph and not of Jacob.

But while this case holds that an initial preceding a surname may be regarded as an abbreviation of a Christian name, it cannot be regarded as an abbreviation of a title, in the absence of proof that it was so intended. Thus, in Burford v. McCue, 53 Pa. 427, it was held error to submit to the jury without other proof the question whether a power of attorney signed by R. P. O'Neal was signed by "Rev." P. O'Neal. "The initials preceding a surname in a signature," said the court, "are always understood to be the initials of a name, and not the abbreviation of a title, unless proved to be the former and not the latter."

VIII. Prefixes and Suffixes.

a. **Prefixes.**—The designation of "Mr." or "Mrs." appearing before the name of a person is regarded in law as a mere title, and forms no part of a name: Schmidt v. Thomas, 33 Ill. App. 109; Feld v. Loftis, 240 Ill. 105, 88 N. E. 281; Elberson v. Richards, 42 N. J. L. 69; Uihlein v. Gladieux, 74 Ohio St. 232, 78 N. E. 363.

But there are certain commonly used prefixes which are recognized as integral and essential parts of surnames. Thus, in Moynahan v. People, 3 Colo. 367, an indictment for the murder of Patrick Fitz Patrick, where the true name of the deceased was Patrick Fitzpatrick, was held fatally defective, and a judgment of conviction thereunder was reversed; the court saying that while the first syllable was originally a mere prefix, at the present day the prefix and the paternal name are invariably written, pronounced and accepted as one name.

And in Clary v. O'Shea, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115, it was held that if in an action of ejectment plaintiff shows the record title to the property to be in "John O'Shea," a judgment in plaintiff's favor against "John O. Shea," based on service by publication and determining adverse claims in the land, is not admissible in evidence to show a link in plaintiff's chain of title, as it cannot be presumed that "O'Shea" and "Shea" are one and the same names.

b. **Suffixes.**—The word "Junior" or "Jr.," or words of similar import, are ordinarily mere matters of description, and no part of a person's legal name: Teague v. State, 144 Ala. 42, 40 South. 312; City and County of San Francisco v. Randall, 54 Cal. 408; Loveland v. Sears, 1 Colo. 433; Coit v. Starkweather, 8 Conn. 289; Headley v. Shaw, 39 Ill. 354; Allen v. State, 52 Ind. 486; Geraghty v. State, 110 Ind. 103, 11 N. E. 1; State v. Dankwardt, 107 Iowa, 704, 77 N. W. 495; Peterson v. Wallace, 140 Iowa, 22, 118 N. W. 37; Johnson v. Ellison, 4 T. B. Mon. 526, 16 Am. Dec. 163; State v. Grant, 22 Me. 171; Commonwealth v. Parmenter, 101 Mass. 211; Simpson v. Dix, 131 Mass. 179; Bidwell v. Coleman, 11 Minn. 78 (Gil. 45); State v. Weare, 38 N. H. 314; People v. Collins, 7 Johns. (N. Y.) 549; People

v. Cook, 14 Barb. (N. Y.) 259, affirmed in 8 N. Y. 67, 59 Am. Dec. 451; State v. Best, 108 N. C. 747, 12 S. E. 907; Blake v. Tucker, 12 Vt. 39; Prentiss v. Blake, 34 Vt. 460; Corey v. Moore, 86 Va. 721, 11 S. E. 114; Clark v. Gilbert, 1 Pinn. (Wis.) 354. Thus, where a protest is signed by "Wm. H. Scudder" and sworn to by "Wm. H. Scudder, Jr.," the presumption is that both represent the same man.

The same rule which holds that the suffix "Jr." is no part of a name applies with equal force to the addition of the word "Senior" or "Sr." to a name: Neil v. Dillon, 3 Mo. 59; Hunt v. Searcy, 167 Mo. 158, 67 S. W. 206; Kane v. Sholars, 41 Tex. Civ. App. 154, 90 S. W. 937. But while the authorities are practically uniform upon the proposition that the suffixes "Sr." or "Jr." form no part of a name, and consequently that this addition to a name in legal proceedings is immaterial, still it seems that where a father and son who bear the same name live in the same town, the addition of these descriptive words for the purpose of distinction is not only material, but required: Kincaid v. Howe, 10 Mass. 203; People v. Collins, 7 Johns. (N. Y.) 549; and in City and County of San Francisco v. Randall, 54 Cal. 408, where it was held that the addition "Jr." is no part of a name and its insertion in a criminal complaint immaterial, the ruling was based upon the fact that it did not appear that there were two persons of the name or that the party was misled.

WALSER v. GILCHRIST.

[220 Mo. 314, 119 S. W. 413.]

PARTITION SALE—Effect of Failure to Renew Order After Term.—A partition sale is void where a term of court has intervened between it and the order of sale and there has been no renewal of the order. (pp. 582, 583.)

PARTITION SALE—Effect of Approval of Invalid Sale.—The approval by the court of a partition sale, ineffectual because made after a term of court has intervened between it and the order to sell, does not amount to a renewal of the order and a validation of the sale. (p. 584.)

Russell & Deal, for the appellant.

John C. Brown, for the respondent.

316 BURGESS, J. This suit was instituted under section 650, Revised Statutes of 1899, for the purpose of determining the title to the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of section 18, township 23, range 17, in Mississippi county, Missouri.

The land in controversy was selected as swamp lands, under the act of Congress of September 28, 1850, the selection

having been approved November 22, 1854. Plaintiff offered in evidence two swamp land patents, dated April 19, 1859, recorded in the deed records [317] of Mississippi county on April 1, 1905, from the state of Missouri to Charles Tucker, each conveying forty acres. He next produced in evidence a certified copy of a decree in partition rendered by the circuit court of Barton county, Missouri, on the eighth day of October, 1869, in a suit wherein the heirs of Charles Tucker were all parties, in which decree the court ordered the sheriff of Mississippi county to sell the land in controversy at public sale for cash, and divide the proceeds of the sale among the heirs, and to execute a deed or deeds to the purchaser of said real estate.

The plaintiff, G. H. Walser, testified in substance that Charles Tucker died in Barton county in the year 1867 or 1868, and that he, plaintiff, was administrator of his estate; that as such he became well acquainted with the heirs of Charles Tucker (naming them), all of whom were parties to the suit in partition in the circuit court of Barton county, at the October term of said court, 1869, and that he bought the land in controversy on the twenty-third day of November, 1870, and was the owner thereof.

Plaintiff next offered in evidence a sheriff's deed, dated November 30, 1875, from William P. Swank, sheriff of Mississippi county, conveying to him the land in controversy, the said deed reciting, in substance that on November 23, 1870, George A. Jackson, the then sheriff of Mississippi county, under and in pursuance of the judgment and order of the circuit court of Barton county, sold said described land to Charles Tucker, he being the highest and best bidder, for the sum of ten dollars. Said deed further recites:

"And whereas, the said George W. Jackson, the sheriff who sold said land, has left the state of Missouri, and that he failed to make the deed to said Walser for such land in pursuance to said sale;

"And whereas, on the twenty-sixth day of October, 1875, the circuit court of the county of Barton, on the petition of said George H. Walser, to require me, the present [318] sheriff of said Mississippi county, Missouri, to execute a deed to said land, found that said purchase money had been fully paid, and that said George W. Jackson, former sheriff of said county, had removed from this state, and that said George H. Walser had purchased said land at said sale, said court ordered

that I, William P. Swank, execute a deed to George H. Walser for said land;

"Now, therefore, in consideration of the premises and of the said sum of ten dollars paid by the said George H. Walser, and by virtue of the authority in me vested, I, William P. Swank, sheriff as aforesaid, do hereby assign, transfer and convey all the right, title and interest and estate of the said (here follow the names of Charles Tucker's heirs) of, in and to the above-described real estate, that might or was sold by virtue of said order as aforesaid. To have and to hold the right, title and interest and estate hereby conveyed unto the said George H. Walser, his heirs and assigns forever," etc.

Plaintiff also offered in evidence a certified copy of the order of the said circuit court of Barton county, made on the twenty-sixth day of October, 1875, directing William P. Swank, sheriff, to execute a deed to Walser for the land in controversy.

The defendant offered no evidence, but at the close of plaintiff's evidence he asked the court to declare the law to be "that the plaintiff has failed to show that he has any title to the property sued for, and the finding should be that plaintiff has no title," which the court refused to do, the defendant excepting.

The court rendered a decree, which was entered of record, finding that the plaintiff was the owner of the real estate described, and that the defendant has no right, title, estate or interest therein. The defendant, after an unavailing motion for a new trial, appealed from said judgment.

319 As defendant contends, the law in force in October, 1869, when the decree in partition was rendered, provided that the circuit court should be held in Barton county, Missouri, on the sixth Mondays after the fourth Mondays in February and August: Laws 1868, p. 34. According to the recitals in the sheriff's deed, read in evidence, the sale therein described did not take place until the twenty-third day of November, 1870, which was more than one year after the order of sale was made, and two terms of the Barton circuit court must necessarily have intervened between the date of the order and the date of the sale; that is to say, the terms of court held on the sixth Mondays after the fourth Mondays in February and August, 1870. There is no evidence in the record that the order of sale was ever renewed from term to term as required by law, and for this reason the defendant

insists that the sheriff's sale was absolutely void, and conferred no authority upon the sheriff to make the deed.

In Hughes v. Hughes, 72 Mo. 136, it is held that an order of sale in partition expires with the term at which the sale is required to be made, and if, for want of bidders, no sale takes place at that time, a renewal of the order must be procured before any further steps can be taken, and a sale at a subsequent term without such renewal is void.

Carson v. Hughes, 90 Mo. 173, 2 S. W. 127, was an action in ejectment to recover the same land sued for in Hughes v. Hughes, 72 Mo. 136. The court said: "By the order of sale, made at the April term, 1863, of the Audrain circuit court, the sheriff was directed to sell the lands at the following October term. No sale was made at that term, but the sheriff, without a renewal of the order, either by the clerk or the court, sold the land at the April term, 1864. No formal order was made approving the sale. To correct some errors a new deed was made out in 1872, and the record entry of the acknowledgment of that deed was put in evidence on the trial [320] of this cause, but not in the former case. It was expressly ruled in the former case that the sheriff had no power to sell without a renewal of the order, either by the court or clerk, and for that reason the sale was void. The production of the entry of the acknowledgment cannot change the result. The certificate of the acknowledgment indorsed on the deed, when offered in the former case, imported, prima facie at least, the existence of such an entry. The deed, if void then, is still void, and on the authority of that case this one is affirmed."

Plaintiff, to obviate the force of the defendant's contention, says that, while the two cases relied upon by defendant have not been directly overruled by this court, the theory upon which they rest has often been repudiated in subsequent decisions; that section 32, chapter 152, General Statutes of 1865, provides that sales in partition may be renewed by "the court or clerk thereof in vacation," and that as no notice of the application for these renewals is prescribed, and no adjudication of any kind contemplated, they are not intended to affect the rights of the parties, and, therefore, the statute prescribing these renewals should be treated as merely directory, and that if there was a failure to comply with such statute in the case at bar, it was cured by the approval of the sale and the order of the court to make the deed to the plaintiff.

But the record does not directly show the approval of the sale upon which plaintiff's deed depends, but conceding that it does show, as contended by plaintiff, that the court made a finding that the purchase money had been paid, and ordered a deed made by the sheriff to the plaintiff, this was not equivalent to a renewal order of sale, because the approval of a sale which was at the time void and dead did not instill new life into it. Plaintiff calls our attention to Robbins v. Boulware, 190 Mo. 33, 109 Am. St. Rep. 746, 88 S. W. 674, wherein it is held that a failure to advertise the sale of land as required by law was a [321] mere irregularity, not affecting in a substantial degree the rights of the parties, and was cured by the approval of the sale. Substantially the same rule is announced in Cochran v. Thomas, 131 Mo. 258, 33 S. W. 6; Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572, 23 S. W. 692; Young v. Schofield, 132 Mo. 650, 34 S. W. 497. But these cases are not in point, and have to do with mere irregularities, while in the cases cited by the defendant the sheriff's deeds were held to be absolutely void.

It is said by plaintiff that the court had jurisdiction; but conceding that it had, that conferred no authority upon it to decide the case contrary to the law.

As neither party showed title to the land, the demurrer to the evidence interposed by the defendant should have been sustained.

The judgment is reversed.

All concur.

An Order for the Sale by an executor of a decedent's property for the payment of debts cannot be regarded as a judgment at law or a decree in chancery for the payment of money, but it is a decree in rem, and will remain in force, so that the executor may sell the property, for more than seven years: Kipping v. Demint, 184 Ill. 165, 75 Am. St. Rep. 164. See, also, White v. Horn, 224 Ill. 238, 115 Am. St. Rep. 155.

PARTRIDGE v. PARTRIDGE.

[220 Mo. 321, 119 S. W. 415.]

WITNESS—Competency of Priest Who Acted as Notary.—In proceedings to reform a deed, the notary who took the acknowledgment is not incompetent, merely because he is a priest, to testify as to the grantor's intention in executing the instrument, if he was not consulted in his capacity as priest. (p. 586.)

REFORMATION OF INSTRUMENT—Deed for Support of Wife.—A deed from a husband to his wife for her support is not a

gratuity, but is founded upon a meritorious consideration; and if the description therein is incorrect, a court of equity will, after his death, reform the deed so as to convey the land actually intended. (p. 587.)

George W. Partridge and Joseph Sayler, for the appellants.

T. A. Cummins, for the respondents.

[323] GANTT, P. J. This is a suit by the children and heirs at law of James M. Partridge, deceased, for partition of the south half of the southwest quarter of section 33, township 64, range 34, in Nodaway county, against Elizabeth Partridge, widow of said James M. Partridge, deceased, and her children by a former marriage with John C. Smith, deceased.

Plaintiffs state, and the evidence tended to show, that the said John C. Smith died seised of the said tract of land, leaving as his widow Elizabeth Smith, since intermarried with and now the widow of James M. Partridge, and the following named children, to wit: Richard Smith, Margaret Smith, Mary Smith, Anna Smith and Agnes Smith.

John C. Smith, by his last will, duly probated, devised this land to his said widow and children, in equal shares. After the marriage of Mrs. Smith to James [324] M. Partridge, and during said marriage, James M. Partridge purchased the undivided one-sixth interest of Richard and Margaret Smith, two of said devisees, being an undivided two-sixths of said tract. Afterward on March 7, 1895, James M. Partridge, having no other property than said one-third of said eighty acres, attempted to convey the same to his wife, said Elizabeth Partridge, but, as is alleged, by mistake of the scrivener the interest of said James M. Partridge was described as "all their undivided shares in the eighty acres of land situated in section 33, township 64, range 34, in the county of Nodaway, and state of Missouri." This deed was made to Agnes Smith as a conduit, and the said Agnes then conveyed the same to her mother, but the last-mentioned conveyance was never recorded and was lost, but the said Agnes Smith, who was at the time intermarried with one Doran, executed and delivered to her mother another deed to said interest in order to perfect the title of record in said Elizabeth. James M. Partridge died in 1898, and the said Elizabeth has been in the actual and exclusive possession of said tract up to the commencement of this suit in November, 1905. In their answer defendants ask to have the deed of James M. Partridge to Agnes Smith for said Elizabeth Partridge corrected and

reformed in the description of said land, so as to conform to the intention and agreement of said James M. Partridge, and so that the same shall read: "All their undivided shares in the eighty acres of land situated in section 33, township 64, range 34, being the south half of the southwest quarter of said section." The circuit court decreed a correction of said deed and found that plaintiffs, as the heirs at law of James M. Partridge, had no interest or title in said tract and dismissed their bill. From this decree the plaintiffs appeal.

1. The evidence tended to prove, and so the circuit court found, that James M. Partridge had no title [325] or interest in any other land in section 33, township 64, range 34, in Nodaway county, save and except the two-sixths of the eighty acres involved in this suit, to wit, the south half of the southwest quarter of said section 33. The testimony of the notary public, who drew the deed and took the acknowledgment, was clear that it was the intention of Mr. Partridge to convey his said interest in this particular eighty acres to his wife, and the notary intended to so write the deed, but by mistake he omitted to describe the part of the section intended to be conveyed.

It is insisted by the plaintiffs that the notary was incompetent to testify, because he was a priest and spiritual adviser of Mr. Partridge at the time he drew the deed and took the acknowledgment. We think this objection is untenable, for the reason that it nowhere appears in the testimony that the notary was consulted in his capacity as a priest, but was called simply in his character as a notary public. Conceding that the description is defective and uncertain, the question arises as to the power of a court of equity to correct this mistake under the facts in evidence in this case. It is unquestionably true that a mere agreement to give land will not be enforced against the donor upon proof alone of the promise to give, whether the promise be oral or in writing, for the reason that as the obligation rests alone upon the promise of the donor, he may revoke it, and equity will not compel a performance: Anderson v. Scott, 94 Mo. 637, 8 S. W. 235; Brownlee v. Fenwick, 103 Mo. 420, 15 S. W. 611. But the principle invoked by the defendant Mrs. Partridge in this case is that while a court of equity will not undertake to enforce a mere gratuity, yet where there is a meritorious consideration, as between the grantor and the grantee, a court of equity will take cognizance of the mistake and correct the same. Thus, in Hutsell v. Crewse, 138 Mo. 1, 39 S. W. 449,

it was ruled that a deed made and delivered by a parent to his minor children for [326] the purpose of making provision for such children has a meritorious consideration that entitled it to the protection of a court of equity. And the deed having been delivered and the land being susceptible of identification aliunde, the contract was executed and the title passed. In Crawley v. Crafton, 193 Mo. 421, 91 S. W. 1027, the decision in Hutsell v. Crewse, 138 Mo. 1, 39 S. W. 449, was reaffirmed. And it was explained that the expression used in that case to the effect that "the title passed," meant the title in contemplation of a court of equity was passed; that in such a case the contract was not purely voluntary, and the court did not enforce the executory contract. That the deed was but the evidence of an executed contract founded upon a meritorious consideration, and the decree simply corrects the evidence of that contract so as to make it conform to the contract as actually made and executed, and that the deed to the wife was based upon a consideration equally meritorious in the eye of a court of equity. And in support of that ruling this court cited 2 Story's Equity, thirteenth edition, 793b; Adams' Equity, eighth edition, pages 97 and 98, which fully sustained the decision of the court in that case. The evidence in this case leaves no doubt that James M. Partridge, recognizing his obligation to his wife and having no other property than this one-third of this eighty acres of land, sought to make a slight provision for her support in case of his death, and the case is brought clearly within the principle of the authorities above cited. We think the evidence fully justified the decree of the court, and upon the clearest principles of equity, the description of the property ought to have been and was properly corrected, and when so corrected it is evident that the plaintiffs had no title in equity and justice to any portion of this land, and the decree dismissing their bill was proper, and it is accordingly affirmed.

Burgess and Fox, JJ., concur.

Voluntary Conveyances.—The Reformation of a Deed is not, at least according to some authorities, affected by whether it is one of bargain and sale or of gift: Jones v. McNealy, 139 Ala. 379, 101 Am. St. Rep. 38. But according to Willey v. Hodge, 104 Wis. 81, 76 Am. St. Rep. 852, a voluntary conveyance of land by a father to his adult son, founded on natural love and affection, and made without any prior consultation or agreement with the grantee, as a testamentary disposition of the property, cannot, after the death of the grantor and as against other heirs, be reformed in equity and made to describe the land which the grantor intended but by mistake failed to convey.

PRICE v. METROPOLITAN STREET RAILWAY COMPANY.

[220 Mo. 435, 119 S. W. 932.]

CARRIER—Presumption of Negligence from Collision of Cars. Where the plaintiff's evidence shows the relationship of passenger and carrier between her and the defendant, the collision of two of the defendant's cars, with consequent injury to the plaintiff, and the exclusive control of these cars by the defendant and its employés, there arises a presumption of negligence against the carrier, so that at the close of the plaintiff's case a demurrer to the evidence should be overruled. (pp. 597, 598.)

CARRIER—Complaint, Whether Alleges General or Specific Negligence.—An allegation that "the defendant carelessly, negligently caused and permitted the train on which the plaintiff was riding as a passenger to come in violent collision with another train of defendant's, said other train being on said Twelfth street and on said incline as aforesaid; that said collision was occasioned without any fault on the part of the plaintiff, but by reason of the negligence as aforesaid of the defendant," charges general negligence. (pp. 598, 599.)

CARRIER—Presumption of Negligence not Waived by Specific Proof.—The plaintiff in an action against a carrier for personal injuries is not precluded from the presumption of negligence to which she is entitled under her petition charging negligence in general terms and not specifically, by introducing evidence of specific acts of negligence, which proof does not clearly show what caused the accident. (p. 600.)

CARRIER—Collision of Cars—Res Ipsa Loquitur.—Where the relation of passenger and carrier is established between the plaintiff and defendant, and the petition alleges general and not specific negligence, and a collision of cars with consequent injury to the plaintiff is shown, a presumption of negligence arises against the carrier, and the doctrine of res ipsa loquitur applies. (p. 601.)

CARRIER—Presumption of Negligence from Collision of Cars. Where a passenger is injured by a collision caused by a cable train running backward down an incline and colliding with another train, the carrier has the burden of showing that it has exercised the highest degree of care, and the same proof that will show that the collision was by some cause which the highest degree of care could not have averted will show that it was the result of inevitable accident. (pp. 601–605.)

CARRIER—Elements of Damages for Personal Injury.—In an action against a carrier for damages for personal injuries received by a passenger, the jury may consider her loss of earnings and the money expended for medical services. (p. 605.)

CARRIER—Instructions in Action for Personal Injury.—An instruction in an action against a carrier for personal injuries sustained by a passenger is not objectionable because it recites her claims as stated in the petition, if it in no wise assumes them to be true or to have been proved. (p. 606.

CARRIER—Safe Appliances.—The Same Degree of Care is not required of a master to adopt the latest appliances as is required of a carrier. (p. 609.)

CARRIER—Failure to Use Most Approved Brake.—In an action by a passenger for injuries sustained by a cable car breaking from its grip and backing down an incline into another car, evidence

is admissible that the car was not equipped with a rail brake, it being shown that the carrier used such a brake on other cars operated over inclines, and that they were more effective than other brakes in stopping cars on an incline. (p. 609.)

DAMAGES—Allegation of Bodily Injury—Proof of Displacement of Organ.—Under an allegation that the plaintiff received "serious, painful and permanent internal injuries," evidence is admissible that after the accident complained of she suffered from a displaced womb, since this is a bodily injury as distinguished from a condition or disease growing out of bodily injuries which should be specifically pleaded. (pp. 606–609.)

John H. Lucas, Ben T. Hardin and R. B. Young, for the appellant.

Brown, Harding & Brown, for the respondent.

441 PER CURIAM. Upon consideration of this cause by the court in bank, it is considered that the petition herein does not charge specific negligence, but general negligence, and the opinion by Graves, J., in division is adopted as the opinion of the court. The court is of the opinion that there is no real conflict between the views expressed in this case and that of Davidson v. Transit Co., 211 Mo. 320, and that the language used in the Davidson case, supra, and quoted in the opinion in this case, was language used arguendo in the discussion of an instruction there under consideration, and it was not thereby meant to say that the petition in the Davidson case was a charge of 442 specific negligence. Judgment is therefore affirmed.

All concur; Valliant, C. J., in separate opinion.

GRAVES, J. Plaintiff, a passenger of the defendant, sues for damages in the sum of fifteen thousand dollars, for injuries alleged to have been received by reason of the car upon which she was riding having collided with another on the same track. The locus of the accident is the viaduct on the Twelfth street line of defendant's railway system in Kansas City, Missouri, and the date November 4, 1903, between 7 and 8 o'clock in the morning. Plaintiff was a resident of Kansas City, Kansas, and was working for the firm of Emery, Bird & Thayer, having charge of the underwear department of that firm's store. On the day in question she boarded one of defendant's cars at Grandview station in Kansas City, Kansas; and rode to a point two short blocks from the defendant's Twelfth street line, where it crosses Mulberry street. Procuring a transfer ticket she went to Mulberry street and there boarded an east-bound cable train (composed

of a gripcar and coach or trailer) to go to her place of business. Mulberry street is near the west end of the Twelfth street viaduct, which is quite a steep incline, upon which were two cable tracks, one for east-bound and one for west-bound cars. The east-bound cars used the south track. After leaving Mulberry street there is quite a space covered by this overhead viaduct, and going east the first street reached where the car rests on terra firma is the bluff or sometimes designated Bluff street. A block east is Lincoln street, which is on an upward incline from the bluff or Bluff street, and whereat is a level space to receive and discharge passengers. Then there is an upward incline to Summit street, where there is another level place to receive and discharge passengers, [443] and going east from Summit is another upward incline. The cable train upon which plaintiff was riding passed over the incline and reached in safety Summit street, where it stopped. It then started and after going up the incline a short space started to run backward, slowly at first, but continued to increase its speed until it reached a point somewhere near the middle of the viaduct incline, where it collided with another of defendant's cable trains, bound eastward, and by this collision the plaintiff was injured. The petition, being a third amended petition, charges the relationship of passenger and carrier, and charges the negligence of the defendant in this language: "That while plaintiff was a passenger as aforesaid on one of defendant's said trains, going in an easterly direction on said Twelfth street in Kansas City, Missouri, and at a point commonly known as the Twelfth street incline, the defendant carelessly, negligently caused and permitted the train on which plaintiff was riding as a passenger to come in violent collision with another train of defendant's, said other train being on said Twelfth street and on said incline as aforesaid; that said collision was occasioned without any fault on the part of the plaintiff, but by reason of the negligence as aforesaid of the defendant; that said cars collided with great force and violence, wrecking both trains of defendant, so in charge of defendant's agents, servants and employés."

By way of answer the defendant said that it "denies both generally and specifically each and every allegation in said petition contained."

Upon trial of the issues there was a verdict, signed by ten jurors, giving plaintiff the sum of five thousand dollars damages, upon which judgment was entered. After timely but

unsuccessful motions for a new trial and in arrest of judgment, the defendant appealed to this court.

444 For the plaintiff the cause was submitted to the jury upon two instructions, one on the measure of damages and the other couched in this language:

"1. The court instructs the jury that if you believe from the evidence that the plaintiff was a passenger upon a train of defendant at the time she claims to have been injured, then having received plaintiff upon board of such train, the due obligation of the defendant to plaintiff was to use the highest degree of care practicable amongst prudent, skillful and experienced men in that same kind of business, to carry her safely, and a failure of the defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on its part; and defendant would be responsible for all injuries resulting to plaintiff, if any, from such negligence, if any. And if you believe from the evidence that there was a collision between two trains of defendant on one of which plaintiff was a passenger (if you believe she was a passenger thereon), the presumption is that it was occasioned by some negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injury, if any, was occasioned by inevitable accident, or by some cause which such highest degree of care could not have avoided."

Those given and refused for defendant will not be noted here, but will receive attention later as occasion requires.

The plaintiff in person testified to facts showing the relationship of carrier and passenger, the collision of the two trains and her consequent injury, and the extent of the injury. Not being able to get a seat, she was standing in the aisle of the coach at time of collision. By doctors she also showed the nature and extent of the injury. The plaintiff, however, did not stop here as she might have done, resting 445 her case upon the well-founded doctrine of presumptive negligence, but she introduces witnesses, the purport of whose testimony is to show a number of negligent acts upon the part of the defendant. This testimony for the plaintiff tends to show the following facts:

William Kevan testified that he was an experienced gripman of eight or nine years' experience on the line of defendant in Kansas City; that by riding over it he was familiar with the Twelfth street incline; that at the time of the acci-

dent defendant was using two brakes upon the cars on the Twelfth street line, the ratchet brake which was applied to the wheels of the gripcar, and the automatic brake which was applied to the wheels of the coach or the trailer; that both were operated from the gripcar; that if the ratchet brake was applied by the motorman too tightly it would lock the wheels of the car and cause them to slide, in which event the automatic brake would not work; that upon another incline, viz., the Ninth street incline, defendant also used what is called a rail brake, which was applied directly to the rail and has nothing to do with the wheels; that the wooden shoe of the rail brake when applied to the rail had more friction than the other brakes named, and in his judgment was the best to stop a car on an incline; that sand used upon the track would help in stopping a car; that by spacing the cars was meant that they should be kept a certain distance apart upon the line; that he understood the Twelfth street incline to be a twenty-five per cent grade and Ninth street incline a thirty per cent grade; that the rail brake which had a two-foot surface applied to the track could be so applied as to lift the moving car from the track, but this would be better in case of a backing car on this incline, and was not dangerous; that if the rails were gummy by means of a foggy, damp morning, it would require a good load to hold [446] the rail brake down to the rail and keep the cars from sliding (the evidence shows these cars were very heavily loaded); that if the ratchet brake is put on too suddenly it will lock the wheels; that the proper thing is for the motorman to put it on gradually; that if the wheels were locked, the brake should be released and put on again, and likewise with the automatic brake; that the motorman ought not to lock the wheels with his brakes.

P. J. Ryan testified that he was in the employ of defendant, November 4, 1903, the date of the accident, and had been for two months; that he was on the Twelfth street line, and among his duties he had to go over the whole Twelfth street line to take care of the carrying pulleys and the curve pulleys; that the carrying pulleys carry the rope along; that the wreck occurred two hundred and fifty yards west of Summit street; that he got there seven or eight minutes after the wreck; that the coach was all broken up into small pieces and the gripcar was badly wrecked; that he was familiar with the conduits and conditions of the rope in the West bottoms; that all along from Fourteenth and Wyoming streets to Twelfth

and Wyoming streets the rope was at places dragging through mud and water; that this was west of the viaduct; that he was an oiler and truckman; that he went over the road every day, opened up the rope conduit and examined the wheels or pulleys; that the conduit was an oval shaped affair through which the rope ran; that in certain places where the rope dragged through the mud there were no wheels or pulleys, because he was unable to get them from the shop; that the conduit had not been all cleared out since the flood in June preceding; that there were bright places on the rope where the tar and oil usually on the rope had been cut off by the mud and water through which the rope passed.

447 By Elmer Graybill, a former employé of the defendant, it was shown that he had worked for defendant in different capacities for thirteen years and for four years as gripman on the Twelfth street line; that at the time of the accident and prior thereto defendant only used the ratchet and automatic brakes on the cars used on the Twelfth street incline; that the rail brake has the greater surface friction, and such brakes were used on the Ninth street line; that he was superintendent at the time of the wreck; that P. J. Ryan was an oiler and looked after the wheels and such as that; that he was familiar with the conduit from Fourteenth to Twelfth on Wyoming street, as he went over the road every day; that there was mud and water in the conduit between those points, and the rope dragged through the mud and water, which had the effect of taking the tar off of the rope; that with the oil and tar off of the rope the grip would take hold quickly and start the car with a jerk, but when the rope was oiled and slick, when the grip was attached it would slip through the jaws of the grip so that the car would not jerk upon starting; that sand upon the track made it easier to stop a car, and especially if the track was slick and gummy.

Upon cross-examination he says that this mud got into the conduit during the June flood and had not been cleaned out; that it had been cleaned out around the covers and pulleys; that the mud and water made the rope clear of tar and oil and the grip would take hold quicker, and the rope would not slide through the grip as it would when oiled, and the gripman would have to be particular or he would start with a very sudden jerk; that grip shanks had frequently been broken on the Twelfth street line; that he had seen them break on heavily loaded cars; that he never knew the grip

itself to break; that if the grip is tightly attached to the rope where the oil has been cut off by mud and water, it is liable to break the jaws of the [448] grip, but witness did not recall of one being thus broken; that this incline was not sanded but one night in the year whilst he was superintendent, and that was Carnival night, and because they expected a heavy travel and overloaded cars; that the cars were supposed to be spaced two minutes apart; that one car should stand at Mulberry street until the other got to Lincoln street on this incline; that at the time of the morning when this accident occurred no spacer was kept on duty, but from 5 o'clock to half-past 6 in the evening, the hours of heavy travel, a man was kept at Mulberry street to space the cars so as to keep two cars off of the viaduct at the same time; then the witness further proceeds in this language:

"Q. In your opinion, could a heavily loaded car, even if the tracks were wet, be stopped that had started back after having stopped at Summit street and proceeded eight or ten feet east, and then something had gotten wrong with the cable, or his grip, or he had lost the cable, or it had become broken—could that car be handled or stopped by the gripman? A. Yes, sir—well, that is owing to the condition of the track more than anything else.

"Q. Under the circumstances that I have put to you? A. Well, there is two different kinds of wet tracks; there is quite a bit of difference in them.

"Q. Any wet track that is properly sanded? A. Well, if the track was properly sanded, of course a man ought to hold it with his brakes if properly sanded.

"Q. Now, then, on a steep hill like that in a foggy morning, when there is a gummy or slippery rail, what would putting sand on the tracks, or anything else do, toward stopping a heavily loaded train? A. Sanding will help.

"Q. It would not hold the train? A. Yes, sir. If there had been plenty of sand it would have held the train.

[449] "Q. With a car on as steep a place as that—with the wheels locked would it not slide notwithstanding the sand? A. You are not supposed to have the wheels locked.

"Q. You do use sand on parts of the Twelfth street road? A. Have a man to sand them?

"Q. Yes. A. Well, we used to have a man to sand the tracks at between Baltimore and Main, eastbound, and between Broadway and Washington, eastbound, and between Walnut and Main eastbound, and westbound at about half-

way between the alley between McGee and Grand avenue and Walnut street.

"Q. What was that for? A. So that the car would not slip down on the track and run into any other one."

This witness further says that if a car going up the incline for any reason should become detached from the cable rope, the proper way was to set the automatic brake first and then the ratchet brake.

By H. H. Rogers it was shown that he had worked on the Twelfth street line as conductor and gripman, passing over the line twenty-two times per day; that there is a level space of forty to fifty feet at Summit street crossing; that the grade east of Summit is medium, not so steep as between Summit and Lincoln; that only the ratchet and automatic brake were used on that line; that the ratchet operated on the grip car and the automatic on the coach; that if the train had started up the grade from Summit street and the rope was lost by reason of breaking the grip or otherwise and the car started backward, the proper course would be to apply the automatic brake first and then the ratchet brake; that sand on the track would help materially in stopping a car going backward on that incline; that a rail brake had much more friction for stopping the car than did the other brakes.

450 On cross-examination some hypothetical questions were propounded thus:

"Q. Now, then, with that grade—assuming that a car is heavily loaded with passengers, all the seats taken and people standing in the aisle, and a dark foggy morning, with the track slippery, after stopping at Summit street and then picking up the rope—that is, stopping the grip and rope so that it will pull the train from ten to a hundred feet up the incline east of Summit, if the grip then breaks, can the gripman hold it with any brakes, even with rail brakes or anything else?

"Q. Yes? A. I say he ought to stop the train on that level.

"Q. On which? A. On the level of Summit street.

"Q. After it has left Summit street? A. Yes, sir.

"Q. And stop it after it runs how far? A. You mean if it runs up?

"Q. Yes, sir. A. If it runs up the length of the train, that is forty or fifty feet.

"Q. I say, suppose he goes a hundred to a hundred and fifty feet, and the rail is quite slippery, a foggy morning, and

the rail is slippery and gummy, a gummy rail, then can he stop it? A. The chances are against him; if he gets from a hundred to a hundred and fifty feet, he will not stop it with a big load.

"Q. Not stop it? A. I don't say not stop it; the chances are he would not.

"Q. He would not stop it even if the track was sanded, if it got that start? A. I would say if the track was sanded, he ought to stop it.

"Q. How is that? A. I say, if the track was sanded, he ought to stop it.

"Q. With what kind of a brake? A. With a ratchet brake and an automatic."

[451] There were a number of witnesses who testified to the good health of plaintiff prior to the accident, and also to her subsequent bad health. Also witnesses who were present at the wreck who described the condition of the car upon which plaintiff was riding after the collision, as well as the appearance of the plaintiff after the wreck.

Such was plaintiff's case in chief, and at this point the trial court overruled a demurrer to the testimony offered by the defendant.

The defendant from a number of witnesses who were or had been in their operating department deduced a number of facts, as follows: First, by an experienced man there was explained to the jury the full operation of a cable train; the movement and condition of the cable or rope; the mechanism and operation of the grip which attaches to the cable for the moving of the car; the mechanism and operation of the three kinds of brakes, i. e., ratchet, automatic, and rail brake; the construction and purpose of the cable conduit, and the pulleys therein—in fact, a full description of the operation of a train and the instrumentalities used in such operation. It was also shown that a casting on the grip-jaw broke first before that train started backward. The grip itself and the parts thereof were before the jury and fully explained. It was shown that the rail brake was not better than the ones used, and in fact not as good; that the material used in the grip was the best obtainable; that the grip on this car had been inspected the night before and was in good condition; that there was no mud or water in the conduit for the cable; that the rope or cable was well oiled; that mud and water would take off the tar and oil from the rope and make the grip take hold of the rope firmer and quicker and start the train with

a jerk; that this would place a greater strain on the grip; that the rope or cable was in the [452] grip just after the accident, but the grip was broken and the break a fresh one.

The motorman was a witness and testified that his car had gotten about the train-length from Summit street when his grip broke with a snap; that he put on the automatic brake and then the ratchet brake, but was unable to stop the train; that he did all that could be done, and remained with his train until the collision; that he then took out the grip and found it broken, the break being fresh throughout; that he had the train well loaded. Other witnesses not employés of defendant corroborate him as to the grip snapping just before the train started backward.

By one witness it was shown that sand was not a good thing to use on an incline because it made the cars pull heavy up hill. By another that the rail brake would knock off the sand. By another that they usually sanded this incline every morning, but he would not say that it had been sanded on this morning. By another it was shown that there was a flagman who was stationed at Mulberry street to watch the street crossing, and also to see that the cars did not run too closely together on that viaduct and incline, and that at the stockyards a mile west of Mulberry street there was a man to space the cars going east over this incline.

From the evidence it also appears that it was a damp, foggy morning and the rails were wet and gummy; that the rope was being properly oiled; that the grip was properly inspected, although on cross-examination it was developed that there was but one man to inspect twenty or more trains, and it took a half hour to the train, which was more hours than he had from the time the trains came in at night and went out in the morning.

In fact, the evidence showed care upon the part of the gripman and the use of proper appliances in proper conditions.

[453] This sufficiently states the case.

1. Defendant insists that its demurrer to plaintiff's evidence should have been sustained. To this we cannot assent. The relationship of passenger and carrier was shown. The collision of two cars was shown, and the consequent injury of the plaintiff was shown. The management, control and operation of these two cars or trains were shown to have been exclusively in the hands of the defendant, its agents and employés. The occurrence, i. e., the collision, is not of the

usual and ordinary occurrences in the operation of such trains. On the other hand, it is an unusual occurrence. The full details of this collision were before the jury. With this situation proven there arises for the protection of a passenger a presumption of negligence upon the part of the carrier, so that at the close of plaintiff's case, unless, for reasons to be discussed later, she was debarred of this presumption of negligence, she had made a prima facie case for the jury, and the demurrer was properly overruled.

2. But it is contended by the defendant that the doctrine res ipsa loquitur does not apply to this case. This it would seem was urged upon two grounds, when we read the briefs in this and the companion case of Loftus v. Metropolitan Street Ry. Co., 220 Mo. 470, 119 S. W. 942, and passed upon at this term of the court, and which for good reasons we have in a way considered with this case. First, defendant urges that the petition charges specific negligence and not general negligence, and for that reason the doctrine of res ipsa loquitur has no application. Secondly, they urge that although it be conceded that the petition is one charging general negligence, yet the plaintiff in her proof in chief undertook to point out specific acts of negligence, and for that reason the doctrine of res ipsa loquitur does not apply, and all instructions [454] based upon that theory were erroneously given. Of these two contentions in their order.

(a) Does this petition charge specific acts of negligence? We think not. The only charge is that "the defendant carelessly, negligently caused and permitted the train on which plaintiff was riding as a passenger, to come in violent collision with another train of defendant's, said other train being on said Twelfth street and on said incline as aforesaid; that said collision was occasioned without any fault on the part of the plaintiff, but by reason of the negligence as aforesaid of the defendant."

This, to our mind, is a charge of general negligence. Had the petition averred a negligent collision of the two trains, and then proceeded to state that such collision was occasioned by the negligence of the gripman in the operation of the car, or the negligence of the conductor in the operation of the train, and pointed out wherein they, or either of them, had been negligent, or had it charged a negligent failure to use proper appliances and pointed out the insufficient appliances; or had it charged that the collision was due to some negligent condition of the track, naming and pointing out

such or other such similar specific acts, then there would have been specific negligence. By defendant we are pointed to the case of Roscoe v. Metropolitan St. R. R., 202 Mo. 576, 101 S. W. 32. This case is not in point nor an authority here. In that case not only a negligent collision was charged, but we analyzed the petition and found six specific charges of negligent acts which were alleged to have brought about the collision. We then held, and rightly, under the great weight of authority, that the plaintiff had pleaded negligence specifically, and if a recovery was had it must be upon specific acts of negligence. But the petition there and the petition here are not at all similar. No specific acts of negligence are charged in the petition before us now. It is as general as it [455] could be to state a case or charge negligence at all. Nor do these views conflict with Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062, 8 L. R. A., N. S., 929, for in that case there was a number of specific assignments of negligence charged in the petition, as there was in the Roscoe case (202 Mo. 576, 101 S. W. 32).

We are next cited to the case of Davidson v. St. Louis Transit Co., 211 Mo. 320, 109 S. W. 583, and especially that part of the opinion found upon the bottom of page 361 and top of page 362. This case is apparently in conflict with the views as herein expressed on the question of the petition in the case at bar stating general and not specific negligence. In the Davidson case the charge of negligence was very much as in the case at bar. It was a collision of two street-cars, and the negligence was thus stated: "Defendant so carelessly and negligently conducted itself that a car in which plaintiff was riding was caused to collide with another car belonging to defendant upon Grand avenue, near its intersection with Finney avenue, whereby plaintiff was thrown down," etc. The Davidson case, when finally determined by the court in bank, makes this observation as to the character of the charge of negligence contained in the petition of that cause: "A recovery in this action is sought upon the negligence which is alleged to consist in the defendant's so carelessly and negligently operating its cars that the car in which plaintiff was riding was caused to collide with another car belonging to defendant upon one of the avenues of the city of St. Louis. In other words, specific negligence was alleged upon which a recovery was sought, and the instruction in order to conform to the uniform rulings of this court should have limited the

consideration of the jury to the acts of negligence specifically complained of in the petition."

The case of Roscoe (202 Mo. 576, 101 S. W. 32), is cited in connection with this proposition. We are inclined to think that the language of the Davidson opinion goes too far when it denominates the charge of negligence so contained [456] in the petition of that case specific negligence, rather than general negligence.

(b) Nor are we impressed with the contention made that because plaintiff on her case in chief put in proof of some specific acts of negligence, she is thereby precluded from the presumption of negligence to which she was entitled under her petition, it being one charging negligence in general terms and not specifically. In so doing she assumed a burden that she did not have to assume in making out a prima facie case, but it does not lose her the right of resting upon the presumption, if the evidence so introduced does not clearly show what did cause the accident. The rule is well stated by the supreme court of Massachusetts, in Cassady v. Old Colony Street Ry. Co., 32 Am. & Eng. R. R. Cas., N. S., 671: "The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine, because, instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. This position is not tenable. It is true that, where the evidence shows the precise cause of the accident, as in Winship v. New York etc. R. R., 170 Mass. 464, 49 N. E. 647, and Buckland v. New York etc. R. R., 181 Mass. 3, 62 N. E. 955, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been as to it if it had not been shown. But, if at the close of the evidence, the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff [457] from relying upon the presumptions applicable to it." To like effect is D'Arcy v. Westchester E. R. R., 82 App. Div. 263, 81 N. Y. Supp. 952.

This is different from a case wherein the plaintiff pleads that the collision was occasioned by one or more specific acts

of negligence. When she so pleads it rises to the dignity of an admission of record, that she knew the cause of the accident. Not only so, but she points out specifically the negligent acts, and must prove them, and recover, if at all, upon the negligent acts pleaded. A mere attempt to prove negligent acts hardly justifies the conclusion that a plaintiff knows the cause of the accident. The Roscoe case (202 Mo. 576, 101 S. W. 32) does not go to the extent of supporting this contention of the defendant, nor do we feel that we should go a step further as argued by counsel in the oral argument.

3. Defendant lodges several complaints against the action of the trial court in giving instruction numbered 1, for plaintiff, which instruction we have set out in the statement.

(a) It is urged as being erroneous because the doctrine of res ipsa loquitur does not apply to this case. This contention we have disposed of in our preceding paragraph. If the negligence pleaded is general negligence and not specific negligence, as we have above concluded, then the case falls peculiarly within the doctrine of res ipsa loquitur. We have an unusual occurence in the operation of machinery entirely under the control of defendant. We have an injury without fault of plaintiff. We have undisputed the relation of carrier and passenger. In such case, presumptive negligence arises, and the doctrine aforesaid is fully applicable.

(b) It is urged that this instruction "too broadly states the rule of law sought to be invoked, casts the burden on appellant, and is misleading." We are [458] unable to view the instruction as defendant sees it. That the burden is upon the defendant to rebut the presumption and to show that it has not been guilty of negligence in a case of this character is unquestioned law. The latter part of the instruction, which says, "and that the injury, if any, was occasioned by inevitable accident or by some cause which such highest degree of care could not have avoided," is the bone of contention.

In the first place, when the defendant has assumed, as it must do under the law, the burden of showing that it has exercised the highest degree of care, and has carried that burden successfully, the same proof establishes that the collision was the result of inevitable accident, or was by some cause which the highest degree of care could not have avoided. In other words, the proof of the one is proof of all the propositions. And especially is this true where all the instrumentalities connected with the collision are absolutely under the control of

the defendant, and not a scintilla of evidence tending to show an intervening and independent separate cause, as in this case.

The wording of this instrument is well grounded on authority in this state.

In Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799, this court quoted with approval the following: "When damage or injury happens to the passenger by the breaking down or overturning of the coach, the presumption, prima facie, is that it occurred by the negligence of the coachman, and the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatever, and that the damage or injury has been occasioned by inevitable casualty, or by some other cause which human care and foresight could not prevent. For the law will, in tenderness to human life and limbs, hold the proprietors liable for the slightest negligence, and will compel them by satisfactory proofs to repel every imputation thereof."

459 Not only so, but we expressly approved of instructions 1 and 2 given for the plaintiff and found set out at length in 68 Mo. 342 and 343. The latter part of instruction 1 reads: "Then it rests on the defendant to prove to your satisfaction that said hack was safe, sound, roadworthy, not overloaded and carefully driven, and that said axle broke, and said accident arose from and was caused by inevitable accident or defect that could not have been seen, detected or known to defendants, their servants or agents, by the exercise of the utmost skill, knowledge, foresight, care, inspection and examination of said coach by defendants, their agents or servants, and unless the jury so believe they will find for plaintiff."

And instruction 2, so approved, reads: "If the jury believe from the evidence that on February 3, 1874, the defendants were engaged in the business of transporting passengers from the railroad depot in Lexington to any and all points of said city, and that on said day the plaintiff was received by them, or their agents, at said depot to be carried on one of the hacks of defendants, and that while being so transported on said hack plaintiff was injured by reason of the breaking of an axle on said hack, then the burden of proof rests upon the defendants to prove to the satisfaction of the jury that said breakdown was caused by inevitable accident and not from any defect, imperfection in the hack, overloading or careless driving, and that by the exercise of the utmost human foresight, knowledge, skill and care, such injury could not have

been prevented by defendants, their agents or servants, and unless the jury so believe they will find for the plaintiff." The instruction in the case at bar goes no further. In each of the instructions, supra, the burden was placed upon defendant not only to show no negligence on his part, but in addition that the injury "was caused by inevitable accident."

[460] Again, in the case of Coudy v. St. Louis etc. R. R. Co., 85 Mo. 79, Norton, J., said: "The court gave an instruction predicating the right of plaintiff to recover on the facts stated in the petition, and told the jury that if they believed from the evidence that those facts were true, they would find for plaintiff, unless they further found that the checking of the train was the result of some unforeseen or unavoidable accident beyond the control of defendant's agents, and that the burden of proof was on the defendant to show such fact. It is claimed that this instruction is erroneous, in that it devolves on defendant the burden of excusing the sudden checking of the train. The instruction, we think, is sustained by the authorities which hold that when an injury is shown to have been occasioned by an error of the carrier or his servants in operating the instrumentalities employed in the business of carrying, a presumption of negligence arises against the carrier, which casts on him the burden of showing that the accident happened notwithstanding the exercise on his part of the high degree of care which the law imposes upon him." It will be noted that the instruction complained of in that case placed the burden upon defendant to show that the injury was the result of "some unforeseen or unavoidable accident."

Further, in Hipsley v. Kansas City etc. R. R. Co., 88 Mo. 348, this court said: "In the case of Lemon v. Chanslor, 68 Mo. 341, 30 Am. Rep. 799, we had occasion to consider the rights of a passenger and the duty under the law which that relation cast upon the common carrier, and it was there held that when the evidence shows that a passenger, without fault of his own, received injury by the overturning or breaking down of the vehicle in which he is being carried, a prima facie case is made out for him, and the onus is cast upon the carrier of relieving himself from the responsibility by showing that the injury was the result of an accident which the utmost skill, foresight and diligence could not have prevented. This [461] rule was applied in a case where horse power and hack were used by the carrier for carrying passengers, and it applies with equal if not greater force when the more powerful instrumentality of steam is used as the motive power. While

carriers are not insurers of the absolute safety of passengers and are not responsible for inevitable and unavoidable accidents, regard for the safety of human life and limb has led to the adoption of the rule announced."

To a like effect is the language of Gantt, P. J., in Clark v. Chicago & A. R. R. Co., 127 Mo. 197, 29 S. W. 1013, wherein he says: "The obligation of a steam railway carrier to its passengers is, as far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries resulting to its passengers from any, even the slightest, neglect, and when the passenger suffers injury by the breaking down or overturning of the coach, the prima facie presumption is that it was occasioned by some negligence of the carrier, and the burden is cast upon the carrier to rebut and establish that there has been no negligence on its part, and that the injury was occasioned by inevitable accident or by some cause which human precaution and foresight could not have averted: Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799; Furnish v. Missouri Pac. R. R. Co., 102 Mo. 438, 22 Am. St. Rep. 781, 13 S. W. 1044."

The broad doctrine announced in Feary v. Metropolitan St. R. R. Co., 162 Mo. 75, 62 S. W. 452, under paragraph 9, by Marshall, J., is not in accord with the cases cited above. It is based largely upon the case of Tuttle v. Chicago, R. I. etc. R. R. Co., 48 Iowa, 236, and entirely ignores the pronounced doctrine of this court in the cases supra. The Iowa court is not in harmony with this court upon the question in hand, except in the Feary case (162 Iowa, 75, 62 S. W. 452), and on this point we are not inclined to follow the Feary case. Had it reviewed and overruled the previous Missouri cases, a different question would have been presented.

In cases such as is disclosed by the record in this case, this instruction is proper.

[462] 4. Objection is urged to plaintiff's instruction No. 2, which reads: "The jury are instructed that the plaintiff claims in her petition that on November 4, 1903, she was a passenger on a cable train of defendant, and that while she was a passenger on such train it came in collision with another cable train of defendant.

"Now, if you find for the plaintiff, and if you believe from the evidence that she sustained injuries as a direct result of said collision, then you may allow her damages for such injuries, if any, as you may believe from the evidence she has sustained as a direct result of said collision. In estimating

such damages you may take into consideration the pain and suffering which you may believe from the evidence she has endured, if any, or is reasonably certain to endure in the future, if any, as a result of such injuries, if any. You may also take into consideration the loss of earnings, if any, which you may believe from the evidence she has sustained as a direct result of such injuries, if any. You may also take into consideration any sum of money which you may believe from the evidence plaintiff has reasonably become liable for, if any, for necessary medical treatment received by her on account of and as a direct result of, said injuries, if any, not to exceed two hundred and fifty dollars, but the whole amount of your verdict should not exceed the sum of fifteen thousand dollars."

The portion attacked is the first paragraph, wherein the court sets out what the plaintiff claims in her petition. The remaining portion of the instruction is certainly not objectionable as to the measure of damages, and the items going to make up such damages. There was evidence as to her earning capacity, as there was also evidence of the sums for which she had become obligated for medical services. This portion of the instruction has met with frequent approval by this court. Nor is the first paragraph objectionable, for it simply recites what the plaintiff claims in the [463] petition and no more. It in nowise assumes such claims to be true or to have been proven, but makes a simple recital of her claims as stated in the petition. There was no error in giving this instruction.

5. (a) It is next urged that there was error in refusing defendant's instruction No. 2. This instruction attempted to declare the law thus: "The court instructs the jury that in this case the burden of proof rests upon the plaintiff to prove to your satisfaction by the preponderance of the credible evidence in the case, that defendant's servants were guilty of negligence as submitted to you in these instructions for your consideration; and this burden of proof as to said negligence continues with the plaintiff throughout the entire trial; and unless you believe and find from the evidence in this case that the plaintiff has proven by a preponderance of the credible evidence in the case, to your satisfaction, that the defendant's servants at the time and place alleged were guilty of negligence as alleged and specified in these instructions, and that said negligence was the direct and proximate cause of plaintiff's injury, then you cannot find for the plaintiff, and your verdict must be for the defendant."

Such an instruction has no place in a case where the doctrine of res ipsa loquitur is applicable. It destroys every vestige of the doctrine of presumptive negligence. In a preceding paragraph the question of the burden of proof is fully discussed, and we shall not reiterate at this point. The instruction was properly refused.

(b) Defendant also complains of the court in modifying instruction No. 6 as asked by it. The court struck out the words, "in charge of the train," which we have italicized in the original draft presented by defendant, which original instruction reads: "Carriers of passengers are not insurers of the safety [464] of those whom they convey, nor answerable for an accident, no matter how produced, excepting only those accidents which can be traced to some neglect of duty. If, therefore, you believe from the evidence that the injuries sustained by the plaintiff were merely the result of accident, no matter how produced, other than by negligence of defendant's servants, *in charge of the train*, then plaintiff cannot recover, and your verdict must be for the defendant."

With the five italicized words stricken out, the court gave the instruction. There was no error in striking out these words. Under the proof in this case, which not only covered acts of the servants in charge of the train, but divers other acts which might have produced the accident, the modification was imperatively demanded. The instruction as modified and given was really more favorable to the defendant than was authorized by the record.

Several other similar objections are urged to the refusal of instructions by the trial court, each of which we have examined, but find them without sufficient merit to require detailed notice herein.

6. In the course of the trial it was shown over the objection of the defendant that after this collision the plaintiff suffered from a displaced or retroverted womb. The admission of this testimony is alleged as error, as being beyond the purview of the injuries charged in the petition.

The petition charges: "That she received a hard and serious blow on the back of her head, seriously injuring plaintiff's head; that she received a hard and serious blow in the chest and stomach, seriously injuring the same; that plaintiff's right hip was crushed, dislocated and injured, her right arm was sprained, skinned and bruised; that her back was twisted, wrenched, sprained and injured; that her left side and [465] leg

were skinned and injured, and that she received serious, painful and permanent internal injuries."

This evidence was evidently admitted under the latter clause of the allegation pertaining to internal injuries, which is rather general on the subject of internal injuries. Yet this was an internal bodily injury, and we use the terms "bodily injury" purposely, so as to distinguish such from conditions and diseases which may result from bodily injuries. The one may be shown under a general allegation whilst to the mind of the writer the other should be specifically pleaded and pointed out by the pleadings.

A similar question is thus disposed of by Johnson, J., of the Kansas City court of appeals, in the case of Wilbur v. Southwest Mo. El. R. R. Co., 110 Mo. App. 689, 85 S. W. 671: "Over the objections of defendant the plaintiff was permitted to introduce evidence of various bodily injuries, chiefly internal, sustained from his violent projection and fall. The ground of the objections was the absence from the petition of allegations of the existence of the particular injuries which the evidence admitted at the trial tended to prove. The averment is that plaintiff 'was greatly injured in body and mind and suffered great permanent injury.' It is true, as urged by defendant, that all of the facts constitutive of the cause of action must be pleaded in the petition: Sidway v. Missouri Land etc. Co., 163 Mo. 342, 63 S. W. 705; Lainitz v. King, 93 Mo. 513, 68 S. W. 263; Pier v. Heinrichoffen, 52 Mo. 333; Leete v. State Bank, 141 Mo. 574, 42 S. W. 1074. But defendant in making application of this rule assumes an incorrect premise. It is the fact of injury that is elemental, not the nature or character of the particular wounds and hurts which necessarily and naturally result from the negligent act. They serve to create the substantive fact and are included within its bounds. Evidence of particular bodily injuries received by plaintiff in [466] the wreck resulting from defendant's negligence was admissible under a general averment of injury to the body: Brown v. Hannibal & St. J. R. R. Co., 99 Mo. 310, 12 S. W. 655; Seckinger v. Philbert etc. Mfg. Co., 129 Mo. 590, 31 S. W. 957; Coontz v. Missouri Pac. R. R. Co., 115 Mo. 669, 22 S. W. 572; State v. Bacon, 24 Mo. App. 403; Pinney v. Berry, 61 Mo. 359; Barrett v. Western Union Tel. Co., 42 Mo. App. 542. It is not to be inferred defendant would not have been entitled to a more definite statement had he by proper motion sought to be informed of the nature of the injuries claimed. Without filing such motion

defendant answered, putting in issue the fact of any injury. In this condition of the record, the objections, made for the first at the trial, came too late; Seckinger v. Philbert etc. Mfg. Co., 129 Mo. 590, 31 S. W. 957; Grove v. Kansas City, 75 Mo. 672; Spurlock v. Missouri Pac. R. R. Co., 93 Mo. 530, 6 S. W. 349; Bowie v. Kansas City, 51 Mo. 454."

We think this correctly states the law as to bodily injuries received in an accident, but it should be limited as Judge Johnson does limit it. If plaintiff proposed to rely upon conditions and diseases growing out of the alleged bodily injuries, then specific pleading thereof should be required, or the evidence excluded.

We are cited by defendant to the case of Magrane v. St. Louis & S. R. R. Co., 183 Mo. 119, 81 S. W. 1158. It is from the fifth paragraph of that opinion wherein defendant seeks consolation. It will be observed that for some reason unknown to the writer, not then a member of this court, that paragraph was withdrawn by a per curiam opinion. The case as it now stands, therefore, lends little weight to defendant's contention, but the original opinion accords with the views of the writer, because the evidence there introduced was such as showed a condition or disease superinduced by a bodily injury, and as we see it, such condition or disease so resulting should have been specifically pleaded, and could not be proved under a general allegation of bodily injuries alone. But the case at bar is different. This [467] petition alleges internal bodily injuries generally, and one of those internal bodily injuries is shown to be a misplaced womb. In other words, it is a bodily injury itself that is shown, rather than a condition or disease growing out of a bodily injury. This contention is ruled against defendant.

7. Further contention is made that there was error in admitting the testimony concerning the rail brakes. There was no error in admitting this evidence. It appears that upon a similar incline controlled by defendant and over which defendant operated its cars rail brakes were in use, and that they were very effective in stopping cars on an incline. In fact, that they were the most effective appliance for such purpose. This presents, therefore, a different question to a case wherein the defendant had never adopted the use of such appliances. Here it had adopted and used such appliances, but failed to have them upon the car in question or in use upon the line in question.

The cases relied upon by defendant are such as hold that a railroad is not required to adopt every appliance which some roads, or even a majority of well-regulated roads have adopted, nor to adopt the latest and newest appliances. They are not in point in this case and that for two reasons: First, these cases relate to the duties of a master to his servant, and the degree of care required in that case is not the degree of care required between carrier and passenger. And, secondly, even if the same degree of care were applicable to the two classes of cases, which is not true, yet where it is shown that the defendant had adopted and used the device, and it was safer and better than others in use for a like purpose, the evidence was proper as tending to show the failure to exercise that degree of care required by the law.

468 8. There is also a charge of improper remarks by counsel for plaintiff, which we have examined, and we fail to see any substantial error in the action of the court at the time.

Nor is there merit in the claim of excessive damages. The woman was under the evidence seriously and permanently injured. She earned one hundred and twenty dollars per month the month previous to the accident. She had not been able to return to her work at the time of the trial. A further detail of the injuries would serve no useful purpose. It follows from what has been said that the judgment should be and is affirmed, but inasmuch as the conclusion here reached upon the question of whether or not the petition states general or specific negligence is in conflict with Davidson v. St. Louis Transit Co., 211 Mo. 320, 109 S. W. 583, a case decided by the court in bank, this cause should be and is certified to the court in bank, for final determination.

Valliant, J., concurs in toto, except he does not think this case conflicts with the Davidson case; Woodson, J., concurs in result, but dissents from paragraph 1 and expresses no opinion on paragraph 6; Lamm, P. J., concurs in all except paragraph 6.

SEPARATE CONCURRING OPINION.

VALLIANT, C. J. The subjoined opinion written by me in division is filed herein as an expression of my views upon the case in this court.

I concur in all that my Brother Graves has written as the law of this case, but I do not agree that what he has said is in conflict with what was said in the case of Davidson v. St.

Louis Transit Co., 211 Mo. 320, 109 S. W. 583. That case and this are alike to this extent, to wit, the injury in each case was caused by a collision of two street-cars belonging to and operated by the same defendant, and it is was so stated in each petition, and also that the [469] collision was caused by the negligence of defendant's servants operating the cars, but there was no further specification of negligence, that is, in neither case did the plaintiff specify in what respect the servants handling the cars were negligent; the statement was that the collision occurred by their negligence, that was all.

The charge of negligence in each case was in a sense general and in another sense specific; it was general in the sense that it did not specify the negligent act of the defendant's servants in bringing about the collision, and it was specific in the sense that it did allege that the injury was caused by a collision of two cars operated by defendant. Therefore, reading what was said in the Davidson case, in the close connection in which it was said, the court was entirely justified in saying that the charge of negligence in that petition was specific, because the court was comparing the allegation in the petition with the instruction given for the plaintiff. In that instruction there was no reference to a collision, and the jury were not required to find that there was a collision, but were authorized to find for the plaintiff if they should find that defendant was negligent in any respect whatever. After defining the degree of care that a carrier was required to exercise for the protection of a passenger, the instruction said: "And the defendant is responsible for the injuries resulting to its passengers through the failure to exercise such care, and any failure on the part of the defendant to exercise a very high degree of care and diligence of a very prudent person in operating its cars would be such negligence as to make the defendant liable for any injury to the plaintiff resulting from such neglect." So this court said: "A recovery in this action is sought upon the negligence which is alleged to consist in the defendant's so carelessly and negligently operating its cars that the car in which plaintiff was riding was caused [470] to collide with another car belonging to defendant upon one of the avenues of the city of St. Louis. In other words, specific negligence was alleged," etc. Under the instruction in the Davidson case, though the plaintiff had failed to make any proof of a collision, and her evidence had tended to show that she had been thrown to the ground in attempting to alight from the car by a sudden starting of it, the jury were authorized to find

a verdict for the plaintiff, but this court said, "No, you have specified a collision between two cars and you can recover only on proof of that specification."

But in the case at bar there is no such instruction; the jury were authorized to find a verdict for the plaintiff only on proof of the negligence specified, to wit, the collision. In that sense the charge was specific, although in pleading the negligence of the defendant's servants in bringing about the collision the charge was general. Therefore, it is correct in this case to say, in the connection in which the term is used, that the charge is general. In my opinion there is no conflict between what this court said in the Davidson case and what Brother Graves now says in this case; therefore, I dissent from the order transferring the cause to the court in bank.

Presumptions of Negligence from the Happening of an Accident are considered in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986; and presumptions of the exercise of due care are discussed in the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108. A presumption of negligence against a carrier does not arise from the abstract fact of an accident to a passenger, but from a consideration of the nature and quality of the accident; it must appear that the accident was such as does not, in the usual course of things, happen to passengers when due care is exercised by the carrier: Roanoke Ry. Co. v. Sterrett, 108 Va. 533, 128 Am. St. Rep. 971; Anderson v. South Carolina etc. R. R. Co., 77 S. C. 434, 122 Am. St. Rep. 591; Lincoln Traction Co. v. Webb, 73 Neb. 736, 119 Am. St. Rep. 879. It it appears that the plaintiff while riding in one of the defendant's cars, which was struck by another of defendant's cars, was injured, the burden of accounting for the collision must be assumed by the defendant: Reynolds v. Transit Co., 189 Mo. 408, 107 Am. St. Rep. 360.

The Rule of Res Ipsa Loquitur is based on the apparent fact that the accident could not have happened without negligence on the part of the carrier; or, upon the literal meaning of the expression, that the thing itself speaks, and shows prima facie that the carrier was negligent: Firebaugh v. Seattle Electric Co., 40 Wash. 658, 111 Am. St. Rep. 990.

FIRST NATIONAL BANK v. WHITE.

[220 Mo. 717, 120 S. W. 36.]

WARRANT OF ATTORNEY—Judgment not in Strict Accord with.—Proceedings under a warrant of attorney must be within its strict letter, and the court cannot enter a judgment except as by the terms of the instrument directed. (p. 617.)

WARRANT OF ATTORNEY.—A Judgment upon Trial cannot be Entered upon a warrant of attorney which gives authority only for the confession of judgment. (p. 617.)

WARRANT OF ATTORNEY—Origin and Nature.—A Warrant of Attorney is a special authority given by a person to an attorney to commence or defend a suit in his behalf. In its infancy the warrant was purely a question of practice, and was the subject of many ancient court rules and statutes; later it assumed the role of security for debt. (p. 621.)

WARRANT OF ATTORNEY—Judgment of Sister State.—The fact that a court has given effect to judgments of courts of other states rendered upon a warrant of attorney contained in an instrument, under the full faith and credit clause of the federal constitution, does not preclude it from refusing to uphold such a contract or instrument executed within the state. (p. 623.)

CONTRACTS—Agreements Ousting Jurisdiction of Court.—Courts guard with jealous eye any contract innovations upon their jurisdiction. (p. 624.)

WARRANT OF ATTORNEY—Provision Against Public Policy in Note.—A power in a note authorizing any attorney to appear for the maker in an action on the note brought against him in any court of record, to waive service of process, confess judgment, and waive all errors in the proceedings and judgment, and all proceedings, appeals or writ of error therefrom, is void as against public policy. (p. 625.)

CONFESSION OF JUDGMENT—Abrogation of Common Law by Statute.—Confession of judgments is covered by the Missouri statutes, which necessarily abrogate the common law on that subject. (p. 626.)

Samuel Feller and Karmes, New & Krauthoff, for the appellant.

Ball & Ryland, for the respondent.

721 GRAVES, J. The record in this case discloses that on October 4, 1905, the defendant executed and delivered to the plaintiff a certain written obligation in the following form:

"$14,758.00. Kansas City, Mo., Oct. 4, 1905.

"Ninety days after date, for value received, we jointly and severally promise to pay The First National Bank of Kansas City, or order, Fourteen Thousand Seven Hundred Fifty-eight Dollars, at its office in Kansas City, Mo., with interest from date at the rate of 7 per cent per annum until paid. All indorsers and parties hereto jointly and severally waive protest.

"And we jointly and severally do hereby authorize any attorney at law to appear for us, or any of us, or the survivor or survivors of us, in an action on the above note brought against us, or either of us, or the survivor or survivors of us, by said The First National Bank of Kansas City, at any time after said note becomes due, in any Court of Record in the State of Missouri or elsewhere, to waive the issuing and service of process against us, or any of us, or the survivor or survivors of us, and confess judgment in favor of said The First National Bank of Kansas City, against us, or any of us, or the survivor or survivors of us, for the amount that may then be due thereon, with interest at the rate therein mentioned, and the costs of suit, together with an attorney's fee of 10 per cent and also in behalf of us or any of us, or the survivor [722] or survivors of us, to waive and release all errors in said proceedings and judgment, and all proceedings, appeals or writ of error thereon.

"JOHN D. WHITE."

January 19, 1906, the plaintiff filed in the circuit court of Jackson county, Missouri, a petition, to which was attached and filed the above written instrument, in this language:

"Plaintiff for its cause of action against the defendant states that on the fourth day of October, 1905, the defendant executed and delivered to the plaintiff his promissory note, wherein and whereby for value received he promised to pay to the plaintiff, or its order, ninety days after date, the sum of fourteen thousand seven hundred and fifty-eight ($14,758) dollars at plaintiff's office in Kansas City, Missouri, with interest from date at the rate of seven per cent per annum. That said note is now past due, plaintiff is still the owner and holder thereof, and the whole thereof together with interest, remains due and unpaid; that the defendant, in and by the terms of said note, agreed and authorized any attorney to appear for him in any action brought against him by plaintiff at any time after said note should become due, in any court of record in the state of Missouri, and to waive the issuance and service of process upon him, and to confess judgment in favor of plaintiff and against defendant for the amount that might then be due on said note, with interest at the rate therein mentioned, costs of suit, and an attorney's fee of ten per cent, and to waive and release all errors in said proceedings and judgment and all appeals or writs of error. Said note is herewith filed, marked 'Exhibit A' and made part hereof.

"Wherefore, plaintiff prays judgment against the defendant for said sum of fourteen thousand seven [723] hundred and fifty-eight dollars, with interest thereon from October 4, 1905, at the rate of seven per cent per annum, and with attorney's fee of ten per cent thereof, and all costs."

On the same date and at the same time there was filed in said cause the following:

"Now comes C. E. Denham, attorney at law, and pursuant to the authority given by the note sued on herein, appears for and enters the appearance of defendant John D. White in the above-entitled cause, waives the issuing and service of process against said defendant, admits that the matters and things stated in the petition herein are true, and consents that judgment may be entered in favor of plaintiff against said defendant as prayed in the petition.

"JOHN D. WHITE,
"By C. E. DENHAM,
"Attorney at Law."

After the filing of the several instruments set out above, and on the same day, the circuit court of Jackson county entered the following judgment in said cause:

"Now comes plaintiff by Ball & Ryland, its attorneys, and comes defendant by C. E. Denham, attorney at law, and said defendant by said attorney enters his appearance herein and waives issuance and service of process, and consents that this cause may be taken up and heard and said cause duly coming on to be heard, on the pleadings and evidence, and the court having heard and considered the same and being fully advised in the premises, finds for the plaintiff and that the matters and things alleged in the petition are true, and finds that by the terms of the note sued on defendant authorized said attorney at law to enter his appearance herein and waive issuance and service of [724] process and to consent that this cause may be now heard and judgment rendered in favor of plaintiff for the amount due on said note, and the court finds that there is now due on said note and plaintiff is entitled to recover from defendant thereon the sum of fifteen thousand sixty-five and 51/100 ($15,065.51) dollars, principal and interest, and the further sum of fourteen hundred seventy-five and 80/100 ($1475.80) dollars as attorney's fees, making a total of sixteen thousand five hundred and forty-one and 31/100 dollars ($16,541.31).

"It is therefore considered, ordered and adjudged by the court that the plaintiff have and recover of and from the de-

fendant the sum of $16,541.31, with interest on $15,065.51 of said sum from this date at the rate of seven per cent per annum together with all costs, and that plaintiff have execution hereof.

"It is further ordered that plaintiff be allowed to withdraw said note from the files upon filing a copy duly attested by the clerk of this court."

The next day, January 20, 1906, the defendant White, through counsel appearing specially, filed a motion to set aside the foregoing judgment, and late on February 1, 1906, filed an amended motion, in this language:

"Now on this day comes J. D. White, the defendant, and appearing specially for the purposes of this motion only, moves the court to set aside and hold for naught a certain alleged judgment rendered against the defendant and in favor of the plaintiff on the nineteenth day of January, 1906, for $16,541.31, for the following reasons:

"First. The court had no jurisdiction of the subject matter or over the defendant and had no power or authority to render the alleged judgment.

"Second. Said cause of action was filed on January 19, 1906, and immediately thereafter, and without notice to the defendant, the court undertook to [725] render judgment against the defendant; that the defendant was not served with summons, neither did he enter his appearance in said cause or authorize anyone else to enter his appearance therein for or on his behalf.

"Third. That C. S. Denham is associated with Ball & Ryland, attorneys for plaintiff herein; that the defendant never at any time authorized said C. E. Denham to represent him in any manner or to enter his appearance in this case, or to do anything whatsoever for or on his behalf in connection with this action; that the defendant had no notice or knowledge of the fact that the plaintiff had instituted an action against him, or that said C. E. Denham pretended to act for him or had pretended to enter his appearance in said case until January 20, 1906, the day after the said pretended judgment was rendered.

"Fourth. That the defendant has a good and meritorious defense to said cause of action in that said note was given without consideration; that the defendant never received anything of value therefor; that long prior to the giving of said note the plaintiff loaned to the Winning Blair Millinery Company the sum of about $17,000; that after said money was

so loaned the plaintiff brought a suit in this court against said Winning Blair Millinery Company and had the defendant herein appointed receiver of said Winning Blair Millinery Company; that after the defendant was appointed receiver, the plaintiff prevailed upon him to execute his note to the plaintiff for the amount which he was owing to the plaintiff, the Winning Blair Millinery Company; that the defendant received no part of said money, neither did the plaintiff part with anything of value at the time the defendant executed said note, and that the defendant was in no way liable to the plaintiff on the indebtedness due for the plaintiff from Winning Blair Millinery Company."

[726] This motion was verified by the affidavit of defendant White.

The motion was heard upon affidavits, the substance of which is not necessary to state at this point. The motion was overruled, and the defendant has appealed from the judgment against him, set out above. Points made will be noticed in the course of the opinion.

1. Analyzed and abbreviated, the power which this alleged warrant of attorney purports to grant is, "to appear for us in an action on the above note brought against us in any court of record to waive the issuing and service of process against us and confess judgment against us and also in behalf of us to waive and release all errors in said proceedings and judgment, and all proceedings, appeals or writ of error thereon."

Under this power, Mr. Denham, as shown by his writing above, entered appearance, waived the issuance and service of process, admitted the allegations of the petition to be true, and consented that judgment might be entered for plaintiff and against defendant as prayed in the petition.

The foregoing is the authority attempted to be exercised by Mr. Denham and the manner of its execution. It will be noticed that he admits the truth of the charges made in the petition and consents that judgment should be entered as prayed. The court, however, does not seem to have been satisfied with this course, if we are permitted, which we are, to gather its version of the matter from the judgment in the case. By the judgment it appears that Mr. Denham, after entering appearance and waiving process and service thereof, only consented "that this cause may be taken up and heard." That the court fully understood that he (Denham) made no further consent is [727] evidenced by its judgment in which it

is stated, "and said cause duly coming on to be heard, on the pleadings and evidence, and the court having heard and considered the same [meaning the pleadings and evidence] and being fully advised in the premises, finds for the plaintiff," etc.

It must be apparent that the power of such an instrument as the one before us should be construed with minute strictness. Not only so, but the proceedings thereunder, if valid at all, must be within the strict letter of the warrant of attorney: 23 Cyc. 705; Cushman v. Welsh, 19 Ohio St. 536; Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. Rep. 92, 34 L. ed. 670; Manufacturers' & Mechanics' Bank v. St. John, 5 Hill (N. Y.), 497; Grubbs v. Blum, 62 Tex. 426; Tidd's Practice, 4th Am. ed., 551.

If the court acquired jurisdiction of the defendant at all, it was by virtue of the terms of the instrument before us. And if the court could act at all, it must act within the strict purview of the instrument giving it jurisdiction, and enter a judgment as by the terms of the instrument directed, and not otherwise: Cushman v. Welsh, 19 Ohio St. 536.

The only judgment which could be entered under the authority granted and given was one by confession. The judgment before us does not purport to be a judgment by confession, or even a judgment by consent. Upon the face of it, it is a judgment upon and after a trial in which evidence was heard. So says the judgment, and there being nothing in the record showing the facts in this regard antedating the entry of judgment, the recitals are conclusive. A judgment upon a trial was beyond the scope of the powers granted in the alleged warrant of attorney. Such a judgment is not a judgment by confession: Holliday's Exrs. v. Myers, 11 W. Va. 276.

In the Holliday case, the court had under consideration the following judgment: "This day came the parties, by their attorneys, and the defendants, [728] by their attorney, withdrew their plea at a former day pleaded; thereupon the plaintiffs having proved their cause, it is considered by the court that the plaintiffs recover against the defendants, Joseph Myers and James M. Johnson, three hundred and one dollars and seventy-two cents, with interest thereon from the fourth day of January, 1872, till paid; also their costs by them in their behalf in this cause expended." Of this judgment the court makes some remarks which are peculiarly applicable to the judgment before us. The language used is: "This judgment, it seems to me from its form and language, is a judg-

ment rendered upon proof of the cause of action made to the court and not upon confession of judgment. This judgment is expressed upon its face to be a judgment rendered 'upon proof of the cause' made to the court, and being so expressed, it should therefore be so considered. The judgment is not such a judgment as is entered by non sum informatus; or by confession or cognovit actionem; or by default for defect of plea after appearance; or nil dicit, as it is termed; or by default under our statute for failure to appear after having been duly summoned."

We conclude, therefore, that even if it be granted that the written instrument involved in this suit was sufficient to give the court jurisdiction of the person, yet the judgment upon its face is not a judgment by confession, and is unauthorized by the warrant of attorney, and therefore should for this reason be reversed.

2. But going beyond the mere technical question in our preceding paragraph discussed, we come to a question urged which goes to the very root of this case, and whilst new and novel in this state, we do not feel that the cause should be disposed of without discussing and passing upon that question. Defendant urges that our statute prescribes the method by which judgments by confession shall be entered, and [729] that inasmuch as this warrant of attorney does not comply with the statute, there is no authority for the judgment. Contra, the plaintiff contends that this state adopted the common law, and that the statutes in question are not exclusive, but only cumulative, and that this proceeding was authorized by the common law. This necessitates an investigation of the old common-law warrant of attorney, for the instrument before us is but the outgrowth of that ancient document. It began as a pure matter of procedure, and in infancy was not broad and comprehensive as in later years. Originally, parties litigant had to appear in person and not otherwise. Of this, Blackstone (3 Blackstone, 25), says: "Formerly every suitor was obliged to appear in person, to prosecute or defend his suit (according to the old Gothic constitution), unless by special license under the king's letters patent. This is still the law in criminal cases. And an idiot cannot to this day appear by attorney, but in person; for he hath not discretion to enable him to appoint a proper substitute; and upon his being brought before the court in so defenseless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that anyone present

can suggest. But, as in the Roman law, 'cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habeat, caeperunt homines per procuratores litigare,' so with us, upon the same principle of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is statute of Westminster III, chapter 10, that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit."

So, too, says Tidd (1 Tidd's Practice, p. 92): "At common law, the plaintiff and defendant must, in general, have appeared in person; and could not have [730] appeared by attorney, without the king's special warrant, by writ or letters patent."

This warrant of attorney to sue for defendant is thus defined in Cyclopedia Law Dictionary, page 693: "A special warrant from the crown, authorizing a party to appoint an attorney to sue or defend for him: Gilb. C. P. 32; Blackstone's Commentaries, 25."

Later, the parties themselves gave written authority to the attorney who was to begin or defend a suit, and the same author thus defines this character of warrant of attorney: "A special authority given by a party to his attorney, to commence a suit, or to appear and defend a suit, in his behalf. These warrants are now disused, though formal entries of them upon the record were long retained in practice: 1 Burrill's Practice, 39."

This right of the parties to appoint their attorneys had its birth by an early statute. Tidd says: "And now by the statute of Westminster II (13 Edward I), chapter 10, a general liberty is given the parties, of appearing by attorney."

It also appears that even when the parties began appointing attorneys it was done by parol in open court, but later by writing denominated warrants of attorney: 1 Tidd's Practice, p. 93. The author there says: "Attorneys were anciently appointed in court, when actually present; but they are now usually appointed out of court, by warrant of attorney; which should regularly be in writing; but an authority by parol is said to be sufficient to support a judgment; and even if an attorney appear without warrant, it is a good appearance as to the court, though he is liable to an action."

In Burrill's Practice, volume 1, page 39, it is said: "Attorneys were formerly appointed by special warrant in writing, and previous to the Revised Statutes, a memorandum of such warrant was always required to be entered on the record.

But this practice is now abolished, [731] and attorneys are generally appointed by parol."

Of course, the writer is discussing the early New York practice, but as Burrill says: "The practice of the supreme court of this state was originally derived from that of the superior common-law courts of England," his remarks are applicable to the question before us.

Progressing, these warrants of attorney took on a commercial phase, and were used as security for debt. Of this Blackstone (3 Blackstone, 397) says: "And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned [by nihil dicit, cognovit actionem, or non sum informatus] in an action of debt to be brought by the creditor against the debtor for the specific sum due; which judgment, when confessed, is absolutely complete and binding; provided the same (as is also required in all other judgments) be regularly docquetted, that is, abstracted and entered in a book, according to the directions of statute 4 & 5 W. & M., c. 20."

So, too, says Tidd (1 Tidd's Practice, p. 545): "The security usually given by the defendant to the plaintiff, on compromising an action, and which is also frequently given where no action is depending, is a warrant of attorney; so called, from its authorizing the attorney or attorneys, to whom it is directed, to appear for the defendant, and receive a declaration, in an action to be brought against him, and thereupon to confess the same action, or to suffer judgment therein to pass by default, etc."

These particular warrants of attorney are thus defined in Cyclopedia Law Dictionary: "An instrument in writing, addressed to one or more attorneys therein named, authorizing them, generally, to appear [732] in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him."

Speaking of the English practice under the latter-day commercial warrants of attorney, Mr. Tidd (1 Tidd's Practice, 552) says: "Within a year and a day next after the date of the warrant, judgment may be entered of course, without applying to the court, or a judge. But if it be not entered

within that time, the court of king's bench must be moved in term time, or, if the warrant of attorney be not above ten years old, an application may be made to a judge in vacation, for leave to enter up the judgment, on an affidavit of the due execution of the warrant of attorney, that the debt, or part of it, is still due, and that the parties are living. This affidavit may be properly entitled in the cause in which judgment is entered up; and it seems that an affidavit sworn before a justice of the peace in Scotland, is admissible if the handwriting of the justice be authenticated. If the warrant of attorney be above ten years old, the application must be made to the court; and where it is above twenty years old, there must in general be a rule to show cause, founded on an affidavit, stating facts which rebut the presumption of payment."

Such judgments on fresh warrants of attorney were entered by the clerk without knowledge of the court. A slight recognition of such a judgment in this state is found in Finley v. Caldwell, 1 Mo. 512, but this was evidently under statute: Vide, Holmes v. Carr & Co., 1 Mo. 56.

Such warrants of attorney, at common law, were frequently used by imprisoned debtors, who authorized confession of debt and compromises to be made thereunder. When under arrest such parties were [733] not allowed to sign the warrant of attorney without there being present an attorney with whom he could advise.

We have thus gone into the details of what we conceive to be the origin of the character of instrument we have before us, so that we may discuss with intelligence the validity of the same in the light and spirit of our laws. First, it will be observed that in infancy the warrant of attorney was purely a question of practice, and as a matter of fact was the subject of many ancient court rules and statutes. Later it assumed the role of security for debt. The validity of a Missouri instrument of this kind has never been before this court. We have often had before us judgments of other state courts rendered upon such an instrument, and under the full-faith-and-credit clause of the federal constitution have held such judgments good: Crim v. Crim, 162 Mo. 544, 85 Am. St. Rep. 521, 63 S. W. 489, 54 L. R. A. 502, and cases cited.

We have been cited to the case of Genestelle v. Waugh, 11 Mo. 367, as a case in point. We have examined the original files in that case. The point here raised was neither raised nor discussed in that case. Genestelle had executed his three

several negotiable promissory notes to Waugh & Corthron of date April 14, 1844. These notes were in the shortest and simplest form for such instruments and due respectively in sixty days, four months and six months. On April 16, 1844, Genestelle signed a written instrument in the presence of B. B. Dayton by which he authorized John R. Shepley and four others, specifically named, "or any other attorney of any court of record in the state of Missouri, to appear in court during term time and receive a declaration or petition in debt on said note and to confess said action and confess judgment." It also authorized a release of errors. There were three of these instruments, one for each note, and in which the note was set out. Dayton made affidavit to the signature of Genestelle [784] to each, and the three notes, with the three powers of attorney, were all filed with a petition on April 21, 1845. The judgment was entered for the sum of the three notes. Motion was made to set it aside on several grounds, but the only ground urged in the short brief filed in this court was that neither of the three powers of attorney authorized the confession of this lump judgment. That is the only question passed upon here.

We have found also the case of Wood v. Ellis, 10 Mo. 382, wherein there was a confession of judgment by attorney, but in this case an examination of the files shows a plain note executed July 23, 1840, due one day after date, and on February 26, 1841, a power of attorney in fact was executed to Uriel Wright and two others to appear at the March term of the Lewis circuit court and confess judgment and release errors. The power was executed by Wright. The note was signed by Glinn & Reese and W. S. Pemberton. The power of attorney was signed by John D. Glinn and W. S. Pemberton, but Pemberton's name was not in the body of the instrument. Of this defect the administrator of Pemberton sought to take advantage. So that the question before us was not in that case.

In neither of these cases was the question raised as to whether or not the instruments were sufficient to give the court jurisdiction over the makers of the note, nor were the notes and instruments used therewith in form as here. But even had they been in form as here, the point here urged was not there urged. So that we repeat that the question is new to this state, save and except what is said by Valliant, J., in his dissenting opinion in Crim v. Crim, 162 Mo. 544, 85 Am. St. Rep. 521, 63 S. W. 489, 54 L. R. A. 502. The majority opinion in the Crim case deals only with the question as to

whether or not we should give full faith and credit to an Ohio judgment had upon a contract of this character, when sued upon in this state, and [735] we held that we should give such credit, Valliant and Robinson, JJ., dissenting.

Recognizing, as we do, that it is settled in this state that full faith and credit will be given to the judgments of other states when had upon contracts of this character, yet that does not mean that we have held that such an instrument is valid under the laws of this state, and if executed in this state, would be enforced by our courts. To our mind such an instrument is contrary to the public policy of Missouri, as we gather such public policy from the laws of the state, so that we heartily concur in the following from Judge Valliant's opinion in the Crim case: "The so-called authorization would certainly not be recognized as valid under the laws of this state, not because we do not recognize the right of a man to appoint an attorney in the regular way to enter his appearance in a suit in court, even for the purpose of suffering judgment to go against him, but because it is against the policy of our law to permit a man, when entering into an obligation, to bargain away his right to be heard in court, should a question ever arise between him and his adversary in relation to it. A man who has signed a paper of that kind, if it is valid, is completely at the mercy of the holder, whatever the merits of the case may be; because the holder may go to any forum in the United States and select any attorney whom he chooses and have judgment entered against the maker, who does not know that he is being sued."

If it be considered as a question of procedure in our courts to thus appoint an attorney, it finds no support under our Code of Procedure or the attorney's act of the state. Of the code, section 649, Revised Statutes of 1899, says: "Parties may prosecute and defend their own suits in proper person or by attorney. It shall not be necessary to file any warrant of attorney to authorize any attorney to appear in any court [736] for either party to an action brought therein, except in cases where it shall be specially required by law."

Our practice has never required a written warrant of attorney from a client to a licensed attorney, whether he be called upon to sue or defend.

And if this instrument be considered as a security for a debt, as it was by the common law, it has never so found recognition in this state. The policy of our law has been against such hidden securities for debt. Our recorder's act

is such that instruments intended as security for debt should find a place in the public records, and if not, they have often been viewed with suspicion, and their bona fides often questioned.

Nor do we think that the policy of our law is such as to thus place a debtor in the absolute power of his creditor. The field for fraud is too far enlarged by such an instrument. Oppression and tyranny would follow the footsteps of such a diversion in the way of security for debt. Such instruments procured by duress could shortly be placed in judgment in a foreign court and much distress result therefrom.

Again, under the law the right to appeal to this court or some other appellate court is granted to all persons against whom an adverse judgment is rendered, and this statutory right is by the instrument stricken down. True it is that such right is not claimed in this case, but it is a part of the bond, and we hardly know why this pound of flesh has not been demanded. Courts guard with jealous eye any contract innovations upon their jurisdiction. The instrument before us, considered in the light of a contract, actually reduces the courts to mere clerks to enter and record the judgment called for therein. By our statute, section 645, Revised Statutes of 1899, a party to a written instrument of this character has the right to show a failure of consideration, but this right is brushed to the wind by this instrument and the jurisdiction of the court to hear that controversy is by the [737] contract devested. In 9 Cyc. 510, it is said: "Agreements whose object is to oust the jurisdiction of the courts are contrary to public policy, and will not be enforced. Thus it is held that any stipulation between parties to a contract distinguishing between the different courts of the country is contrary to public policy. The principle has also been applied to a stipulation in a contract that a party who breaks it may not be sued, to an agreement designating a person to be sued for its breach who is nowise liable and prohibiting action against any but him, to a provision in a lease that the landlord shall have the right to take immediate judgment against the tenant in case of a default on his part, without giving the notice and demand for possession and filing the complaint required by statute, to a by-law of a benefit association that the decisions of its officers on a claim shall be final and conclusive, and to many other agreements of a similar tendency. In some courts, any agreement as to the time for suing different from the time

allowed by the statute of limitations within which suit shall be brought or the right to sue be barred is held void."

The contract not only provides that the plaintiff in the contemplated proceeding for a mere formal entry of judgment may go to any court of record in this state, but may go to any court of record elsewhere. Such contracts have received the condemnation of this court. In the case of Reichard v. Manhattan Life Ins. Co., 31 Mo. 518, this court said: "The next error is that the court refused to instruct the jury that, if they found from the evidence that when application was made for the policy of insurance, the applicants waived all right to bring any action for any claim whatever arising under said policy except in the courts of the state of New York, then the plaintiff cannot recover. We think the court very properly [738] refused this instruction, not only upon the ground that the agreement to waive the right to sue in our courts is void as against public policy, but because it is in direct contravention of a statute of this state passed for the government and regulations of agencies of foreign insurance companies approved December 8, 1855."

We shall not pursue this question further. This contract, in so far as it goes beyond the usual provisions of a note, is void as against the public policy of the state, as such public policy is found expressed in our laws and decisions. Such agreements are iniquitous to the uttermost, and should be promptly condemned by the courts until such time as they may receive express statutory recognition, as they have in some states.

3. Before concluding, one other matter should be mentioned. At most the latter clause of the judgment note is but what is known as a warrant of attorney, as herein elsewhere stated. The power granted is to confess judgment. Now, even if it be said that there was full common-law authority for such an instrument, until our legislature had acted upon the subject in such a manner as to abrogate the common law, yet when we examine our statutes we find the subject fully covered by statute, which statute necessarily abrogates the common law. What is the subject matter? Nothing, save and except the mode and manner of entering a judgment by confession. This mode and manner is fully covered by Revised Statutes of 1899, sections 789 to 792, inclusive, which read:

"Sec. 789. A judgment by confession may be entered without action, either for money due or to become due, or to

secure any person against contingent liability on behalf of the defendant, or both, in the manner herein prescribed.

739 "Sec. 790. A statement in writing must be made, signed by the defendant, and verified by affidavit, to the following effect: First, it must state the amount for which the judgment may be rendered, and authorize the entry of judgment thereon; second, if it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due; third, if it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

"Sec. 791. Such statement and affidavit shall be filed, and the court shall render judgment for the amount confessed, and cause the same to be entered upon the records, first being satisfied of the identity of the defendant, if present, or, if not present, that he executed the same in writing and made the affidavit hereinbefore required."

The judgment before us shows that it was not procured through either of the methods prescribed by these statutes. When this contract uses the words "confession of judgment" it must be construed to mean by the methods prescribed by statute for confession of judgment. Authorities from other states lend but little light, because their statutes are different.

A reading of the statutes above but shows the public policy of the state to obviate frauds. Note the precautions requiring affidavits and acknowledgments, so as to have everything in the open rather than in the dark.

From what has been said, it follows that the circuit court never had jurisdiction of the defendant, and the judgment is reversed.

All concur.

A Warrant of Attorney to Confess Judgment, while usually regarded as valid, must be strictly construed and the power strictly pursued: Spence v. Emerine, 46 Ohio St. 433, 15 Am. St. Rep. 634; Estate of Claghorn, 181 Pa. 600, 59 Am. St. Rep. 680; Mayer v. Pick, 192 Ill. 561, 85 Am. St. Rep. 352. A judgment by confession under warrant of attorney regularly entered in a state where the debtor resided when the power was given, in conformity to the law of that state, will be enforced in another state, though the entry of judgment in the same manner is not authorized by the law of the latter state: Cuykendall v. Doe, 129 Iowa, 453, 113 Am. St. Rep. 472. See, also, the note to Montgomery v. Consolidated etc. Co., 103 Am. St. Rep. 325.

A Warrant of Attorney to Confess Judgment reciting that in consideration thereof we do hereby make, constitute, and appoint a certain person named to be our true and lawful attorney, for us and in our name, to appear before any court of record, and at any time after the date hereof, to waive service of process and confess judgment against us, or either of us, and in favor of the holder of this note, for as much as appears to be due according to date and tenor hereof, is sufficient to authorize the confession of judgment thereon, before the maturity of the note: Farwell v. Huston, 151 Ill. 239, 42 Am. St. Rep. 237.

CASES

IN THE

SUPREME COURT

OF

OKLAHOMA.

EX PARTE CLENDENNING.

[22 Okl. 108, 97 Pac. 650.]

CRIMINAL LAW—Sentence, Time for, When Commences to Run.—Where not controlled by statute, the date for the beginning of service of a term of imprisonment not fixed by the sentence is the day of the sentence, when not legally stayed. (By the editor.) (p. 638.)

CRIMINAL LAW—Power of the Court to Issue the Commitment after the Lapse of the Term Involved or Intended in the Sentence.—When a judgment of imprisonment is imposed by a court on plea of guilty or conviction in a criminal case, and the same is not stayed as provided by law, the defendant should forthwith be committed to the proper officer for incarceration; and where this is not done, and the court makes an order under which the defendant is discharged from custody, it has no power or jurisdiction, after the lapse of the time involved in the sentence and after the term, to issue commitment on such judgment. (pp. 643, 644.)

(Syllabi by the court unless stated to be by the editor.)

Wade S. Stanfield and Barnum & McGraw, for the petitioner.

Charles West, attorney general, and William C. Reeves, assistant attorney general, for the state.

109 DUNN, J. This case is an original proceeding in habeas corpus, brought by William Clendenning, who alleges that he is unlawfully restrained and deprived of his liberty by Henry Clay King, as sheriff of Creek county, state of Oklahoma. From the record in the case we gather that on December 16, 1907, the defendant was brought into the county court of that county, and in case No. 15 the following judgment was entered against him: "Defendant appeared in person, but without attorney, and entered a plea of guilty of selling intoxicating liquors, whereupon the court ordered that he be fined fifty dollars and pay costs, amounting to four dollars and fifteen

cents, a total of fifty-four dollars and fifteen cents, and to be committed to jail until said fine and costs are paid; and it was further ordered by the court that defendant be confined in the county jail for a period of thirty days, said sentence to be suspended on good behavior."

Thereafter, and on January 21, 1908, the defendant was again arraigned before the court of said county in case No. 68 charged with the same offense, when the court entered against him the following judgment: "Defendant waived arraignment and entered a plea of guilty, whereupon the court ordered that he pay a fine of seventy-five dollars and costs, and that he be given thirty days in jail; jail sentence suspended during good behavior. Fine and costs were paid, and defendant was conditionally discharged as shown above."

In neither of these cases was commitment issued.

Thereafter, and on June 27, 1908, after the expiration of the terms of court at which both of the foregoing judgments were rendered, and after the expiration of about five months from the date on which the last judgment was rendered, and six months subsequent to the day of the first, the court pronounced the following judgment in case No. 68: [110] "Now, on this twenty-seventh day of June, A. D. 1908, the same being one of the judicial days of the regular May, A. D. 1908, term of this court, the above matter came on to be heard, and it appearing to the court that on the twenty-first day of January, A. D. 1908, said defendant was, by judgment of this court then and there rendered, adjudged, ordered and decreed to be imprisoned in the county jail of Creek county, Oklahoma, and it further appearing to the court that said jail sentence was on good behavior of said defendant, and it now appearing to the court, from the records of this court, that the behavior of said defendant has not been good since said twenty-first day of January, 1908, the suspension of said jail sentence is hereby set aside and annulled, and the said judgment of this court is hereby this day ordered enforced, and the said defendant is committed to the custody of the sheriff of Creek county, Oklahoma, for imprisonment in said jail for thirty days from and after the date hereof, in conformity with said judgment of this court rendered as aforesaid on said twenty-first day of January, A. D. 1908. To all of which action of the court the defendant excepts. Whereupon said defendant prayed an appeal to the supreme court of Oklahoma, which was by this court denied, and the defendant then and there duly excepted. Whereupon said defendant asked the court to fix the

amount of appeal bond, which was by the court denied, to which the defendant excepted."

And immediately thereafter, and on the same day, the court rendered the following judgment in case No. 17: "Now on this twenty-seventh day of June, A. D. 1908, the same being one of the judicial days of the regular May, A. D. 1908, term of this court the above matter came on to be heard, and the same action was taken herein as in No. 68–Criminal, except that the sentence herein was by the court allowed to be concurrent with the sentence in said No. 68–Criminal."

Upon this action by the court and the commitment issued thereunder the defendant was taken into custody, and this writ was by him sued out to regain his liberty. He contends that after the expiration of the term at which the judgments were rendered, and after the expiration of the time within which they would or could have been served, in the absence of escape on his part, or any appeal or other lawful procedure taken to stay the same, the court lost jurisdiction to issue commitment thereon and to require their [111] enforcement by his imprisonment. This raises the question of whether or not a court, after delivering its judgment and sentence in a criminal case, may stay the same in the absence of appeal or other legal proceedings taken looking to its modification, and after the term at which it was rendered has expired, and after the time embraced therein has elapsed, whether it has jurisdiction to then issue commitment in execution of its judgment and incarcerate the defendant thereunder. In support of the action taken by the court, we are cited by the attorney general to a number of authorities. Those which most nearly touch the proposition, and upon which he most strongly relies, are as follows: Allen v. State, 1 Mart. & Y. 294; Fults v. State, 2 Sneed, 232; Sylvester v. State, 65 N. H. 193, 20 Atl. 954; State v. Hatley, 110 N. C. 522, 14 S. E. 751; People v. Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856; Weber v. State, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

The case of Allen v. State, 1 Mart. & Y. 294, was one decided by the supreme court of Tennessee. Allen was convicted of the crime of manslaughter at the circuit court of Green county in September, 1826. He was sentenced to be imprisoned six months, and to be branded by burning on the hand, and to pay the costs of the prosecution. He asked for a stay of this judgment to enable him to make application to the governor for a pardon, and the court in granting it was doubtless greatly influenced by the fact that the burning on

the hand, if inflicted, would much impair the privilege granted by a pardon, should one be secured. The judgment was stayed under a statute to enable defendant to make such application. This case is referred to in the case of Crane v. State, 94 Tenn. 98, 28 S. W. 317, in which the statute under which the court acted in that case is cited. Defendant Crane made application for a stay of the execution of his sentence until he could likewise apply to the governor for a pardon, and the supreme court of the state in reference to this matter said: "The power of this court to grant such a suspension in a proper case is clearly given by section 6096, Mill & V. Code, as [112] follows: 'In case of the conviction and sentence of a defendant to imprisonment, the presiding judge may, in all proper cases, postpone the execution of the sentence for such time as may be necessary to make application to the executive for a pardon or commutation of punishment.' This power and discretion was exercised by this court in the case of Allen v. State, 1 Mart. & Y. 295. It is apparent, however, from a reading of the statute, that such power and discretion to suspend execution of sentence will only be exercised in proper cases, and will not be extended to cases generally; otherwise, the courts of justice would be impeded, and the governor deluged with applications in all cases before the convicted person could be imprisoned."

The case of Fults v. State, 2 Sneed, 232, was another case from Tennessee, which was decided upon authority of the case of Allen v. State, 1 Mart. & Y. 295. In that case the defendant was sentenced to a fine of ten dollars and two days' imprisonment. The fine and costs were secured, and there appears of record the following entry: "On motion of defendant, David Fults, and for reasons appearing to the satisfaction of the court by admission of the attorney general and the evidence in the case, he is permitted to enter into recognizance to appear at the next term of this court and then undergo the imprisonment adjudged against him, and abide by and perform the sentence of the court."

He appeared at the next term of court, and was ordered to be imprisoned pursuant to the judgment. From this he appealed, and the supreme court held that there was nothing irregular in the proceeding, and that the execution should go. The stay of the execution, it will be noted, was to a time certain, and there was nothing contingent in it. Where there is no statute, such as in this state, some few of the courts have held that a court may fix a day certain in the future on

which a sentence shall begin. This was done in this case, and the supreme court sustained it.

The case of Weber v. State, 58 Ohio St. 616, 51 N. E. 116 41 L. R. A. 172, in our judgment, is not applicable, for the reason that in that case the judgment, the suspension, and the setting of the same aside all took place at the same term of court. The supreme court said: "When the suspension is without express conditions, as in this case, it is within the power of the court to set aside the suspension [113] at any time during the same term, on its own motion, and to order the sentence to be executed."

In the case at bar it will be noted that both terms of court at which these judgments were rendered had expired, that no motion for new trial or other proceeding had taken place to review or reverse the same, and the judgments were final so far as the control of the court over them was concerned.

Neither do we consider the case of State v. Hatley, 110 N. C. 522, 14 S. E. 751, as controlling in this case. That was a case in which Philip Hatley and his wife were sentenced to be imprisoned for twelve months in the county jail, with the proviso that if the defendants left the state within thirty days no execution should issue, otherwise the defendants were to be imprisoned. The parties left the state, and in about one month returned to the jurisdiction of the court. Thereupon the clerk of the court issued execution upon the judgment that had been previously rendered. In the consideration of the case the supreme court of North Carolina said: "The court had no power to pass a sentence of banishment, and we think the judgment of the court cannot be fairly construed as a judgment of banishment. If so, it would be void. The only judgment passed by the court was that the defendants be imprisoned twelve months, and the words, 'but if the defendants leave,' etc., constitute no part of the sentence or judgment of the court, but were manifestly intended only as a note or memorandum directing the clerk to postpone the period at which the sentence shall go into execution and not as a banishment for the defendants, or an infliction upon some other community, predicated upon the assumption that it would be desirable and beneficial, both to the community in which they were engaged in the bad calling of keeping a disorderly and disreputable house and to the defendants in giving them an opportunity to reform under new surroundings. Such course is not unfrequent, and, though dictated by the best intentions to benefit the public, as well as

offenders, it is not to be commended. We think it quite clear, when the defendants left the state and speedily returned (for it appears that the court was held in the latter part of October and [114] they returned early in December), they came within the condition upon which the clerk was to issue the capias."

The facts contained in the foregoing quotation distinguish that case from the one at bar, in that the court did not stay its judgment or the execution, and that the commitment was issued by the clerk; and this within the period of time during which the defendants, had they been immediately committed, would have been serving their sentence. These facts, we believe, take that case out of the rule controlling the one at bar.

Another case relied upon by the attorney general (People v. Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856), was one wherein the supreme court of the state of New York by mandamus commanded the court of sessions to pronounce judgment in a criminal case wherein one Attridge had been convicted of the crime of grand larceny, in which the trial court, out of respect to his youth and previous good character, had suspended sentence. Three days thereafter the county judge, one of the three judges sitting at the trial, in the absence of the other two, brought the defendant before him and sentenced him to imprisonment. He was released upon habeas corpus on the ground that the sentence was not concurred in by a majority of the court. He was remanded to the custody of the sheriff, and again brought before the court, and the judgment thereupon was given that sentence be suspended during good behavior. He was thereupon discharged from custody. Thereafter the supreme court granted a peremptory writ of mandamus commanding the said trial court to proceed to judgment and to pass sentence upon the defendant as prescribed by law. On the case being appealed to the court of appeals, the court of last resort of the state, it said: "The precise question involved, therefore, is the power of a court of record, possessing jurisdiction in criminal cases, to suspend judgment after conviction." And the court held that the trial court possessed this power in the following language: "Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence [115] at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts, and numerous adjudged cases."

The statement of that case will show that it is not applicable to the case at bar, for the reason that the question involved here is not the power to suspend sentence, but the power of the court after sentence to suspend execution.

This case is noted, and the above distinction drawn, in the consideration of the case of In re Webb, 89 Wis. 354, 46 Am. St. Rep. 846, 62 N. W. 177, 27 L. R. A. 356, which was a case where execution of the judgment of the court, as in the case at bar, was suspended. The Forsyth case being cited on the part of the state to sustain the power of the court to suspend execution, just as it is cited by the attorney general in the case at bar, the supreme court of Wisconsin said: "The case of People v. Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856, was not a case where execution of a sentence had been suspended, but where sentence had been postponed; and the power of the court to delay sentence in its discretion was sustained, and numerous authorities were cited to support it. But the present case involves different considerations. Here the execution of a sentence already pronounced is indefinitely suspended, and it may be the pleasure of the court never to direct execution, so that the suspension has the practical effect of a pardon, or of arrest of judgment, indeterminate or final, without the authority of law; and it has been likened to the incorporation into our criminal jurisprudence of the 'ticket of leave' system, without any of its safeguards, leaving the convicted criminal subject to the mere option or caprice of the judge, who may direct the enforcement of the sentence after any lapse of time, however great, or withhold it to the great detriment, it may be, of the interests of the public—a power plainly liable to great abuse."

The case of Sylvester v. State, 65 N. H. 193, 20 Atl. 954, is one wherein the supreme court of New Hampshire, in a case on all-fours with the one at bar, decided that it was within the power of the court to stay its execution. But one case is relied upon and cited by it to support its opinion, and that is the case of Commonwealth v. [116] Dowdican's Bail, 115 Mass. 133. An inspection of that case shows that it was not one wherein the court suspended execution; but it, like the case of People v. Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856, was one wherein the court suspended sentence. The New Hampshire supreme court does not discuss the proposition involved, and cites no other authority to support its opinion. Hence it is practically of little or no weight as an authority.

To supplement the cases presented to us above, we have sought diligently to find other authority; but we have been unsuccessful. Outside of those which the attorney general has presented to sustain this judgment, we have been unable to find a solitary well-considered opinion. Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent, that "in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future, indefinite time, depending on the happening of an uncertain contingency; and an arrest under such conviction, made after the expiration of the term of imprisonment named in the sentence, and after the term, is illegal': In re Strickler, 51 Kan. 700, 33 Pac. 620; In re Bloom, 53 Mich. 597, 19 N. W. 200; State v. Murphy, 23 Nev. 390, 48 Pac. 628; Tuttle v. Lang, 100 Me. 123, 60 Atl. 893; Ex parte Gordon, 1 Black, 503, 17 L. ed. 134; State v. Voss, 80 Iowa, 467, 45 N. W. 898, 8 L. R. A. 767; In re Markuson, 5 N. D. 180, 64 N. W. 939. We will review some of these cases.

The case of In re Strickler, 51 Kan. 700, 33 Pac. 620, was one wherein the defendant pleaded guilty in the district court of Ford county, Kansas, to the charge of assault and battery, whereupon the following sentence was pronounced upon him by the court: "It is the sentence of the law that you, W. H. Strickler, be by the sheriff of Ford county, Kansas, incarcerated in the jail of said county there to remain for the space of ninety days from the date of this sentence. It is further ordered by the court that the operation [117] of this sentence shall be suspended during such time as the defendant shall keep the peace with all mankind, and desist from all unnecessary use of intoxicating liquor, and refrain from becoming intoxicated. It is further ordered as a condition of this sentence that whenever the said W. H. Strickler shall violate any one of the above conditions, and upon notice thereof to the sheriff by the prosecuting officer of Ford county, Kansas, or by the judge of this court, the said sheriff shall immediately incarcerate the said Strickler in the jail of said county, and he shall remain there committed until the expiration of ninety days from said date of incarceration, and until the costs of this prosecution have been paid by him. The question as to whether the conditions of this suspension have been broken shall be determined by the prosecuting attorney of Ford

county, or by the judge of this court, and no judicial investigation shall be required."

After the expiration of the term of court at which this sentence was pronounced, and after the lapse of ninety days, the court issued the following commitment on this sentence to the sheriff of the county: "And whereas, said defendant, W. H. Strickler, has failed to comply with the conditions of said judgment, you are therefore commanded to take and commit said defendant, W. H. Strickler, to the jail of Ford county, Kansas, there to remain until said judgment be complied with."

Upon the commitment issued the petitioner was arrested and placed in jail. He sued out in the supreme court a writ of habeas corpus, and that court, on the consideration of the case, speaking through Mr. Justice Allen, said: "The question here presented is whether the district court could lawfully sentence the defendant to imprisonment in the county jail, and then suspend its execution, to be enforced at some future time on the happening of a contingency named in the judgment. Section 256 of the Criminal Code (Gen. Stats. 1901, sec. 5701) reads: 'Where any convict shall be sentenced to any punishment the clerk of the court in which sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general or usual deputy, cause such convict to receive the punishment to which he was sentenced.' While it is usual to delay sentence after conviction until motions for new trials, in arrest of judgment, and the [118] like, are disposed of, and while it is within the power of the court to continue the hearing of such motions, or for any other good and sufficient cause to withhold sentence, yet when a sentence has been pronounced by the court, its operation begins at once, and under the section just quoted it is the duty of the sheriff to immediately proceed to carry the sentence into effect. We are not called on to consider the right of the court, at the term at which the conviction was held, to reconsider or modify its own order. In this case it was attempted to hang a sentence of ninety days' imprisonment over the head of the defendant, to be executed at such time as the prosecuting attorney of Ford county or the judge of the court might see fit. This would leave the defendant in a very uncertain situation. He would be unable to tell for an indefinite period whether he was a free man or a convict, and while the sentence in terms might be for but ninety days' imprisonment, it would be in

effect far more severe, because of the uncertainty as to the time of its execution. Such a sentence is wholly unauthorized by law. The commitment issued thereon is illegal, and does not justify the imprisonment of the petitioner. He will be discharged."

The facts in the case of Tuttle v. Lang, 100 Me. 123, 60 Atl. 193, are stated by the supreme court of Maine as follows: "The petitioner was arrested and brought before the Skowhegan municipal court, charged with the offense of the unlawful sale of intoxicating liquors. Before pleading to the complaint the petitioner, the prosecuting complainant, and the judge came to an agreement by which the petitioner should plead guilty and be sentenced to a fine, costs and imprisonment, but that no mittimus in execution of the sentence should issue until the petitioner should again be guilty of unlawfully selling intoxicating liquors. The petitioner thereupon pleaded guilty, sentence of fine, costs and imprisonment was imposed, a memorandum of the agreement was noted on the judge's docket, and the petitioner was released from arrest and allowed to go without day, without payment of fine and costs, and without imprisonment. No mittimus or other precept in execution of the sentence was issued, or even prepared."

After the expiration of nearly two years the judge, being of the opinion that the petitioner was again unlawfully selling intoxicating liquors, issued commitment on the previous sentence, delivering it to the sheriff, who took the prisoner into custody and [119] committed him to jail. He sued out a writ of habeas corpus, and the supreme court of Maine on these facts held: "If, after conviction and sentence, any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person."

The case of In re Markuson, 5 N. D. 180, 64 N. W. 939, was one where on June 29, 1895, the petitioner was convicted of a contempt of court in violating the terms of an injunction order. The syllabus in the case sufficiently states the facts and the judgment to show the holding, and is as follows: "On June 29, 1895, petitioner was convicted of a criminal contempt of court, and judgment was entered of record against him in substance as follows: 'That petitioner be imprisoned in the county jail of Barnes county for a period of ninety days, commencing with to-day at noon; that he pay a fine of two

hundred dollars, and if default be made in the payment of the fine, he shall be imprisoned as many days as two dollars is contained in two hundred dollars, or one hundred days.' Immediately after said judgment was entered the court, of its own motion, made certain orders in the case, which were entered of record, to the effect: First, that in case an appeal was taken the time should commence to run from the date of the remittitur being filed in the district court; second, that the judgment be suspended thirty days, unconditionally, to facilitate an appeal to the supreme court; third, the court ordered that the bail bond given to secure the petitioner's attendance from day to day during the trial in the district court be and remain valid and binding upon the petitioner, and that petitioner was ordered to obey the further orders of the district court, whether made by that court, or made to conform to orders of the supreme court. Held, that the time of said imprisonment began to run at noon on June 29, 1895, and that the several orders purporting to suspend or postpone the operation of the judgment were without authority of law, and null and void."

In the consideration of the case the court recognizes the general rule, supported by practically all of the authorities, that where not controlled by statute, the date for the beginning of the service [120] of the term of imprisonment is not fixed in the sentence, its time will commence to run, when not legally stayed, on the day of sentence: See 25 Am. & Eng. Ency. of Law, 303, note 2. And this, in our judgment, is rendered certain in this state by the terms of our statute (Wilson's Rev. & Ann. Stats. Okla. 1903, sec. 5583), which provides that upon the judgment "the defendant must forthwith be committed to the custody of the proper officer and by him detained until the judgment be complied with." The court in the case last cited held that the sentence "began its operation when it was pronounced, and continued to be in full force from that day until it ceased to operate by its own terms."

The reasoning of the supreme court of Nevada in the case of State v. Murphy, 23 Nev. 390, 48 Pac. 628, is peculiarly applicable to the case at bar, in view of the fact that their statute is practically the same as our own. This was a case where Murphy had been convicted of selling whisky to an Indian, and a judgment of imprisonment for a term of two years was pronounced against him therefor. Thereupon Murphy, expressing his intention of taking an appeal, moved the court for a stay of execution and to admit him to bail.

The court granted a stay of execution of judgment for ten days, and ordered that he be admitted to bail in the sum of three thousand dollars. Bond was given in accordance therewith, and Murphy was released from custody. He did not appeal, and on suit being brought on the bond, it was contended on the part of the principal and his sureties that the bond was void, because the court had no authority or jurisdiction to make an order staying execution of judgment. In the consideration of this case the court says: "The contention is that the trial court had no authority to make an order staying the execution of a judgment of imprisonment, and no authority to release or order the release of a defendant, under recognizance or otherwise, after judgment of imprisonment had been rendered against him, except after an appeal therefrom had been taken, and therefore any recognizance given for that purpose and at such time is void. This contention also involves a construction of our criminal practice act and must be sustained. Section 451 of the criminal practice act (Gen. Stats. 1885, [121] sec. 4331) provides that, 'when a judgment has been pronounced, a certified copy of the entry thereof in the minutes shall be forthwith furnished the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require the execution thereof, except when judgment of death is rendered.' Section 453 of the same act expressly provides that, if the judgment be imprisonment, the defendant shall forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with: Gen. Stats. 1885, sec. 4333. We are unable to find any other provisions of the law bearing directly upon the time and the manner of enforcing the judgment of the district court in cases of this character, or in any manner modifying the same, excepting such provisions as direct the enforcement of such judgment by order of the appellate court on appeal. No discretion is reposed in the district court as to the time its judgment shall become operative and enforceable, and any order thereof in contravention of the direct provisions of the statute above cited is without authority and void, and the release of the defendant, with or without bond, pursuant to such order, is unwarranted, and any bond, recognizance or bail given for such release for the purpose of such order is without authority and void. In the case at bar the complaint avers that the defendant was released from custody upon the execution and acceptance of the bail bond. The court had no right,

no authority, and no power to order a stay of execution or the judgment of imprisonment for any length of time; nor had it any authority to release the defendant from custody, under bail, until he had appealed."

The practical identity of the statutes construed in the foregoing case with our own renders the foregoing decision particularly valuable.

One of the cases, recognized in many of the authorities cited as a leading one on the proposition here involved, is State v. Voss, 80 Iowa, 467, 45 N. W. 898, 8 L. R. A. 767, decided by the Iowa supreme court. A number of defendants involved in that case were enjoined from unlawfully selling intoxicating liquors. They violated the terms of the injunction, and upon the hearing the court found them guilty and adjudged punishment therefor by imprisonment and a fine of five hundred dollars, and an order was made that they stand committed to the county [122] jail unless the fine and costs were sooner paid. The judgment contained a further condition in this language: "The execution of this judgment is to be suspended during the pleasure of the court; but whenever the court, or one of the judges thereof, so directs, execution and warrant of commitment are to issue." The case was taken to the supreme court by certiorari, and it was contended that the order of the court suspending judgment was void; and the court, through Mr. Justice Beck, in the consideration of this matter, said: "The case is this: We find a judgment for a fine against defendant, which can only be enforced at the pleasure of the court. The judgment is thus suspended, and the state is defeated of the remedy provided by law, upon the exercise of the pleasure of the district court. If the power to do this exists in a case of contempt, it must exist in all cases punishable by fine and imprisonment. The law is no respecter of persons. One violator of law possesses no rights or immunities not held by another. It follows, then, that all fines and penalties prescribed by law may be collected only when it accords with the pleasure of the court in which judgment is rendered therefor. The claim of the validity of the condition of the judgment leads to the most absurd results. It is hardly necessary to say that it is based upon no statute."

The case of In re Webb, 89 Wis. 354, 46 Am. St. Rep. 846, 62 N. W. 177, 27 L. R. A. 356, from the supreme court of the state of Wisconsin, was one where the petitioner was convicted of the crime of adultery on the 16th of March, 1894, and was sentenced to pay a fine of two hundred dollars and to

be committed to the common jail for six months. The defendant paid the costs of the prosecution, and the court directed "that the sentence of imprisonment be suspended until the further order of the court." After the expiration of that term, and after six months had expired, the court ordered that the defendant be required to fully comply with the sentence in payment of the fine imposed and committing him until the same was paid, for a period not longer than six months, in accordance with the previous sentence. An original writ of habeas corpus was sued out in the supreme court of that state, and in the consideration of that case, Justice Pinney, in [123] holding that the judgment of the court committing the relator to jail under the conditions mentioned was void, said: "The sole power is vested in the governor 'to grant reprieves, commutations, and pardons after conviction for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper': Const., art. 5, sec. 6. And the action of the court in the premises, after it had regularly pronounced the punishment provided by law for the offense in question, is clearly obnoxious to the objection that it is an attempted exercise of power not judicial, but vested in the executive. When the sentence was pronounced the defendant was in custody; and it became eo instante his duty to pay his fine, and for failure to do so the term of his imprisonment at once began. It had fully expired before the order of October 12, 1894, was made, under which he has been committed and is now held in confinement. The sentence has been in part complied with, and the attempted withdrawal indefinitely of the remainder was, we think, without legal warrant and void."

The syllabus of the case is as follows: "After sentence has been pronounced in a criminal case the court cannot, as a matter of leniency to the defendant, suspend indefinitely its execution. A defendant was sentenced to pay a fine and the costs and to stand committed to jail until payment, the period of imprisonment being limited to six months; and the court directed that if the costs were paid at once the sentence of imprisonment be suspended until further order. The defendant paid the costs accordingly, but failed to pay the fine. Held, that an order, made more than six months later, that defendant pay the fine and stand committed to jail until payment in accordance with said sentence, was without authority."

Section 143 of Bunn's Constitution of Oklahoma (Const., art. 6, sec. 10) provides: "The governor shall have power to grant, after conviction, reprieves, commutations, paroles, and pardons for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. He shall communicate to the legislature, at each regular session, each case of reprieve, commutation, parole, or pardon, granted, stating the name of the convict, the crime of which he was convicted, the date and place [124] of conviction and the date of commutation, pardon, parole or reprieve."

The statutes of Oklahoma relating to the enforcement of judgments in criminal cases are contained in volume 2 of Wilson's Revised and Annotated Statutes of Oklahoma of 1903 at chapter 68, and are as follows:

"Sec. 5581 (Sec. 445). When a judgment, except of death, has been pronounced, a certified copy of the entry thereof, upon the minutes, must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution."

"Sec. 5583 (Sec. 447). If the judgment be imprisonment or a fine and imprisonment, until such fine be paid the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with."

From the foregoing provisions of the constitution, it will be observed that no one within the state is given power to reprieve, commute, parole, or pardon an offender with the exception of the governor, and it will be further observed that when judgment has been pronounced, a certified copy of the entry thereof must be forthwith furnished the officer whose duty it is to execute it, and where the judgment is imprisonment the defendant must forthwith by such officer be committed and detained under the execution. There is no latitude allowable under these provisions. They embody the plain, unambiguous letter of the law. Under such statutes, where the execution is not stayed by proper proceedings to reverse, vacate or modify, service of sentence under a judgment of imprisonment begins on the day on which it is rendered and continues until fully executed according to law. Nor can there be any doubt of the salutary character of this law. Speedy and certain punishment, following the infraction of a law, best meets its ends and purposes, and leniency, through

delay toward an offender, seldom works kindness to him or safety to the public; but where circumstances do arise which render the sentence or operation of the law unduly harsh or cruel, and by reason of its universality the operation of the law is thought to work ill [125] in particular cases, the power is vested in the governor to reprieve, commute, parole, or pardon, except in certain cases; but he, in the exercise of this right and duty, is hedged around by the provision that he must report his doings thereunder to the legislature. Such power is not vested in a court, and it is as much within the law as the poorest defendant who appears before it for sentence. Statutes provide penalties for the infraction of law, and where incurred, they are not subject to enforcement on the whim, caprice or discretion of the court; and if a court undertakes to do so, it would lead ultimately, as is stated by the supreme court of Iowa, to the most absurd results.

Let us look at the facts in this case, and see if this is not true. Our constitution provides that one who is guilty of unlawfully selling intoxicating liquors "shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense." In the case at bar the defendant, being charged with the violation of this law, in the first case entered his plea of guilty, and the court assessed the minimum fine and imprisonment thereunder, and then, instead of incarcerating him in accordance with the plain terms of the law, deliberately accepted the fine and costs and permitted him to go during good behavior. What do we now find? But a trifle more than a month had elapsed when the same defendant is again before the same court charged with the same offense, and entered the same plea. Again the court assessed a fine and the imprisonment required under the law, and once more solemnly entered an order releasing the defendant during good behavior. Were such a course permitted to trial courts, and did it receive the sanction of this court, it would make the enforcement of the law a mere farce, bring all courts in disrepute, and consummate the results noted. Such enforcement would result in licensing the sale of intoxicating liquors by the payment of fines at stated intervals. This course we cannot sanction. The constitution will not permit it, and the statute plainly prohibits it. The execution should have issued for the imprisonment of this defendant on the day of [126] his conviction. His incarceration should have taken place under it. That it did not is to be regretted; but the court has no power or juris-

diction after the expiration of the time of the sentence and of the term of court when rendered to call it back and issue a commitment thereunder. We fully concur in the sentiments expressed by Chief Justice Wallin of the supreme court of North Dakota in the case of In re Markuson, 5 N. D. 180, 64 N. W. 939, where he says: "It is an unpleasant duty to enter an order discharging the petitioner from custody, in view of the fact that he was convicted by a competent court, and has not actually suffered the punishment indicated in the final judgment of the court. But our duty is plain, and we may not shirk from its performance."

While in this instance if we had the power to sanction the execution of the belated commitment, which we have not, it would result in the punishment of one guilty man, yet the conclusion which the law compels will doubtless prevent the escape from punishment of many guilty men in the future; but, whatever the result, it is law and the petitioner will be discharged.

Hayes, Kane and Turner, JJ., concur.

Williams, C. J., dissents.

A Court Ordinarily has No Authority to Indefinitely Postpone Sentence upon one convicted of crime, or to suspend the execution of sentence after it has been imposed, except as an incident to obtaining a new trial or taking an appeal: In re Webb, 89 Wis. 354, 46 Am. St. Rep. 846; Neal v. State, 104 Ga. 509, 69 Am. St. Rep. 175; Miller v. Evans, 115 Iowa, 101, 91 Am. St. Rep. 143; People v. Barrett, 202 Ill. 287, 95 Am. St. Rep. 230; In re Flint, 25 Utah, 338, 95 Am. St. Rep. 853; People v. Adams, 176 N. Y. 351, 98 Am. St. Rep. 675; Grundel v. People, 33 Colo. 191, 108 Am. St. Rep. 75; State v. Hunter, 124 Iowa, 569, 104 Am. St. Rep. 361.

FIRST NATIONAL BANK v. KISSARE.

[22 Okl. 545, 98 Pac. 433.]

VENDOR OR MORTGAGOR, When can Convey a Better Title than He has.—To the general rule that a vendor or mortgagor can convey no better title than he has, there is this well-defined exception, which is, that where the owner of the property clothes another with the indicia of title, or allows him to appear as the owner thereof or as one having full power of disposition, an innocent third person thus led into dealing with such apparent owner with reference to such property will be protected. (By the editor.) (p. 646.)

ESTOPPEL, Holder of Chattel Mortgage, When Protected by.—Where, in an action of replevin brought by K. for certain cattle taken

by defendant in foreclosure of a chattel mortgage as the property of B., the evidence disclosed that K., the owner of said cattle, while living in another state, branded them in B.'s brand and sent them into what is now this state, to be by him pastured for hire, and that while so in his possession were mortgaged to defendant by B. as his property, to secure a loan to B., held, that K. is estopped to set up title to the property as against the defendant. (p. 647.)

(Syllabi by the court unless stated to be by the editor.)

Crump & Rogers and J. W. Crump, for the plaintiff in error.

W. P. Langston, for the defendant in error.

645 TURNER, J. On December 27, 1902, G. W. Kissare, defendant in error, plaintiff below, brought suit in replevin in the United States court for the Indian Territory, western district, at Wewoka, against the First National Bank of Holdenville, plaintiff in error, defendant below, to recover fifteen three year old steers, twenty-four cows, and nine calves, nine two year old steers, six four year old steers, two two year old heifers, and a yearling steer; all but the latter and the calves being branded 646 T on the left side and K on the left thigh. The defendant gave a retaining bond, and on February 7, 1903, filed answer, which was, in effect, a general denial, set up title to the property in one J. T. Butler, and claimed a special ownership therein, and right of possession thereto by virtue of a chattel mortgage executed thereon by said Butler to it on June 2, 1902, to secure a loan to him of three thousand dollars. There was trial to a jury which resulted in a verdict for plaintiff, and, after motion for a new trial filed and overruled, defendant prosecuted a writ of error to the United States court of appeals in the Indian Territory, and the cause is now before us for review as the successor of that court.

It is urged that the judgment of the trial court is contrary to law. There is very little, if any, conflict in the testimony. It discloses that in the spring of 1901 Kissare, defendant in error, was living on a farm near Conway, Arkansas; that J. T. Butler, his son in law, was living on a ranch near Holdenville, Indian Territory; that the brand of the former was a K on the left thigh and that of the latter a T on the left side; that about that time Butler went to Arkansas and bought from Kissare about one hundred head of cattle bearing his brand, and shipped them to his ranch near Holdenville, but before shipping branded them in his own brand; that in the spring of 1902 he again went to Arkansas and got one hundred head

of mixed cattle, the property of Kissare, all bearing his brand, which Butler agreed to ship to his ranch and pasture for hire, and which were before shipment branded by Kissare in Butler's brand; that they were billed out from Conway by Kissare in Butler's name consigned to him at Holdenville, and from there, upon their arrival, were taken by Butler to his ranch and intermingled with the first shipment; that on June 2, 1902, Butler, being indebted to plaintiff in error in the sum of one thousand dollars, to secure a loan of three thousand dollars, executed to plaintiff in error, who accepted it in good faith, a chattel mortgage, [547] without the knowledge or consent of Kissare, on three hundred and two head of cattle, including those aforesaid, described as "of various colors and all branded T on any part of the animal," said mortgage being "intended to cover all the cattle I own in this brand, and are all free from encumbrance and I guarantee the number to be not less than stated." It also covered the increase, and provided that the "marks and brands used to describe the above stock are the holding marks and brands and carry the title, although said property may have other marks and brands." After condition broken plaintiff in error took possession of such part of the property described in said mortgage as remained, and sought to foreclose, whereupon Kissare brought this suit, claiming the cattle replevined to be a part of those shipped by him from Arkansas to Butler to pasture for hire.

We are clearly of the opinion that the judgment is contrary to law, and that Kissare is estopped to assert title to the cattle contained in Butler's mortgage as against the bank.

To the general rule that a vendor or mortgagor can convey no better title than he has, there is a well-defined exception, which is that where the owner of property clothes another with indicia of title or allows him to appear as owner thereof, or as having full power of disposition over the same, an innocent third party thus led into dealing with such apparent owner with reference thereto will be protected: Bigelow on Estoppel, 5th ed., 560. In Williams v. Fletcher, 129 Ill. 356, 21 N. E. 783, the court, after stating the rule substantially as above, quotes approvingly from Rapallo, J., in McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341, thus: "Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precluded him from disputing, as against them, the existence of

the title or power, which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

[548] This is true whether the indicia of ownership is intrusted either designedly or negligently, and is true either of sales or mortgages. 24 American and English Encyclopedia of Law, 1165, says: "Where the owner of property designedly or by negligence intrusts another with the title or indicia of the ownership of personal property, and the latter sells the property to a bona fide purchaser, such purchaser will be protected in his title as against the owner, upon the principle that, where one of two innocent parties must suffer through the fraud of a third person, the loss should fall upon the one who by his own act created the circumstances which permitted the fraud to be perpetrated."

Of course, a mortgagee is entitled to protection as a bona fide purchaser: 24 Am. & Eng. Ency. of Law, 1169.

That Kissare by branding his cattle in Butler's brand and sending them from Conway, Arkansas, to Holdenville, Indian Territory, many miles from where they were known as his property, and by placing them in Butler's possession, thereby clothed Butler with the highest indicia of title thereto, there can be no doubt. It is a well-known fact that cattle bearing a brand are by the business world taken to be the property of the owner of the brand. By thus branding them, Kissare not only proclaimed to the world Butler's ownership in the cattle as effectually as he could have done by any other means, but just as effectually disclaimed ownership in them himself. It is undisputed that the bank knew these cattle to be in Butler's brand, and in good faith relied upon this apparent ownership and loaned Butler three thousand dollars secured by the chattel mortgage in evidence on the cattle, believing him to be the owner. We are of the opinion that it would be a fraud upon the bank to permit Kissare, under the circumstances, to assert title to the property, and that he is estopped from so doing: Cowdrey v. Vandenburgh, 101 U. S. 572, 25 L. ed. 923; Velsian v. Lewis, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631; Drew v. Kimball, 43 N. H. 282, 80 Am. Dec. 163; Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111; McMurray v. Hughes, 82 Iowa, 47, 47 N. W. 883; Nodle v. Hawthorn, 107 [549] Iowa, 380, 77 N. W. 1062; Rigney v. Smith, 39 Barb. 383; Wood's Appeal, 92 Pa. 379, 37 Am. Rep. 694.

The cause is therefore reversed and dismissed, at the cost of defendant in error.

All the justices concur.

Where the Owner of Property Clothes Another with Apparent Title or power of disposition, and thus induces innocent purchasers to buy, they will be protected, not upon the title or authority of the party from whom they buy, but from the act of the owner, who is estopped from disputing as against them the title or power which he allowed to appear to be vested in the party making the sale: Velsian v. Lewis, 15 Or. 539, 3 Am. St. Rep. 184. See, also, Oliver Ditson Co. v. Bates, 181 Mass. 455, 92 Am. St. Rep. 424, and cases cited in the cross-reference note thereto; Marling v. Jones, 138 Wis. 82, 131 Am. St. Rep. 996.

HORR v. HERRINGTON.

[22 Okl. 590, 98 Pac. 443.]

MORTGAGE, JUNIOR, Effect of not Making the Holder of a Party to Suit Foreclosing the Senior Mortgage.—A junior mortgagee, not being made a party to a suit to foreclose a first mortgage, is not affected by a judgment and decree foreclosing it. The foreclosure is effectual against those persons who were made parties, and a sale would vest the estate in the purchaser, subject to the rights therein of the subsequent lienholder. (p. 651.)

MORTGAGE FORECLOSURE, Effect on Persons not Made Parties.—If a party interested, other than the owner of the equity of redemption, is not made a party to a suit for the foreclosure of the mortgage, such foreclosure is effectual only as against the parties in interest who are made parties, and the sale under the foreclosure vests the estate in the purchaser, subject to redemption by any person interested and not made a party to the foreclosure proceeding. (By the editor.) (p. 651.)

LIENHOLDERS, Inferior, Rights of.—One who has a lien, inferior to another upon the same property has a right: First, to redeem the property, in the same manner as its owner might, from the superior lien; and, second, to be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby. (p. 652.)

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MORTGAGE FORECLOSURE, Purchase at, When Subject to Junior Mortgagee's Rights.—If a junior mortgage has been duly recorded, a purchaser of the mortgaged premises on a foreclosure rendered on a senior mortgage will be presumed to have bid and purchased with reference to the junior mortgage and with knowledge of the right of the holder of that mortgage to redeem. (pp. 654, 656, 657.)

(Syllabi by the court unless stated to be by the editor.)

J. I. Howard and Massingale & Duff, for the plaintiff in error.

W. A. Smith, for the defendants in error.

591 KANE, J. This was a controversy between W. O. Horr, the plaintiff in error, and J. M. Beal, one of the defendants in error, over the surplus accruing from the foreclosure sale of a certain tract of land. On the nineteenth day of January, 1903, the defendants in error, J. H. Herrington and F. C. Herrington, husband and wife, executed and delivered to one Lydia May Field, a promissory note for the sum of one thousand dollars, and to secure payment of the same executed and delivered a mortgage upon certain real estate situated in Washita county, Oklahoma. On the first day of December, 1903, the same parties executed to the plaintiff in error a note for one thousand dollars, and executed a mortgage upon the same real estate, to secure payment 592 thereof. On the fourth day of February thereafter they made, executed and delivered to the defendant in error, J. M. Beal, a warranty deed to said premises, all of which instruments were duly recorded. On the ninth day of September, 1904, Lydia May Field instituted foreclosure proceedings upon the first mortgage, making the Herringtons and J. M. Beal parties defendant, the plaintiff in error herein, the second mortgagee, not being made a party. On the thirty-first day of October, 1905, a trial was had between the parties to the suit, and a judgment was rendered in favor of Lydia May Field and against the Herringtons for the sum of

nine hundred and thirty-eight dollars and thirty-seven cents, together with interest and attorney's fees, and a decree of foreclosure was entered against all of the parties defendant, whereby it was decreed that the land be sold in the manner prescribed by law, and the proceeds of said sale applied (1) in payment of costs of said sale and action; (2) in payment of said judgment; and (3) that the residue, if any, be paid to said defendant J. M. Beal.

About thirty days after the judgment and decree were entered the plaintiff in error, by leave of court, intervened in said action, setting up his note and mortgage. After stating facts sufficient to entitle him to a foreclosure of his second mortgage, he further alleged in substance that, by reason of the execution and delivery of the note and mortgage by John H. Herrington and F. C. Herrington to the intervener, said intervener has a lien on the premises therein described, and that intervener is entitled to a judgment against said John H. Herrington and F. C. Herrington in the sum of seven hundred and fifty-three dollars and thirty-seven cents, and interest thereon at the rate of twelve per cent per annum from February 1, 1904, and reasonable attorney's fees and all costs of suit. That the note from John H. Herrington and F. C. Herrington, his wife, to Lydia May Field, was a prior and first lien on said tract of land, and that the note and mortgage of intervener was a secondary and inferior lien thereon. Then follows the prayer, which is in words and figures as follows: "Wherefore your intervener prays that said plaintiff herein, Lydia May Field, make strict proof of her claim against said defendants, and that a strict accounting thereof be made and of all [593] costs therein expended and all claims arising against said tract of land by reason of her mortgage thereon, and that when said tract of land is sold, as provided by law, that the proceeds thereof be applied, first, to the payment of the amount found to be due Lydia May Field under her first and prior lien and all costs therein expended, and that her mortgage and note be canceled, and that the proceeds of said sale, after being so applied, shall next be applied to the payment of the said note of this intervener, amounting to seven hundred and fifty-three dollars and thirty-seven cents principal and interest from February 1, 1904, at the rate of twelve per cent per annum and a reasonable attorney's fee as therein provided, and all costs of said suit herein expended, and that the remainder thereof be paid to said defendants as their interests may appear, and that the note and mortgage of intervener be canceled and held for naught."

On the fifth day of July, 1906, the land was sold under the decree, and was purchased by the intervener for the sum of seventeen hundred and sixty-five dollars, the same being more than two-thirds of the appraised value of the land, and the sale was afterward upon his motion confirmed, and a sheriff's deed thereto made, executed, and delivered, the amount of the bid being paid to the sheriff and by him turned into court. In November, 1906, Beal was served with summons in the proceedings in intervention, and on the nineteenth day of March, 1907, he appeared and filed his separate answer to the petition, setting up the facts of the suit on the first mortgage, it having proceeded to judgment and sale, and that the intervener was the purchaser, that the mortgage of intervener was of record at the time said sale of land was made, and praying that the surplus in the sum of six hundred dollars over and above the amount necessary to pay the first mortgage and costs should be ordered turned over to him because of his ownership of the equity of redemption and legal title at the time of the sale. To this answer the intervener demurred, which demurrer was overruled by the court and judgment entered in favor of Beal.

That the plaintiff in error, not being a party to the proceedings, was not affected by the judgment and decree foreclosing the first mortgage, is now too well settled to need argument or authorities [594] to support it. When a party in interest other than the owner of the equity of redemption is not made a party to a bill for the foreclosure of a mortgage, the foreclosure is effectual as against those persons interested in the equity who are made parties. A sale would vest the estate in the purchaser, subject to redemption by the person interested in it who was not made a party to the proceedings: Story's Equity Pleading, sec. 193; Matcalm v. Smith, 6 McLean, 416, Fed. Cas. No. 9272; Kelgour v. Wood, 64 Ill. 345; Ohling v. Luitjens, 32 Ill. 23; Georgia Pac. R. Co. v. Walker, 61 Miss. 481; Frische v. Kramer's Lessee, 16 Ohio, 125, 47 Am. Dec. 368; Tallman v. Ely, 6 Wis. 244; Banning v. Sabin, 45 Minn. 431, 48 N. W. 8; Turman v. Bell, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886; Porter v. Kilgore, 32 Iowa, 379; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293; Valentine v. Havener, 20 Mo. 133; Brundred v. Walker, 12 N. J. Eq. 140; McCall v. Yard, 11 N. J. Eq. 58; Haffley v. Maier, 13 Cal. 13.

In this state the statutory rule is to the same effect. Section 3456, Wilson's Revised and Annotated Statutes of 1903,

The cause is therefore reversed and dismissed, at the cost of defendant in error.

All the justices concur.

Where the Owner of Property Clothes Another with Apparent Title or power of disposition, and thus induces innocent purchasers to buy, they will be protected, not upon the title or authority of the party from whom they buy, but from the act of the owner, who is estopped from disputing as against them the title or power which he allowed to appear to be vested in the party making the sale: Velsian v. Lewis, 15 Or. 539, 3 Am. St. Rep. 184. See, also, Oliver Ditson Co. v. Bates, 181 Mass. 455, 92 Am. St. Rep. 424, and cases cited in the cross-reference note thereto; Marling v. Jones, 138 Wis. 82, 131 Am. St. Rep. 996.

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provides that: "One who has a lien, inferior to another upon the same property, has a right: First, to redeem the property in the same manner as its owner might, from the superior lien; and, second, to be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby."

Section 3457 defines redemption as follows: "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

It is clear that the plaintiff in error did not attempt to exercise either of his statutory rights. That he was entitled to do so up to the time the land was sold and he became a purchaser thereof, there can be no doubt. And that his right to redeem would continue if anyone but himself had been the purchaser at that sale seems equally clear. The sale would vest the estate in the purchaser, subject to redemption by the holder of the junior encumbrance, [595] who was not made a party to the proceedings. This doctrine is amply sustained by the authorities heretofore cited. The sale, though it failed to be effectual as against the holder of the second mortgage, would operate as an assignment of the first mortgage and all the mortgagee's rights thereunder to the purchaser who might proceed de novo to foreclose as against the parties who had been omitted. But if the holder of a junior encumbrance, who had not been made a party to the suit, becomes the purchaser, it obviously follows that his right to redeem is lost or waived. He could not redeem from himself, and he could not foreclose his mortgage against himself, for no one may be plaintiff and defendant in the same cause. The rule that the purchase of the land by the junior mortgagee merges his lien in the superior title is founded upon the reason that there could generally be no advantage to him in keeping on foot his own mortgage against his own estate: 1 Jones on Mortgages, sec. 869. But, of course, whenever an advantage could accrue to the mortgagee by preserving his lien for the purpose of using it as a screen to protect him from an intermediate title, such as a junior mortgage or other subsequent lien, the purchaser is entitled to keep his lien alive for such purpose. But there is no reason for the invocation of this rule in the case at bar. This controversy does not affect the title to the land; it is admitted by all parties that the plaintiff in error is the owner of it in fee simple, and, as

far as the record shows, there were no liens subsequent to his mortgage.

Under our laws a mortgage conveys no title to the mortgagee, and, there being no provision for redemption after the foreclosure sale, it follows that all the right, title and interest of all the defendants who were made parties to the suit merged in the decree and was vested in the plaintiff in error by virtue of his purchase at the sale and the issuance of the sheriff's deed to him, as he was the only person remaining who had any interest in the [596] land. He intended, no doubt, to effect a merger of his mortgage lien into his paramount title thus acquired. "The necessary consequence of a decree of foreclosure and sale of mortgaged premises is to merge the interests of the parties to the suit in the decree, and to transfer and vest them in the purchaser at the sale": Tallman v. Ely, 6 Wis. 244.

By the purchase of the land and filing his petition in intervention, he voluntarily abandoned his right to redeem, and sought to attach his lien to the surplus arising from the sale. There are no reasons that we know of why this could not be done, provided there were sufficient equities to warrant a court of equity in granting such relief; but he was not entitled to it merely as a holder of a junior encumbrance, for the statute, which seems to be in harmony with the general rule, fixes his rights under the contract. "The only right of a junior mortgagee who has not been made a party to the foreclosure of a prior mortgage is to redeem the property from that mortgage. It does not matter that on the sale of the property under the foreclosure of the prior mortgage there was a surplus which, with the consent of the mortgagor, was paid to a third mortgagee who was made a party to the suit, and the property subsequently depreciated so that there was no value above the first mortgage. The middle mortgagee has no claim upon the surplus. Whether the property has increased or depreciated in value since the sale under the first mortgage does not affect his right to redeem, which is the only right he has in the matter": Jones on Mortgages, sec. 1431; McKernan v. Neff, 43 Ind. 503; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293; Gault v. Equitable Trust Co., 100 Ky. 578, 38 S. W. 1065; Sanger v. Nightingale, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30 L. ed. 1105.

"A subsequent encumbrancer has no right upon the surplus moneys arising from a sale under a statute foreclosure of which he has no notice, his lien not being affected by the

that mortgage to redeem. And a middle mortgagee, who was not a party to proceedings of foreclosure on the senior mortgage, cannot elect to affirm a sale made to the junior mortgagee, on a decree rendered upon the senior mortgage in such proceedings, and recover of the junior mortgagee the surplus after paying the senior mortgage.

In the case of Greensburg Fuel Co. v. Irwin Natural Gas Co., 162 Pa. 78, 29 Atl. 274, certain property was sold; it was agreed that the sale did not affect a mortgage of a large amount held by the Southwest Natural Gas Company; at the sale this company holding the lien purchased the property, and thereafter claimed that it was entitled to share pro rata with the other creditors in the distribution of the proceeds. In the opinion, Mr. Justice McCollum says: "The property levied on in this case was sold subject to any mortgage or mortgages legally existing thereon, and the only mortgage upon it was held by the Southwest Company. It was so sold on writs evidently controlled by the mortgagee and purchaser at the sheriff's sale. A mortgage, the lien of which is not discharged by a sheriff's sale, cannot share in the proceeds of the sale. In such case all that the purchaser takes by the sale is the equity of redemption, and his bid is for such sum as he is willing to pay for the property above the amount of the mortgage debt. If the purchaser is the mortgagee, his mortgage is in equity satisfied; his claim is paid in the purchase of the property sold subject to it."

The same principle was involved in the case of Trimmier v. [600] Vice, 17 S. C. 499, 43 Am. Rep. 624, where Mr. Chief Justice Simpson, who delivered the opinion of the court, says: "The purchase of the equity of redemption unites the equitable title under the mortgage and the right to redeem in the same person; and, where there is no intervening claim, merger is the result, and the mortgagee becomes the owner in fee, with nothing left for the mortgage to operate upon. In addition to this, the right of the mortgagor to redeem being the only interest that can be sold by a judgment junior to the mortgage, the purchaser at such sale, whether he be the mortgagee or a stranger, is supposed to give the amount of his bid for that interest, over and above the mortgage debt, leaving the land, when purchased by a stranger, still subject to be sold for the mortgage debt, and, when purchased by the mortgagee, to be applied in satisfaction of his debt, which by operation of law is thereby extinguished. As we have already

said, this is the admitted doctrine where the entire property has been purchased by the mortgagee."

Further discussing the same proposition, the learned chief justice continues: "In the case of Moss v. Bratton, 5 Rich. Eq. (S. C.) 3, the court held that Bratton, who bought at sheriff's sale under an execution junior to the mortgage, obtained his title encumbered with the lien; and though he did not become personally liable for the mortgage debt yet the land in his hands was specifically bound, so far as it might suffice for the payment of the debt. The only interest sold was the right of the mortgagor to redeem. No doubt Bratton supposed that the land was worth the amount he bid for this interest and the mortgage debt besides. If it turned out upon a resale for foreclosure that he was mistaken, this was an error of judgment on his part, and his misfortune, to which all men are liable."

The reasoning in the foregoing cases is applicable to the case at bar. All of the bidders at the foreclosure sale—and the record shows there were others besides the plaintiff in error—must have been bidding with full knowledge of the condition of the title, and that they would take the land offered for sale subject to the right of plaintiff in error to redeem, and no doubt governed their bids accordingly. At least, this is the presumption that from the [601] record before us must prevail. The plaintiff in error based his right to the surplus solely upon the proposition that he is entitled to it by reason of his junior mortgage. This position we believe to be untenable. His plea of intervention was filed shortly after the decree was rendered and before the sale, but summons was not issued thereon until after the sale. Under such circumstances the mere filing of the petition, without issuance or service of summons, would not constitute notice to the bidders or anyone interested in the land that the plaintiff in error had abandoned his right to redeem. The land would proceed to sale entirely unaffected by the petition, and the sale must have been subject to the right of redemption by the plaintiff in error. Of course, at the time the petition was filed there was no means of telling whether there would be a surplus or not, and so at that time plaintiff in error really had no cause of action in the form in which he brought it. The relief he seeks is purely equitable. If he had alleged in his petition that the land sold for its full value notwithstanding the outstanding right to redeem, or such other facts

as would appeal to the conscience of a court of equity, he would possibly be entitled to the relief prayed for. Having failed to do this, and there appearing to be no equity supporting his right to a lien on the surplus, the judgment of the court below must be affirmed.

All the justices concur.

That a Junior Mortgagee has a Right of Redemption from a sale made under a senior mortgage, see the note to Horn v. Indianapolis Nat. Bank, 21 Am. St. Rep. 247. According to Austin v. Bailey, 64 Vt. 367, 33 Am. St. Rep. 932, the foreclosure of a mortgage does not exhaust the lien as to subsequent encumbrancers who have a right to redeem; these must redeem from the mortgage and cannot redeem from the sale. A junior mortgagee obtains an indefeasible legal title, under the Alabama code, when he redeems land sold under the senior mortgage: Francis v. Sheats, 153 Ala. 468, 127 Am. St. Rep. 61.

A Junior Mortgagee not Made a Party to Foreclosure Proceedings of a senior mortgagee, who has both actual and constructive notice of the rights of the former, may foreclose against the mortgagor, or redeem from the first mortgagee or his assignee or the purchaser at the foreclosure sale: Anson v. Anson, 20 Iowa, 55, 89 Am. Dec. 514.

FLEMING v. FRANING.

[22 Okl. 644, 98 Pac. 961.]

MORTGAGE—Default in Nonpayment of Taxes, Effect of Their Payment by the Mortgagor Before Suit Brought.—Under a mortgage clause providing that the whole amount of the mortgage debt shall become due, at the option of the mortgagee, for default in the payment of taxes before the same become delinquent, a default and subsequent sale of the mortgaged property does not entitle the mortgagee to foreclose, where all taxes, penalties and interest lawfully assessed against the said property have been fully paid off and discharged by the mortgagors and notice thereof given to the mortgagee before suit. (pp. 661, 662.)

MORTGAGE — Default Based on Uncertain and Indefinite Covenants.—Where from the record it appears that the clause in the mortgage upon which the alleged defaults are based is too indefinite and uncertain to authorize a default thereon, so as to enable the mortgagee to declare the mortgage absolute and foreclose the same, the judgment of the trial court in refusing to foreclose the same will not be disturbed. (pp. 663, 664.)

(Syllabi by the court.)

C. L. Botsford, for the plaintiff in error.

Shartel, Keaton & Wells, for the defendants in error.

644 TURNER, J. On September 3, 1904, D. B. Fleming, plaintiff in error, plaintiff below, sued John Franing, Rebecca Franing, and Ed. B. Johnson (a junior mortgagee), defend-

ants in error, defendants below, in the district court of Cleveland county, to foreclose, in the first count, a certain mortgage on a certain house and lots in Norman, Oklahoma, executed and delivered to him by John and Rebecca Franing on July 12, 1902, to secure to him a debt of five thousand dollars, evidenced by their promissory note of that date, payable five years thereafter, with interest; also to foreclose, in the second count, a second mortgage on said property, executed and delivered by said defendants on the same day to E. K. Himes, to secure to [645] him a debt of two hundred and fifty dollars, evidenced by their promissory note of that date, payable at stated intervals thereafter, of which said mortgage plaintiff was the owner by proper transfer thereof from said Himes, both of which he alleged to be due by reason of the mortgagor's failure to perform certain covenants contained therein, thereby occasioning a default, because of which he had, by proper notice, declared the entire debt due, and prayed judgment of foreclosure. After much pleading plaintiff, on November 16, 1905, filed an "amended and supplemental petition," and again declared, as aforesaid, and alleged, a breach of other and further special covenants contained therein, occasioning a default, because of which he had, by proper notice, declared the entire debt due, and prayed judgment therefor, and that said mortgages be foreclosed.

To this there was answer filed by said defendants, which, after admitting the execution of the instruments sued on, contained a general denial and a plea of estoppel, to which there was a reply, in effect, a general denial and a plea in confession and avoidance of the estoppel, and on June 1, 1906, the cause coming on for trial, both parties waived a jury, and tried the same to the court, who, after hearing the testimony, on October 16, 1906, found "the issues in favor of said defendants John Franing and Rebecca Franing, that there was no such breach of the conditions of the mortgages sued on herein as would under the terms of said mortgages, or either of them, justify in law a foreclosure of either of them in this action, and that this action was prematurely brought," and on October 24, 1906, overruled plaintiff's motion for a new trial on the 17th, to which he excepted, and dismissed his original and amended and supplemental petition, and gave judgment against him and for costs, from which said judgment he appealed to the supreme court of the territory of Oklahoma, and the same is now before us for review as successor of that court.

646 As there is no assignment of error relied on in plaintiff's brief, we will select one from his petition in error which will reach the merits of this controversy, and that is: "That the decision and judgment of the court is not sustained by sufficient evidence, and is contrary to law." It is insisted that as the first mortgage provides: "Fourth. Upon any breach of the first, second and third special covenants of this mortgage hereinbefore enumerated the holder of this mortgage may declare the entire sum or sums secured hereby, due and payable by giving ten days' notice and shall be entitled to a foreclosure of this mortgage for the satisfaction thereof," and as said second special covenant therein provides: "Second. That the first parties will pay all taxes and assessments, whether general or special, lawfully levied or assessed on said premises, before the same become delinquent"—that there is sufficient in this record to disclose a breach of this covenant, giving plaintiff the right to foreclose, and that the court erred in failing to so hold. For a breach of this covenant the amended and supplemental petition states, in substance, that defendants failed to pay all taxes and assessments levied upon the mortgaged property before the same became delinquent for the years 1902 and 1903, and the same was sold for the taxes of 1902, that the taxes of 1903 were paid by the purchaser at the sale for the taxes of 1902, and that on August 22, 1904, while the land yet remained unredeemed, plaintiff gave due notice, as required in the fourth special covenant aforesaid, and thereby elected to and did declare a default and the entire sum secured by said mortgage due and payable. This is expressly admitted by defendants, but it is by them contended that, on the same day, and before this suit was brought, all taxes, penalties and interest lawfully assessed against said premises had been by them paid off and discharged, and plaintiff duly notified thereof, and that consequently, at the time of the commencement of this action, a breach of this covenant did not exist, and no right to foreclose either of these mortgages had accrued.

647 As this statement of facts is expressly admitted by plaintiff in his reply, and the testimony so discloses, we will now determine what effect, if any, the payment of said taxes before suit had on plaintiff's right to declare a default because of their delinquency, and on his right to bring this suit. It is contended by defendant that the effect was that the default was redeemed and a bar to the suit. In this we concur. It

has been repeatedly so held. 2 Jones on Mortgages, section 1185, lays down the general rule that "If after a default in the payment of taxes the mortgagor pays the same without prejudice to the mortgagee, and before suit is brought to declare the debt due because of the default, such payment is a bar to the suit"; citing Smalley v. Ranken, 85 Iowa, 612, 52 N. W. 507.

In that case in the trial court suit had been brought to declare the debt due because of a default, and foreclosure had been decreed upon an agreed statement of facts to the effect that the debt had matured by the terms of the mortgage because of a failure to pay taxes, but that such had been made a basis of default, by amendment, after said taxes had been paid. The supreme court in reversing the case said: "The condition of the mortgage that all taxes should be paid within thirty days from the time they became due and payable is a ground upon which it is sought to declare the note due and sustain the action. The object of the condition of the mortgage was to enable the plaintiff to treat the debt as due, and save himself from loss because of the default. After the payment of the taxes all such liability for loss was at an end. His situation was exactly as if there had been no default as far as the conditions for forfeiture were concerned. To justify a forfeiture under such circumstances would work an injustice that the court ought not to permit. We think the payment of the taxes, after a breach of the condition for their payment, and in a way that no prejudice could result because of the default, and before suit brought to declare the debt due because of the default in payment, is a bar to such a proceeding."

Ver Planck v. Godfrey, 42 App. Div. 16, 58 N. Y. Supp. 648 784, is also directly in point. There the court in the syllabus say: "Under a mortgage clause providing that the whole amount shall become due, at the option of the mortgagee, for a default in the payment of taxes for sixty days, a default for that time does not entitle the mortgagee to foreclose, where the taxes are thereafter paid by the mortgagor, and notice thereof given to the mortgagee before action is begun."

And in passing, after reciting the facts, said: "Upon the foregoing facts we are at a loss to understand upon what equitable principle a judgment of foreclosure and sale could be decreed. At most there was but a technical default in the payment of the taxes, which were promptly paid by the

mortgagor as soon as her attention was called to them. The plaintiff had not been injured by the default; neither had her security been impaired or diminished in the slightest degree. The payment of the taxes before the commencement of the action restored the parties to their original positions, and the complaint should therefore have been dismissed. The case of Shaw v. Wellman, 59 Hun, 447, 13 N. Y. Supp. 527, is directly in point, There Judge Daniels, delivering the opinion of the court, said: 'It further appears that these taxes were paid on the 21st of October, 1889, and that fact was alleged by a supplemental answer as a defense to this action. This payment, in its effect, fully restored all the rights intended to be protected by this part of the mortgage. It indemnified both the plaintiff and his assignee against all possible prejudice or loss arising from default. And, when this appears, it is the policy of equity to consider the default to have been redeemed by a payment.' Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316, is also in point."

Under this view of the case that the payment of taxes before suit was a bar to this suit for the default stated, it is unnecessary to discuss whether, as is contended by defendants, plaintiff, by accepting three hundred and fifty dollars as one year's interest on this debt on August 15, 1904, with knowledge that the property had been sold for taxes, thereby treating the mortgage as a subsisting one, in effect waived the default. We think it sufficient to say that such were the facts, and that there is authority to support the contention [649] that they did constitute a waiver, but upon this we express no opinion: Jacobs v. Swift, 8 Kan. App. 857, 56 Pac. 1127. It will thus be seen that, if a right of action accrued to plaintiff to foreclose the second mortgage by reason of said nonpayment of taxes, payment thereof before suit also operated as a bar to a suit for its foreclosure, and that the court did not err in so holding.

It is next contended that, as the mortgage provides, first, "that said first parties will procure separate policies of insurance against fire and tornadoes, each in the sum of five thousand dollars, and maintain the same during the life of this mortgage for the benefit of the mortgagees or his assigns, and made payable to the mortgagee or assigns as his or their interest may appear, said policies to be approved by E. K. Himes," and as the record discloses a default in this special covenant on the part of the said mortgagors, which was duly

declared by plaintiff, as prescribed by the fourth special covenant, the court erred in refusing to decree a foreclosure on that ground. But does the record so disclose in point of fact? We think not. There is no contention as to the tornado insurance mentioned in said first special covenant, but it is contended that defendants defaulted in the sum of one thousand dollars on the five thousand dollars fire insurance therein covenanted to be maintained. As the burden of proof was upon plaintiff to so show in the trial court, and, when there found against, as he was, to so show to this court, it would seem that the instincts of disputation would have prompted him to point out in his brief wherein the testimony sustained his contention, but such he does not do or attempt. Besides, it was his duty so to do under rule No. 25 of this court. We have gone carefully into the record, however, and from the vague and conflicting evidence on this point cannot say that the court erred in finding as it did, and that no default of this covenant existed in point of fact at the time this suit was brought, nor of the terms of the second mortgage set forth in the petition, which provided as follows: "But if the default is made in such payment, or any part thereof, or interest thereon when due, or the taxes, or if the insurance [650] is not kept in force thereon, then this conveyance shall become absolute, and the whole shall become due and payable, and it shall be lawful for said party of the second part, his heirs, administrators or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law"; for the reason that nowhere in this mortgage do the mortgagors obligate themselves to pay the taxes or keep in force the insurance on the mortgaged premises.

With reference to taxes and insurance there can be said concerning this mortgage as was said concerning the mortgage in Noble v. Greer, 48 Kan. 41, 28 Pac. 1004, containing an almost identical provision. In that case suit was filed to declare a default on the mortgage for failure of the mortgagor to pay taxes, and to foreclose the same, and which was filed as an exhibit to the petition. The trial court, upon objection, would not permit evidence of a default to be introduced on the trial, for the reason that the petition failed to state facts sufficient to show that the mortgagor had made default or covenanted in the mortgage to pay the taxes. On appeal the supreme court affirmed the judgment of the trial court, and in passing said: "An examination of the mort-

gage attached to the petition in this case fails to disclose any provision under which the mortgagor promises or agrees to pay any taxes or to secure and keep any insurance on the premises. It is true that the default provision of the mortgage declared that, 'if default be made in such payments, or any part thereof, or the interest thereon, or the taxes, or if the insurance is not kept up thereon, the conveyance shall become due and payable,' and the mortgagee may sell. What taxes are referred to? Taxes on the land described in the mortgage? Probably. But there is nothing in the mortgage to show what taxes are meant. What insurance is to be kept up? And on what property is it to be kept up? There is no agreement in the mortgage by which the mortgagor is to insure anything, and no provision pointing out what property is to be insured, nor what amount of insurance is to be kept thereon. The usual provisions found in mortgages, whereby the mortgagor stipulates to pay the taxes on the premises mortgaged, and keep them insured, are [651] omitted in this mortgage. The debt sued on in this case was not due when the action was begun, except upon the theory that default had been made in the payment of taxes by the mortgagor. We are not willing to hold a debt, otherwise not due, to have become due by reason of a provision in a mortgage relating to defaults, when the mortgage contains no provision for payment of taxes by the mortgagor, and the only provision in the mortgage relating to taxes is as indefinite and uncertain as the one involved in this case."

And so also in this case, the usual provisions found in mortgages obligating the mortgagors to pay the taxes on the premises and keep them insured being omitted from this mortgage, we for the same reason are not willing to hold the debt therein not otherwise due as accelerated and due, and order a foreclosure.

Neither is it necessary, in view of what we have held, to determine whether, as contended by defendants, and, in effect, held by the trial court, it was necessary for plaintiff to prove, before being entitled to a foreclosure of the first mortgage, a concurrent breach of the first three special covenants therein contained.

This has been rendered obviously unnecessary, inasmuch as it is apparent to us that no breach existed at the time suit in foreclosure was brought, and for that reason the judgment of the trial court is affirmed, and it is so ordered.

All the justices concur.

Where There had been a Default by the Mortgagor in paying taxes, not due to willful neglect, it was decided in Noyes v. Anderson, 124 N. Y. 175, 21 Am. St. Rep. 657, that a prompt payment of the assessment by the mortgagor upon learning the default, before summons was served upon him in an action of foreclosure, entitled him to relief from the consequences of his default. If a note secured by mortgage provides that it shall become due at the option of the holder upon default in interest, and the mortgage provides that such note shall become due in thirty days after such default, the mortgagee has a right to proceed to foreclose upon the expiration of such thirty days; and a tender of the interest, long after its maturity, but before the commencement of the suit to foreclose, does not bar nor defeat the latter action: Swearingen v. Lahner, 93 Iowa, 147, 57 Am. St. Rep. 261.

KAHN v. BLEDSOE.

[22 Okl. 666, 98 Pac. 921.]

BANKRUPTCY—Preference, What is.—The intent of a debtor or creditor or the knowledge of the creditor of the insolvency of the debtor constitutes no material part of the transaction by which a creditor may be preferred. If the insolvent debtor transfers any of his property while insolvent, and such transfer enables the creditor to whom it is made to obtain a greater percentage of his debt than any other creditor of the same class, the transfer is a preference. (By the editor.) (p. 667.)

BANKRUPTCY.—A Surety is a Creditor of a Bankrupt Principal before default and from the signing of the note. (By the editor.) (p. 668.)

BANKRUPTCY—Classification of Creditors, How Determined.—Creditors of a bankrupt and their claims against his estate are respectively of the same class when the creditors are entitled to receive thereon the same percentage of dividends from the bankrupt's estate. (p. 669.)

BANKRUPTCY—Surety, Effect of Receipt of Preference by on Another and Open Account.—A surety on an obligation of a bankrupt is a "creditor" under bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. Stats. 1901, p. 3418]); and, when he has received from the bankrupt, within four months next preceding the filing of the petition for adjudication in bankruptcy, while the bankrupt is insolvent, a preference on an open account due by the bankrupt to him, such surety will not be allowed his claim for the amount paid after the adjudication by him as surety in discharge of the obligation of the bankrupt principal, unless he returns to the trustee the preference received by him upon the open account. (p. (p. 669.)

(Syllabi by the court unless stated to be by the editor.)

Potterf & Bowman, for the appellants.

Ledbetter & Bledsoe, for the appellee.

666 HAYES, J. This matter grows out of the application of M. Kahn & Brother, appellants, plaintiffs below, for the

allowance by J. F. Bledsoe, trustee in bankruptcy, in the matter of J. N. Barral, bankrupt, of the sum paid by appellants on account of security debts of the said J. N. Barral. A petition in bankruptcy was filed in the United States court for the southern district of the Indian Territory at Ardmore against J. N. Barral on January 9, 1904. On the twenty-fourth day of the same month he was adjudicated a bankrupt. On the fifteenth day of February, 1904, appellants presented their claim for allowance, which was resisted, and the same was [667] tried before the court on the 13th of June, 1904, upon an agreed statement of facts. The facts are brief, and will be stated in the language of the agreed statement upon which the case was tried, which is in the following words: "It is agreed that M. Kahn & Brother paid off the three notes above described, after the said J. N. Barral was adjudged a bankrupt. It is agreed that the indebtedness represented by the said notes was the indebtedness of J. N. Barral, and while the said M. Kahn & Brother signed the same as principals, they were the sureties of J. N. Barral thereon. It is further agreed that the said J. N. Barral was indebted to M. Kahn & Brother on open account, eight hundred and nineteen dollars and ninety-two cents, at the time of the filing of the petition in bankruptcy herein, and that said M. Kahn & Brother had received of the said J. N. Barral, within the period of four months preceding the filing of the petition in bankruptcy herein against him, the sum of two thousand four hundred dollars upon current account while insolvent. It is agreed that there shall be submitted to the Hon. Hosea Townsend, judge of the United States court, in bankruptcy, the question of whether or not the said M. Kahn & Brother, being disqualified to prove up their claim for eight hundred and nineteen dollars without refunding the money received by them, may prove up the money paid by them above set forth on account of notes signed by them as surety for J. N. Barral. It is agreed that said question shall be submitted to the Hon. Hosea Townsend as above set forth upon this agreed statement of facts, upon the briefs to be filed by Messrs. Potterf & Bowman, attorneys for M. Kahn & Brother, and by Ledbetter & Bledsoe, attorneys for Wertheimer-Swarts Shoe Company, and other creditors who have not received any preferences, and whose claims have been allowed."

The court disallowed the claim of appellants, and rendered judgment accordingly, from which an appeal was taken to the United States court of appeals of the Indian Territory, and

the case is now before this court under the provisions of the enabling act for final disposition (Act June 16, 1906, c. 3335, 34 Stat. 267).

The sole question presented by the record in this case is whether one who is [668] surety upon a promissory note for a bankrupt debtor, and who, after the principal has been adjudicated a bankrupt, pays off such note, can prove up such note against the estate of the bankrupt and receive dividends thereon, when such surety was also a creditor of the bankrupt, upon an open account, and had received preferential payments thereon within four months next preceding the time of the filing of the petition in bankruptcy while the debtor was insolvent. The provisions of bankruptcy act of July 1, 1898, chapter 541 (30 Stat. 562, U. S. Comp. Stats. 1901, p. 3445), govern in this case. Section 60-a of this act defines what constitutes a preference in the following language: "A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The intent of the debtor or creditor, or the knowledge of the creditor of the insolvency of the debtor, constitutes no material part of the transaction by which a creditor may be preferred. If the insolvent debtor transfers any of his property while involvent, and such transfer enables the creditor to whom the same is transferred to obtain a greater percentage of his debt than any other creditor of the same class, such transfer is a preference: Gans v. Ellison, 114 Fed. 734, 52 C. C. A. 366; Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. Rep. 74, 46 L. ed. 147; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. Rep. 906, 45 L. ed. 1171.

Section 57-g of the act declares what the effect of receiving preferences by a creditor shall be upon the right of such creditor to have allowed his claim against the bankrupt estate. Said section reads as follows: [669] "The claims of creditors who have received preferences, voidable under section sixty, subdivision 'b,' or to whom conveyances, transfers, assignments, or encumbrances, void or voidable under section sixty-seven, subdivision 'e,' have been made or given, shall not be

allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments or encumbrances."

The United States circuit court of appeals of the eighth circuit held, in Swartz v. Fourth National Bank, 117 Fed. 1, 54 C. C. A. 387, that the legal effect of this section is to prohibit the allowance of any claim of a creditor who has received a preference either upon the claim which he seeks to have allowed, or upon any other claim of the same class he holds against the estate of the bankrupt, unless such creditor first surrenders the preference he has received. In the case at bar appellants were creditors of the bankrupt by virtue of his indebtedness to them upon an open account, on which claim it is admitted they had received a preferential payment within four months preceding the filing of the petition in bankruptcy. It therefore remains to be determined whether appellants were creditors of said bankrupt by reason of their being sureties on the notes payable, respectively, to H. Aaronson, trustee, and the First National Bank of Gainsville, and whether the claim of appellants on said notes, after they had paid the same to the holders thereof, were of the same class as their claim upon the open account.

It has been repeatedly held by the courts that a surety is a creditor of his bankrupt principal, and that he is such creditor before default and from the date of signing the note: In re Stout (D. C.), 109 Fed. 794; Livingstone v. Heineman, 120 Fed. 786, 57 C. C. A. 154; Swartz v. Siegel, 117 Fed. 13, 54 C. C. A. 399. The facts in the last case cited are very similar to the facts in the case at bar, and the pronouncement of the court of the law in that case should govern in this case. In that case the Fourth National Bank of St. Louis held notes of the bankrupt principal, on which Siegel & Brother were sureties, and on which the bank had received preferential payments. Subsequent to the adjudication [670] of the principal as a bankrupt Siegel & Brother discharged the notes by paying to the bank the balance due thereon, and then sought to have their claim allowed in the bankruptcy proceeding for the amount paid by them in settlement of the balance due on the notes. Siegel & Brother had also been creditors upon an open account of the bankruptcy within the four months preceding the institution of the bankrupt proceedings, which account had been settled in full by preferential payments. The court denied the right of Siegel & Brother to have allowed their claim for the balance paid on the notes of the bankrupt to the bank, both upon the ground that the bank, as holder of

the same, had received a preference, and, under section 57-i of the bankrupt act of 1898 upon the payment by them of said notes, they became subrogated to the rights of the holder thereof, subject to the limitations and disqualifications attached to the note in the hands of the bank, and upon the further ground that the claimants had received a preference upon their open account with the bankrupt, and it was the order of the court that Siegel & Brother's claim be not allowed unless they should repay to the trustee, not only the amount of the preferential payments made by the bankrupt to the bank on the notes, but also the amount of the preferential payment received by them upon the open account.

Able counsel for appellants have exhaustively discussed in their brief the rights of a surety, by payment of his principal's obligation after the principal has been adjudicated a bankrupt, to become subrogated to the rights of the holder of such obligation, and have insisted that the surety, upon making such payment, takes the claim subject only to the limitations and disqualifications of the same in the hands of his predecessor. But the circuit court of appeals in Swartz v. Siegel, 117 Fed. 13, 54 C. C. A. 399, has decided against this contention, to the extent that it was held in that case that a surety could not be allowed his claim on such obligation if either the holder had received preferential payments on the note, or the surety had received preferential payments on other indebtedness of [671] the same class due by the bankrupt to the surety. The test of classification of creditors is declared by the court in its syllabus to Swartz v. Fourth National Bank, 117 Fed. 1, 54 C. C. A. 387, in the following language: "The test of the classification of creditors under the bankrupt act of 1898 is the percentage of their claims they are entitled to draw out of the estate of the bankrupt, and not the relations of the creditors to parties other than the bankrupt. If they are entitled to receive the same percentage, they are in the same class; if different percentages, in different classes."

The appellants in the case at bar as creditors of the bankrupt were entitled to receive from his estate the same percentage on their open account, if no preference had been given them thereon, as the holders of the notes would have been entitled to receive if they had continued to hold the notes and prove up the same before the trustee, and had not received a preference thereon; and, had there been no preference, and if nothing had transpired to disqualify appellants to prove up

their claims upon the open account, and as sureties on the notes after they had discharged the same, they would have been entitled to receive the same percentage of dividends on their two claims. The appellants, therefore, were not entitled to have allowed their claim on the amount paid by them on the notes unless they first surrendered the preference received by them on the open account.

The judgment of the trial court is affirmed.

All the justices concur.

The General Rules Governing Preferential Payments or Transfers by a bankrupt are discussed in the recent cases of Suffel v. McCartney Nat. Bank, 127 Wis. 208, 115 Am. St. Rep. 1004; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 115 Am. St. Rep. 955; Habegger v. First Nat. Bank, 94 Minn. 445, 110 Am. St. Rep. 379; Thompson v. Fairbanks, 75 Vt. 361, 104 Am. St. Rep. 899; Tatman v. Humphrey, 184 Mass. 361, 100 Am. St. Rep. 562.

IN RE UNGER.

[22 Okl. 755, 98 Pac. 999.]

MUNICIPAL CORPORATIONS can Exercise Only Such Powers of Legislation as are given them by the law-making power of the state. Grants of such power are strictly construed, and any fairly reasonable doubt is resolved by the court against the corporation, and the power is denied. (By the editor.) (p. 672.)

MUNICIPAL CORPORATION, Grants of Taxing Powers to, Construction of.—A grant by the legislature of taxing power to a municipal corporation is to be strictly construed, and any fairly reasonable doubt concerning the existence of such power is resolved by the courts against the corporation and the power is denied. All acts beyond the scope of the power granted are void. (p. 672.)

MUNICIPAL CORPORATION, Power to Tax Contractors, Limitations upon.—The power being granted by the legislature to a city of the first class to levy by ordinance an occupation tax on "contractors," held, that the term is not sufficiently generic to cover "persons doing contract work," and that that part of an ordinance seeking to levy such tax on "persons doing contract work" is illegal and void. (pp. 673, 674.)

HABEAS CORPUS to Assail a Conviction Under a Void Municipal Ordinance.—Habeas Corpus will lie to discharge a petitioner restrained of his liberty by virtue of a conviction based upon a void ordinance. (pp. 674, 675.)

(Syllabi by the court unless stated to be by the editor.)

F. C. Hunt, for the petitioner.

V. S. Decker, for the respondent.

[755] TURNER, J. On May 28, 1908, petitioner filed in this court an original application for a writ of habeas corpus, alleging himself to be illegally restrained of his liberty by C. D. Spencer, city marshal of the city of Chandler, for the nonpayment of a certain fine and costs assessed against him in the police court of said city for the alleged violation of an ordinance thereof, which said ordinance he claims is void. The return to the writ shows petitioner to be in the custody of said Spencer, as city marshal of said city, by virtue of an alias commitment from said court directing respondent to confine petitioner in the city jail and keep him so confined until said fine and costs are paid. At that time the [756] city of Chandler was a city of the first class, and the only authority relied on to justify the passage of the ordinance complained of is that part of Wilson's Revised and Annotated Statutes of 1903 of Oklahoma, which refers to cities of that class, and provides: "Sec. 386. The city council shall have authority to levy and collect a license tax on auctioneers. contractors." Pursuant to this authority, the city council of said city on December 17, 1907, passed an ordinance, the material part of which is as follows:

"Sec. 1. That for the purpose of raising a revenue for said city there is hereby levied an occupation tax on each and every occupation and business hereinafter named, that are now and may hereinafter be maintained within the corporate limits of the city of Chandler, Lincoln county, Oklahoma. House and sign painting business six ($6.00) dollars per year. Contractors or persons doing contract work twenty ($20.00) dollars per year.

"Sec. 4. It shall be unlawful for any person, persons, company or corporation to engage in any of the businesses provided herein without first paying the tax herein specified and provided for and obtaining a license therefor.

"Sec. 5. Any person, persons, company or corporation violating any of the provisions of this ordinance shall upon a conviction thereof be fined in a sum of not less than five dollars, nor more than one hundred dollars, and shall stand committed until such fine and costs are paid and each and every day wherein such violation shall continue shall constitute a new and independent offense."

On January 16, 1908, petitioner was arrested on a complaint charging that on January 1, 1908, in the city of Chandler, he, "then and there being, did then and there willfully, unlawfully and wrongfully do certain contract work,

to wit, house and sign painting, doing such work at a contract price and not by the day labor, nor so much per diem, and this without first paying for and taking out an occupation tax license," as provided for in the ordinance aforesaid, contrary to section 1 thereof, etc. He was tried, convicted, fined and committed "until said fine and costs are paid." [757] He insists that the ordinance is void. If so, he must be discharged; otherwise not.

In our opinion that part of the ordinance forming the basis of this prosecution is clearly void, for the reason that it goes beyond the taxing power delegated by the legislature in the section of the statute above set forth. The authority there delegated gave the city the power to tax "contractors." Municipal corporations can exercise only such powers of legislation as are given them by the law-making power of the state. Grants of such powers are strictly construed, and "any fairly reasonable doubt is resolved by the courts against the corporation, and the power is denied. All acts beyond the scope of the powers granted are void": 1 Dillon on Municipal Corporations, 4th ed., sec. 89. "By the weight of authority, statutes and ordinances imposing licenses and business taxes are to be construed strictly in favor of the citizen and against the government, especially where they provide penalties for their violation" (21 Am. & Eng. Ency. of Law, 2d ed., sec. 809), as in this case, and are not to be extended to persons or things not expressly within the grant of power: Kiel v. City of Chicago, 176 Ill. 137, 52 N. E. 29. It is also a fundamental canon of construction that in this connection the law-making power must have used the words employed in their known and accepted signification: Emmons v. City of Lewistown, 132 Ill. 380, 22 Am. St. Rep. 540, 24 N. E. 58, 8 L. R. A. 328.

Tested by these rules, did the grant of power to pass an ordinance levying an occupation tax on "contractors" grant the power to the city to so tax "persons doing contract work"? In other words, is the term "contractors," in the sense in which it was used in the section of the statute, supra, sufficiently generic to embrace within its meaning "persons doing contract work"? If so, the ordinance is valid; if not, it is void, and the petitioner must be discharged. In Brown v. German-American Title & Trust Co., 174 Pa. 443, 34 Atl. 335, the court adopted the definition of a "contractor," as laid down in the Century Dictionary, [758] to be "one who contracts or covenants either with a public body or pri-

vate parties to construct works or erect buildings at a certain price or rate." That this is the sense in which the term is commonly understood is apparent, and by it we are persuaded that the legislature only intended to grant the power to tax the occupations of such as building contractors, bridge contractors, railroad contractors, paving contractors, etc., or those engaged in what is commonly known as construction work on a large scale. In this we are borne out by Webster's International Dictionary, which defines "contractors" to be "specifically one who contracts to perform work on rather a large scale, at a certain price or rate, as in building houses or making a railroad."

Having thus determined what occupations are fairly taxable under the term "contractors," let us see what falls within the meaning of "persons doing contract work" as distinguished from the former, for to these the city has attempted to extend by this ordinance its power of taxation. It is clear that "persons doing contract work" not only includes contractors themselves, but might fairly be construed to cover in the broadest acceptation every person engaged in any kind of work pursuant to a contract express or implied. Under its guise, the city might tax all workers for hire, whether by the job, day, month, or any other time, and might fairly include the trades and professions, the bootblack, the messenger boy, and the maid in the kitchen. The difference in the range of taxation covered by the two terms, and that the first is not sufficiently generic to cover the second, is apparent at a glance. Now, let us turn to the complaint, and see what is attempted to be done in this instance. Petitioner therein is charged, not with carrying on the business or being engaged in the occupation of "house and sign painting" (taxed in the same ordinance at six dollars per year) without paying the license tax, but with on a certain day "doing certain contract work, to wit, house and sign painting, doing such work at a contract price, and not by the day labor or [759] so much per diem," contrary to the terms of the ordinance. In other words, the complaint charges him with doing an odd job or isolated act of house and sign painting. That such a person is not a "contractor" within the meaning of the ordinance is apparent from what has been said, and also by the distinction drawn by the supreme court of Louisiana in State v. McNally, 45 La. Ann. 44, 12 South. 117. In that case defendant appealed from a judgment against him in the civil district court of the

parish of Orleans compelling him to pay a license tax as "contractor or builder." In distinguishing between contractors and others, the court, in passing, said: "To illustrate, we will add that when a mechanic is employed to do a particular piece of work—for instance, to do the carpenter work on a house, or to plaster or to paint the same—and he works at his trade on said house, and employs others to assist in the work, he is exempt, because he follows and works at his trade exclusively. But, when he undertakes to build houses generally, and only superintends the work and performs only such mechanical labor as his pleasure may dictate, or to show or direct those employed by him, he does not follow his trade exclusively on the building and employing others to assist him, but he is a contractor, employing others to do the work exclusively of his individual labor."

As such a person, then, as is described in the complaint, is clearly not a "contractor," and as the city was without legislative power to extend by ordinance its power of taxation so as to include this isolated act of house and sign painting under a provision therein taxing the occupation of "persons doing contract work," we conclude that that part of the ordinance attempting to tax "persons doing contract work" is illegal and void, and petitioner's conviction, fine and present restraint are also illegal and void. It would seem that in ordaining a tax on "contractors" or "persons doing contract work," the law-making power of the city was attempting to define what occupations were intended to be included under the term "contractors." If such is true, the attempt was futile, as it goes without saying that the city could not extend its powers of taxation by an unauthorized definition of a word contained [760] in the grant of power (Kansas City v. Lorber, 64 Mo. App. 604; Twining v. City of Elgin, 38 Ill. App. 356; Town of Trenton v. Clayton, 50 Mo. App. 535), and that by defining the word "contractors" as "persons doing contract work" did not make it so, and this court will not be bound by such definition.

While the right of petitioner to invoke the aid of the writ of habeas corpus is not before us, if it were, we are inclined to think we would favor the right. We are not unmindful that irregularities in proceedings of this kind before the lower courts are not properly inquired into by habeas corpus but on appeal; but where, as in this case, the conviction and consequent restraint are the result of a prosecution based upon a void ordinance, the error is not merely an irregularity, but

fundamental, and may be reached by this writ: In re Gribben, 5 Okl. 379, 47 Pac. 1074; 15 Am. & Eng. Ency. of Law, 2d ed., 169, and cases cited; McQuillin on Municipal Ordinances, 574, and cases cited; Ex parte Nielsen, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118.

We are therefore of the opinion that that part of the ordinance seeking to impose an occupation tax on "persons doing contract work" is void; that the judgment of the lower court is also void; that the petitioner is illegally restrained of his liberty, and should be discharged; and it is so ordered.

All the justices concur.

The Constitutionality of Ordinances Imposing a License Tax upon Contractors is discussed in the note to Hager v. Walker, 129 Am. St. Rep. 271.

The Writ of Habeas Corpus can be Used, according to the better rule, to attack the constitutionality of a statute or ordinance under which a prisoner is held: Ex parte Harrison, 212 Mo. 88, 126 Am. St. Rep. 557; Servonitz v. State, 133 Wis. 231, 126 Am. St. Rep. 955, and cases cited in the cross-reference note thereto.

CASES

IN THE

SUPREME COURT

OF

OREGON.

BOGARD v. BARHAN.

[52 Or. 121, 96 Pac. 673.]

FRAUDS, STATUTE OF—Description of Land.—The description of land in a contract of sale must be such as to make the intention manifest, and extrinsic evidence cannot be resorted to, to determine what land is intended. (p. 678.)

FRAUDS, STATUTE OF—Description of Land—Extrinsic Evidence.—If the description of land in a contract of sale fits and comprehends it, the contract is good under the statute of frauds; and extrinsic evidence may be resorted to either to ascertain the boundaries or otherwise fix its identity, so long as it does not vary the agreement. (p. 678.)

DEEDS.—The Rule for Determining the Sufficiency of a Description of land is, that a surveyor with the deed before him, with the aid of extrinsic evidence, if necessary, shall be able to locate the land and establish its boundaries. (p. 678.)

FRAUDS, STATUTE OF.—The Following Descriptions of Lands Sufficiently Comply with the Statute of Frauds, assuming that there are not two properties answering to the respective descriptions: "The brick store building occupied by Beebe & Whitman, located in Woodburn, Marion County, Oregon"; "his 5-acre residence property lying west of the Catholic Church"; "lot 7, block 2, Tooze's addition to Woodburn"; "my 15-acre farm located one mile north of Woodburn, Marion County, Oregon." (pp. 678, 679.)

SPECIFIC PERFORMANCE—Pleading.—A complaint which purports to describe a quadrangle and mentions only three sides of it is insufficient. (pp. 679, 680.)

SPECIFIC PERFORMANCE—Pleading.—A complaint which purports to describe the boundaries of a lot of land and contains lines which do not close, or if read as closed by the aid of extrinsic evidence would inclose much more than the land contracted to be sold is insufficient. (p. 680.)

SPECIFIC PERFORMANCE—Pleading.—A complaint which purports to describe several parcels of land and which runs the metes and bounds of all of them together without identifying the particular parcels, is insufficient. (p. 680.)

George G. Bingham and Elisha P. Morcom, for the appellant.

Thomas Brown and John A. Carson, for the respondent.

[122] EAKIN, J. This is a suit to compel specific performance of the following contract for an exchange of lands.

"Woodburn, Oregon, June 16, 1906.

"This agreement made this date between A. Barhan, party of the first part, and Z. T. Bogard, party of the second part, witnesseth: That the party of the first part agrees to transfer to the party of the second part the following described property, the brick store building occupied by Beebe & Whitman, located in Woodburn, Marion County, Oregon; also my 15-acre farm located one mile north of Woodburn, Marion County, Oregon; also to pay one hundred dollars cash and give my note for eight hundred dollars, payable on or before eight years, in payments of one hundred dollars each year, with interest at the rate of 8 per cent, payable annually. For this the party of the second part agrees to transfer to the party of the first part his 5-acre residence property lying west of the Catholic Church, and also lot 7, block 2, Tooze's addition to Woodburn. And it is further agreed that the taxes on property of party of the first part is to be assumed by party of the second part, and that on party of second part to be assumed by party of the first part, and that party of second part is to occupy his residence property until September 30, and that party of first part is to occupy the 15-acre farm until the party of the second part gives possession of his residence property. A. BARHAN.

"Z. T. BOGARD."

The amended complaint sets out the contract, and attempts to give a specific description by metes and bounds of the property mentioned in the agreement, and alleges a tender to perform by plaintiff and a refusal to perform by defendant.

To this complaint defendant demurs, on the ground that it does not state facts sufficient to constitute a cause [123] of suit. The demurrer was overruled by the court, an answer was filed, a trial had, and a decree rendered for plaintiff, and defendant appeals.

1. By the demurrer the defendant questions the sufficiency of the writing to answer the requirements of the statute of frauds, in this: That it is void for uncertainty of the descrip-

tion, and that the averments of the amended complaint are broader than the memoranda. There are four items of real property mentioned in the agreement, namely, "the brick store building occupied by Beebe & Whitman, located in Woodburn, Marion County, Oregon"; "my 15-acre farm located one mile north of Woodburn, Marion County, Oregon"; "his 5-acre residence property lying west of the Catholic Church"; and "lot 7, block, 2, Tooze's addition to Woodburn." None of these descriptions is sufficiently definite within itself to locate or identify the property; and the question is: Are they sufficient to answer the requirements of the statute of frauds? The description or designation of the property in the agreement must be such as to render the intention entirely manifest, and resort cannot be had to extrinsic evidence to determine what property is intended.

2. But though the description of the property in the agreement does not indicate its boundaries, and yet is sufficient to fit and comprehend the property, it is a compliance with the statute of frauds; and resort may be had to extrinsic evidence to ascertain the boundaries or otherwise fix its identity, and apply the description to the very property intended, provided that it does not dispute or add to the agreement: Ryan v. United States, [124] 136 U. S. 68, 10 Sup. Ct. Rep. 913, 34 L. ed. 447; Halsell v. Renfrow, 14 Okl. 674, 78 Pac. 118; 2 Ann. Cas. 286; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Browne's Statute of Frauds, sec. 385; Wood on Frauds, sec. 353.

3. That is certain which can be made certain. If the land has, as a tract or lot, acquired a name to distinguish it and by which it is known, the same may be conveyed without reference to its boundaries. The rule for determining the sufficiency of a description in a deed or any other writing in relation to real property is: Can a surveyor, with a deed or other instrument before him, with or without the aid of extrinsic evidence, locate the land and establish the boundaries? Willamette Falls C. & L. Co. v. Gordon, 6 Or. 175; House v. Jackson, 24 Or. 89, 32 Pac. 1027; Hayden v. Brown, 33 Or. 221, 53 Pac. 490; Smiley v. Fries, 104 Ill. 416.

4. Tested by these rules, each of these properties is capable of identification from the description contained in the agreement. "The brick store building occupied by Beebe & Whitman, located in Woodburn, Marion County, Oregon," is a definite description of the property, provided there are not

two properties answering to that description. When the evidence was adduced it appeared that it was only a portion of the first floor of a certain two-story brick building, but it is not disputed that the only portion of said store building owned by defendant, and for which plaintiff seeks a conveyance, was the portion thereof occupied by Beebe & Whitman; and it is easily identified and bounded.

5. Plaintiff's property designated as "his 5-acre residence property lying west of the Catholic Church" does not mention the location thereof by reference even to the county and state; and this is claimed to be too indefinite. But it is said in Devlin on Deeds, section 1012: "When a doubtful description is to be construed, the court should endeavor to assume the position of the parties, the circumstances [125] of the transaction should be carefully considered, and, in the light of those circumstances, the words should be read and interpreted." The contract is dated at Woodburn, Oregon, and in the light of that fact, and that all the other property is referred to as at Woodburn, the designation of "his 5-acre residence property lying west of the Catholic Church," and "party of the second part is to occupy his residence property until September 30," clearly indicates that it is the property in which he was residing in that vicinity, and by extrinsic evidence its location and boundaries may be easily ascertained. At any rate, on the face of the agreement, it is sufficiently definite for identification.

6. The same is true of defendant's fifteen-acre farm. "Lot 7, block 2, Tooze's addition to Woodburn," is a definite description on the face of the agreement. At the trial it was suggested that this lot is in "Tooze's First Addition." If Tooze platted several additions to Woodburn, it is likely that he designated the first one as "Tooze's Addition," and not "Tooze's First Addition." At any rate, the designation is not defective or indefinite on its face.

There is an evident error in the description of the property sought to be described by metes and bounds in the "third parcel" in the complaint, probably intended as a description of the first parcel in the agreement, namely, "the brick store," but which is clearly incorrect; and plaintiff has applied here for leave to amend his complaint by correcting the error in that description. But it is unnecessary to consider that motion, as the demurrer must be sustained for other defects.

7. We find two other errors in the descriptions in the amended complaint equally as defective as that of the brick

store, namely, the "second parcel" in the amended complaint describes only three sides of a quadrangle and thus does not close or bound any property.

[126] 8. The description of what is probably intended as a part of plaintiff's five-acre residence property does not close, but, if closed by extending the last distance given, includes more than sixty acres of land, and clearly has no application to the property described in the agreement.

9. Furthermore, the amended complaint attempts to describe by metes and bounds, six separate parcels as the property mentioned in the agreement, without any allegation of facts to identify the particular piece to which anyone is intended to refer, or from which the court can say that it fits or comprehends the description in the agreement; and the amended complaint is insufficient in that particular. Therefore the complaint does not disclose the identity of the property mentioned in the agreement, nor that plaintiff is entitled to a decree requiring a conveyance of the property described in the complaint, or that the plaintiff is fulfilling the agreement by tendering a conveyance of the property he describes for that purpose; and the demurrer should have been sustained.

The decree is reversed and the cause remanded, with directions to sustain the demurrer, and for such other proceedings as may be proper.

The Sufficiency of the Description of the Land in the memorandum of sale to satisfy the statute of frauds is a question that was before the Rhode Island court in the recent case of Cunha v. Callery, 29 R. I. 230, post, p. 811, and see the cases cited on this question in the cross-reference note thereto.

JENNINGS v. TRUMMER.

[52 Or. 149, 96 Pac. 874.]

APPEAL AND ERROR—Nonsuit, Denial of—Review.—The appellate court will not review a motion for a nonsuit where, though the evidence originally was insufficient, it has been cured by subsequent testimony properly disclosed by the record. (p. 682.)

BROKERS—Commission—When Earned.—It is not necessary for a broker for sale to personally introduce a buyer to his principal, it being sufficient if he advises him of and names the prospective purchaser. (p. 683.)

BROKERS—Commission—When Earned.—If an owner, with knowledge of the facts, deals with his broker's client, even through

another agent, he is liable for the commission to such broker. (p. 683.)

BROKERS—Commission—When Several Employed.—The duty of the vendor who employs more than one broker to sell his property is to allow them to act independently and remain neutral as between them, and between them and a purchaser. He cannot step in and complete the sale and escape liability for the commission. (pp. 683, 684.)

BROKERS — Commission — When Several Employed.—Where independent brokers are employed on the sale of the same property, the first who sells is entitled to the commission without any express contract to that effect. (p. 684.)

BROKERS—Commission—Duty of Vendor—Uberrima Fides.—Between the principal and the broker the utmost good faith must be exercised. (p. 684.)

APPEAL AND ERROR—Conflict of Evidence.—When there is a conflict of evidence, it is for the jury to resolve it from the evidence and not for the court of appeal to review. (p. 684.)

BROKERS—Commission—Simultaneous Employment of Several.—To entitle one of several brokers employed to sell the same property to his commission, the prospective purchaser must have dealt with such one originally and without previous inquiry from or negotiation with any of the others; the relation once established continues to the end of the transaction, and cannot be broken off by the employer selling through another, even after rescission of the contract of brokerage with such one. (pp. 684, 685.)

William Reed and Cicero M. Idleman, for the appellant.

Gammans & Malarkey, for the respondent.

150 EAKIN, J. This is an action to recover commissions for the sale of real estate. Plaintiffs allege that in December, 1904, the defendant employed them to find a purchaser for the furniture and goodwill of a rooming-house in Portland, Oregon, for the price of $7,000 net to the defendant, for which they were to have for their commission such sum above $7,000 as they should be able to obtain; that on December 23, 1904, plaintiffs were negotiating a sale with Mrs. Lange as a prospective purchaser at the price of $7,750, which she was ready, able and willing to pay therefor, and plaintiffs advised defendant of such prospective sale and gave him the name of the customer, and on December 24, 1904, while plaintiffs were so negotiating with Mrs. Lange, the defendant sold the property to her for a price in excess of $7,000; that the sale was 151 procured through the efforts of plaintiffs; and they now ask judgment for $750, the amount of their commissions thereon.

Defendant, by his answer, denies these allegations of the complaint, and alleges that plaintiffs did not procure Mrs. Lange as the purchaser, but that L. R. Cottrell, another real

estate broker, introduced her as the purchaser to the defendant at the price of $7,250. The cause was tried by the court without the intervention of a jury, and the court found for the plaintiffs, and rendered judgment thereon, and defendant appeals.

1. The denial of the defendant's motion for a judgment of nonsuit, interposed at the close of plaintiff's testimony, is the only ground of error presented by the defendant in his brief. It is a general principle that, even if the evidence was insufficient to be submitted to a jury, yet the appellate court will not review the motion if such defect has been cured by subsequent testimony which is properly disclosed by the record: Bennett v. Northern P. Ex. Co., 12 Or. 49, 6 Pac. 160; Carney v. Duniway, 35 Or. 131, 57 Pac. 192, 58 Pac. 105; Elmendorf v. Golden, 37 Wash. 664, 80 Pac. 264. Therefore we are at liberty to examine the whole of the evidence which is contained in the bill of exceptions in considering the error assigned.

Defendant's contention is that the property was listed with two agents, and that Cottrell actually brought Mrs. Lange and defendant together and the sale was thus [152] consummated; that he was justified in dealing with Cottrell, and plaintiffs have no cause of action. On the twenty-third day of December, 1904, plaintiffs notified the defendant that they had secured Mrs. Lange as a purchaser for said property on the terms and conditions required by the defendant, and the defendant thereupon assented thereto by giving plaintiffs until January 1st to complete the transaction, and signed the following agreement to that effect, viz.:

"I hereby agree to give a clear bill of sale to the furniture and good will of the rooming house, No. 323½ Washington St. (known as the Raleigh Block), Portland, Oregon, which includes all the furniture on all of the three upper floors of said building, for the sum of seven thousand dollars ($7,000.00), said sale to be made by the 1st day of January, 1905; and I also agree to loan the purchaser, Mrs. Lange, four thousand dollars, said four thousand dollars to be secured by a first mortgage on said furniture, the principal to be paid off five hundred dollars each quarter, with interest. Said interest is to be at the rate of 8 per cent per annum. It is understood that Jennings & Co. are to get their commission over and above said seven thousand dollars. Done this 23d day of December, 1904. L. TRUMMER."

Although plaintiffs did not actually introduce Mrs. Lange to the defendant, it was not necessary that they do so. They did advise him of the prospective sale and of the name of the purchaser, and, if defendant dealt with her as the result of such information, then plaintiffs brought them together; and the evidence was sufficient to be submitted to a jury on that question. Miss Lange, who is the daughter of Mrs. Lange and was her agent in this transaction, had agreed with the plaintiffs as to the terms of the sale, except that she desired to make a deposit of only $10, instead of $100, as asked by plaintiffs. This fact is evidenced by a blank receipt drawn up in the presence of Miss Lange and read over and assented to by her, except as to the $100 deposit required thereby.

153 3. Whatever may be the rights of a real estate broker who takes a customer away from another and closes a sale between such customer and the owner, if done without the aid or connivance of the owner, yet if the owner, with knowledge of the facts, deals with the customer of the first broker, even through another agent, he will be liable to the first broker; and, in view of the evidence in this case, it is a question for the trior of the facts to determine, whether the defendant did not collude with Cottrell to defeat plaintiff in his efforts to complete the sale. The agreement of defendant of December 23d, set out above, was so signed soon after 12 o'clock M. Mr. Cottrell testifies that on the afternoon of that day defendant showed him a copy of this agreement, and they discussed whether or not it gave Jennings the exclusive right to sell to Mrs. Lange; and he says:

"I read it over, and I said: 'I don't see that this is the sold option. It looks to me like he has the privilege to sell it at this price if he can do so before that time.'

"Q. And you considered that you had an opening to get in? A. Mr. Trummer seemed to be of the same opinion.

"Q. He thought that did not give him the exclusive option, and he told you you could go ahead? A. He said: 'You can have it at the same price.'"

This was before Cottrell had seen Mrs. Lange. Trummer testifies that at the same conversation he told Cottrell to go ahead and make the sale.

4. The cases quoted from in defendant's brief upon this question are to the effect that the owner cannot interfere, but the several brokers are free to act independently of each other, and the owner is under no obligation to decide between their conflicting claims, but only to remain neutral, both as between

them and between them and the purchaser. The owner cannot step in and complete the sale, and escape liability for the commission.

[154] 5. The above quotation from the evidence shows, not only that the defendant did not remain neutral, but within a few hours gave to a competing broker the confidence obtained from the plaintiffs and aided him in diverting the customer from plaintiffs. Such conduct is entirely lacking in good faith toward plaintiffs. Between the principal and the broker the utmost good faith must be exercised. The case of Wood v. Wells, 103 Mich. 320, 61 N. W. 503, is very much in point here. The purchaser was procured by Wood, but the sale was consummated by Calkins, another broker, to Wood's customer on practically the same terms; defendant having been previously informed by plaintiff of his negotiations and with whom he was dealing. It was held that the plaintiff was the procuring cause of the sale and entitled to his commission. To the same effect is Elmendorf v. Golden 37 Wash. 664, 80 Pac. 264, where the plaintiff procured the purchaser, of which defendant had full notice. Another broker interfered, and the defendant completed the sale to the second broker for the benefit of plaintiff's customer; and it was held that plaintiff was entitled to his commission. To the same effect is McCormack v. Henderson, 100 Mo. App. 647, 75 S. W. 171.

6. Defendant urges that plaintiff has not established by a preponderance of the evidence that Mrs. Lange had agreed to buy from the plaintiff at the price of $7,750. Although the evidence is conflicting upon this question, three witnesses testify that she did; and that was a question of fact to be determined from the evidence, which we cannot review.

7. Tinsley v. Scott, 69 Ill. App. 352, makes the proper distinction in such a case as this: "Of several independent brokers under such employment at the same time, the one who first so sells is entitled to the commission. No express contract to that effect is required to give him that right."

[155] 8. "But, to be a producer, the party presented must be a client or a customer of his own, and not one then sustaining that relation to another broker under like employment. If he was first in negotiation with such other, he continues to sustain that relation to him until it is expressly broken off, or the matter of the purchase has ceased to be held by him under consideration. The employer, with notice of the pend-

ency of such negotiation, cannot escape liability to the broker for his commission by selling to his customer through another, even though he first discharges the former, if he does so without giving him a reasonable time to effect the sale." To the same effect is Day v. Porter, 60 Ill. App. 386. It is said: "Knowing that appellees were, by his procurement, negotiating with and had procured an offer from Mr. Corneau on the 25th, and were still endeavoring to sell to him, he could not, on the 30th, without giving them a reasonable time in which to effect a sale, avail himself of their efforts and deprive them of all compensation, by suddenly terminating their employment. The verdict of the jury in this case must be held as establishing that appellant, when the negotiations of appellees with the customer were in progress, terminated their authority for the purpose of avoiding the payment of commissions to them."

9. The evidence in this case tends to establish that in the afternoon of the 23d of December, just after Jennings had secured the agreement from defendant giving him until January 1st to conclude the sale to Mrs. Lange, he gave to Cottrell information of the whole transaction, and consented to his interfering at least eighteen hours before Mrs. Lange phoned to the plaintiffs that she would not purchase, and on the afternoon of the same day Cottrell concluded an agreement of sale with Mrs. Lange, eight days before the expiration of the time given to plaintiffs in writing in which to close the sale; and it is a question of fact, to be determined from all the evidence, whether [156] defendant and Cottrell were not the occasion of the sudden termination of her dealings with plaintiffs. There was sufficient evidence upon these questions to raise an issue of fact, and it was not error to deny the motion for judgment of nonsuit.

The judgment is affirmed.

A Real Estate Broker is Entitled to his Commissions if he is the procuring cause of negotiations which result in a sale, even though the negotiations are conducted and concluded by the principal in person: Gelatt v. Ridge, 117 Mo. 553, 38 Am. St. Rep. 683. If a sale is brought about through his exertions, he is entitled to his commission, although the sale is consummated by the owner: Branch v. Moore, 84 Ark. 462, 120 Am. St. Rep. 78; Bowe v. Gage, 127 Wis. 245, 115 Am. St. Rep. 1010. As to the right to commissions where several brokers have been employed, see Whitcomb v. Bacon, 170 Mass. 479, 64 Am. St. Rep. 317; as to the effect of an agreement to divide commissions with a subagent, see Graves v. White, 43 Colo. 131, 127 Am. St. Rep. 106; and as to the effect on the right to commissions of acting as agent for an adverse party, see Plotner v. Chill-

son, 21 Okl. 224, 129 Am. St. Rep. 776. An agreement between the owner of property and a broker to pay the latter commissions if the sale is made by either is unilateral, and therefore not enforceable by the broker if the sale is made by the owner: Taylor v. Barbour, 90 Miss. 888, 122 Am. St. Rep. 328.

STATE v. HAMMELSY.

[52 Or. 156, 96 Pac. 865.]

FALSE PRETENSES—Definitions.—A false pretense is a "representation of some fact or circumstance, calculated to mislead, which is not true"; or "such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value." (p. 687.)

FALSE PRETENSES—Obtaining Money or Property by.—The gist of the offense, against which the statute is directed, is obtaining money or property of another by deceit, fraudulently and feloniously superinduced by the beneficiary; and when one by his acts intentionally creates a belief, as to an existing fact, which is false, with the intent to deprive another of his property, and does so, it does not matter whether the erroneous belief was induced by words or acts, or both. (p. 687.)

FALSE PRETENSES — Fraudulent Check. — Under section 4463, B. & C. Comp., a check is an order on a bank purporting to be drawn upon a deposit of funds, and the drawer engages that on presentation it will be paid; and therefore when a check is given with the fraudulent and felonious purpose of obtaining the property of another, the drawer knowing that it will not be paid, the offense of obtaining property by false pretenses is complete, although the drawer made no other representation in reference to it. The giving of such a check is of itself as much of a representation as an oral declaration to that effect. (p. 688.)

Allen E. Reames, prosecuting attorney, Clarence L. Reames, deputy, and Andrew M. Crawford, attorney general, for the state.

No appearance for the defendant.

157 BEAN, C. J. The defendant was indicted for obtaining money by false pretenses, the false pretense being a check, drawn by himself to his order on a bank, which he indorsed, and fraudulently and feloniously presented and delivered to one Orr, with intent to defraud, knowing at the time that he had no funds in the bank for payment of such check, and that it was worthless. A demurrer to the indictment was sustained, on the ground that it does not allege that any false or deceitful means were used by defendant to induce Orr to

accept the check, such as representing that he had money or credit at the bank, or that it would be paid on presentation, or the like.

1. In support of the ruling it is argued that the mere drawing and passing of a check on a bank in which the drawer has no funds or credit is not a false pretense, although it may be done for the purpose of fraudulently obtaining property or money from another, and with the knowledge of the drawer that the check is worthless and will not be paid. A false pretense is a "representation of some fact or circumstance, calculated to mislead, which is not true" (Anderson's Law Dictionary, page 808); or, as Mr. Bishop defines it, "a false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value": 2 Bishop's Criminal Law, sec. 415.

2. The pretense need not be in words, but may be implied from the acts of the party. The gist of the offense, against which the statute is directed, is obtaining money or property of another by deceit, fraudulently and feloniously superinduced by the beneficiary; and, when one by his acts intentionally creates a belief, as to an existing fact, which is false, with the intent to deprive another of his property, and does so, it cannot matter whether the erroneous belief was induced by words or acts, or both. Mr. Wharton (2 Wharton's Criminal 158 Law, ninth edition, sec. 1170) says: "The conduct and acts of a party will be sufficient, without any verbal assertion." He cites several cases in support of the text, among which is that of a person who assumed the garb of an Oxford student, and by such garb and his conduct represented himself to be a student of the university, and so obtained funds. It was held that the false pretense was complete, although not a word passed as to his status. So, also, it was held to be a false pretense when a prisoner obtained money from an officer of a postoffice by indorsing and presenting to her, for payment, an order in favor of another person, although he did not make any false declaration or assertion to obtain the money: Rex v. Story, R. R. C. C. 80. And again, the offering of a worthless bill in satisfaction of an obligation is within a statute providing for the punishment of anyone who, by false pretense, with intent to commit a fraud, obtains the property or money of another, although no representations are made as to the value of the bill: Commonwealth v. Beckett, 119 Ky. 817, 115 Am. St. Rep. 285, 84

S. W. 758, 68 L. R. A. 638. In ruling upon this case, the court said that the mere offering of the bill in payment of the obligation "amounts to an assertion or representation by conduct, which may be as efficacious to convey an idea, or to constitute the basis of a reasonable belief, as though exact and appropriate words had been used. Words are used to express ideas. Signs might be used instead. Conduct that conveys necessarily the same idea, and intended to do so, is, by a substitute for the words or signs, expressive of it. We have no doubt but that the use of a worthless bill, pretending it is valid, and with the intent to defraud, is a false token under the statute."

3. Now, a check is an order on a bank purporting to be drawn upon a deposit of funds, and the drawer engages that on presentation it will be paid: B. & C. Comp., sec. 4463, [159] The giving of such an instrument is therefore as much of a representation that the drawer has money or credit with the bank as if he had made an oral statement or declaration to that effect. And when the check is given with the fraudulent and felonious purpose of obtaining the property of another, with knowledge of the drawer that he has neither money nor credit at the bank, and that the check will not be paid, it is within the statute, although the drawer made no other representation in reference thereto. It was so ruled in the early case of Rex v. Jackson, 3 Camp. 370. And the doctrine has been approved by the courts and text-writers, and it is generally agreed that it is not necessary that the drawer should have told the person to whom he gave the check that he had funds or credit in the bank: 12 Am. & Eng. Ency. of Law, 2d ed., 838; Rapalje on Larceny, sec. 402; 2 Wharton on Criminal Law, sec. 2107; McClain on Criminal Law, sec. 674; Underhill on Criminal Evidence, sec. 444; People v. Donaldson, 70 Cal. 116, 11 Pac. 681; People v. Wasservogle, 77 Cal. 173, 19 Pac. 270; Commonwealth v. Drew, 19 Pick. 179; note to Barton v. People, 25 Am. St. Rep. 375-380. The Texas cases, Ayers v. State, 37 Tex. 1, 38 S. W. 792, Brown v. State, 37 Tex. 104, 66 Am. St. Rep. 794, 38 S. W. 1008, and Blackwell v. State, 41 Tex. Cr. 104, 96 Am. St. Rep. 778, 51 S. W. 919, which apparently hold a contrary doctrine, are under a statute different from ours, and in the construction of which the courts of that state hold that, before a defendant can be convicted, there must be a distinct and certain representation of an existing fact, and the indictment must show such certain and distinct representation of

the fact, either past or present: Martin v. State, 36 Tex. Cr. 125, 35 S. W. 976. From our examination of the question we are constrained to believe that the court below was in error in sustaining the demurrer.

Judgment reversed.

The Crime of Obtaining Money Under False Pretenses is the subject of a note to Barton v. People, 25 Am. St. Rep. 378. As to whether the offense is committed by drawing checks without funds in the bank, see Blackwell v. State, 41 Tex. Cr. 104, 96 Am. St. Rep. 778; Brown v. State, 37 Tex. Cr. 104, 66 Am. St. Rep. 794; State v. McCormick, 57 Kan. 440, 57 Am. St. Rep. 341. Where one party to a horse trade agrees to pay the other seven and one-half dollars to boot, and accordingly, with intent to defraud, hands him a ten dollar Confederate bill, saying, "Give me two dollars and a half; here is a ten dollar bill," whereupon the other receives the bill, supposing it to be United States currency, and passes two dollars and a half back as change, the offense of obtaining money under false pretenses is committed, although the bill may not be calculated to deceive a person of ordinary prudence and discretion, for the law protects the unwary and even the "foolish": Commonwealth v. Beckett, 119 Ky. 817, 115 Am. St. Rep. 285.

STATE v. YOUNG.

[52 Or. 227, 96 Pac. 1067.]

ASSAULT AND BATTERY—Plea of Not Guilty—Burden and Details of Proof—Admissions by Prisoner.—Section 1370, B. & C. Comp., provides that a plea of not guilty controverts and is a denial of every material allegation in an indictment, and, therefore, where the charge is an assault with a dangerous weapon by shooting the prosecutor, and the defendant admits the assault by shooting and pleads a justification, the burden nevertheless of proving every material element of the charge beyond reasonable doubt is upon the state. Evidence of the number and character of the gunshot wounds in such case is both relevant and admissible. (pp. 690, 691.)

CRIMINAL LAW—Evidence.—Admissions of facts by a prisoner do not render inadmissible evidence of those facts relevant to the issue. (p. 691.)

ASSAULT AND BATTERY—Evidence—Justification.—Where the indictment charges an assault with a dangerous weapon, and the defendant seeks to justify on the ground that the prosecutor was about to commit a felony on defendant's wife, he cannot give evidence that the prosecutor's moral character is bad, that he is a disturber of the family relations of others as well as of the defendant, that he had made statements to the defendant's wife from which defendant believed he intended to seduce her, and that at the time of making the assault he believed that if his wife were in the prosecutor's presence that night she would be in imminent danger from the prosecutor, there being no evidence to show that the prosecutor had made any

threats or offered any violence to the defendant or to his wife, who was not present at the time of the assault. (p. 692.)

ASSAULT AND BATTERY—Self-defense—To what Extent Warranted.—By section 1654, subdivision 1, B. & C. Comp., resistance to the commission of crime may be lawfully made by the party about to be injured, or by any other person in his aid or defense, when it is necessary to prevent a crime against his person, to the extent (under section 1757 of the same subdivision) of killing one about to commit a felony upon such party or his wife. Armed with these provisions, it is not only the right, but the duty, of a husband to resist an assault on his wife and to use reasonable force to that end, even to take the life of the assailant to prevent the commission of such felony if the circumstances are such that the wife had the right to use the force in her own defense, the right to defend another being no greater than such other has to defend himself. (pp. 692, 693.)

HOMICIDE—Manslaughter.—A husband is not justified in killing, or attempting to kill, another to prevent the seduction or debauching of his wife by artifice or fraud, and even where the adultery is by consent of the wife, and the husband catches the offender in flagrante delicto and kills him, it is manslaughter. (pp. 692, 693.)

CRIMINAL LAW.—Adultery is a Felony by statute, but not upon the party intending to voluntarily participate in it and who is particeps criminis. (p. 694.)

HOMICIDE.—Justification for Slaying in Self-defense or the defense of a wife or daughter must be founded on transactions occurring in respect to parties then and there present and not to such as merely threaten danger to one absent; and where it is in defense of the wife's chastity, it must be to prevent not a past offense or future attempt but a present and impending violation thereof, and reasonably necessary to prevent it. (p. 694.)

CRIMINAL LAW—Appeal.—The Bill of Exceptions must contain such objections to instructions and to remarks of the attorneys as it is desired to bring under the notice of the court of appeal, otherwise they cannot be considered. (p. 694.)

Cicero M. Idleman and William R. McGarry, for the appellant.

Andrew M. Crawford, attorney general, and Isaac H. Van Winkle, assistant attorney general, for the state.

229 SLATER, C. 1. Upon the trial defendant admitted assaulting Van Dran by shooting and wounding him, and pleaded justification thereof. The theory of the defense was that defendant believed Van Dran was about to commit a felony upon the former's wife, by committing adultery with her, and to prevent the accomplishment of such unlawful purpose, and to protect her and their children, as well as himself, from infamy and disgrace, it was necessary to make the assault.

The first assignment of error relied upon to reverse the judgment, is the admission of the testimony of two physicians as to the number and character of the gunshot wounds suf-

fered by Van Dran as the result of defendant's assault. The objection was that the extent of the injury done and the manner in which it was done became incompetent and immaterial, upon defendant having admitted the shooting and pleaded justification. The argument is that, if the defendant was warranted in making the assault and attempting to take the life of his adversary, the particulars relating to the character of the wounds, their extent, and the point at which the missiles entered or departed from the body have nothing to do with the question of defendant's guilt, and could serve no other purpose than to prejudice the jury against defendant. But a plea of not guilty was entered to the charge, and that controverts, and is a denial of, every material allegation in the indictment: B. & C. Comp., sec. 1370.

2. The burden of proving each material element of the charge beyond a reasonable doubt was, therefore, upon the state, and the right to offer and have received evidence relevant and material to the issue cannot be taken away by the defendant admitting or offering to admit that the part of the charge sought to be proven [230] is true. "Evidence of facts which in themselves are relevant to the guilt of the accused are not inadmissible because he admits or offers to admit that such facts are true": 12 Cyc. 391.

Thus the fact that defendant, in a prosecution for homicide, admits the killing, does not render inadmissible the weapon which he used (State v. Jones, 89 Iowa, 182, 56 N. W. 428), or the clothing worn by the deceased (State v. Winter, 72 Iowa, 627, 34 N. W. 475); and the fact that defendant in a prosecution for forgery admits that certain notes are forged, and that he passed them, does not render the notes inadmissible (Commonwealth v. Miller, 3 Cush. (Mass.) 243). The evidence offered was material and relevant: State v. Remington, 50 Or. 99, 91 Pac. 473.

3. The evidence admitted without objection tended to show that Van Dran and the defendant each conducted a saloon about four doors apart, in the same block on Washington street, in the city of Portland, in this state; that they had been acquainted with each other for a number of years, and had been on friendly terms; that a few minutes before the making of the assault, and about half-past 12 o'clock at night, the defendant, who for some time had been living apart from his wife, on account of domestic troubles claimed to have been caused by Van Dran, saw his wife passing his place of business and going up the street toward the former's place of

business, and, secretly following her, saw her go into a stairway leading to some private apartments over Van Dran's saloon, which rooms the latter maintained; that, supposing his wife had gone upstairs to these rooms, defendant went into the saloon, met Van Dran, had a friendly greeting, took a drink with him, and then asked him to step outside, saying he wished to speak to him; that on reaching the sidewalk defendant accused Van Dran of having made some statements derogatory of the former's treatment of his wife, but [231] the latter disclaimed having done so, and in response to a call that he was wanted inside, Van Dran returned to the room, defendant following; that when he got inside, six or eight feet from the door, defendant fired a pistol at him, wounding him in the arm, and immediately afterward fired two other shots into his body while he was behind the bar.

Defendant offered to show that Van Dran's moral character was bad; that he had interfered with and disturbed the family relations of others, of all of which matters defendant had been informed; that Van Dran had interfered with defendant's domestic relations, resulting in an estrangement and the latter's separation from his wife; that he had been guilty of certain acts toward defendant's wife, and had made certain declarations to her, from which the inference might fairly be drawn that he was attempting to seduce her; and that, with such knowledge, defendant, at the time of making the assault, was acting under the belief that his wife, if found in Van Dran's presence or in his place of business, was in imminent danger, and that in fact Van Dran was intending to commit the crime of adultery with her that night, to prevent which he made the assault—all of which, on objection by the state, was rejected, and on this account error is assigned.

It is not claimed, nor was there any evidence tending to show, that Van Dran had offered or attempted any personal violence to the defendant at the time of the assault, or to the person of defendant's wife, who it is admitted was not present; nor had he made any threats that he would do any violence to either of them. But he attempts to justify the assault by the claim that it was necessary to prevent Van Dran from committing adultery with defendant's wife that night, which he believed the former was seeking to accomplish by artifice and the active co-operation of the wife.

4. There are some circumstances under which an act that would otherwise be a crime is justifiable. In such [232] case no crime is committed. By section 1654, subdivision 1, B. &

C. Comp., resistance to the commission of crime may be lawfully made by the party about to be injured, or by any other person in his aid or defense when it is necessary to prevent a crime against his person; and section 1757, subdivision 1, B. & C. Comp., justifies the killing of a human being when done by any person to prevent the commission of a felony upon such person or upon his wife. By virtue of these provisions of the statute it is not only the right, but it is the duty, of the husband to resist an assault about to be made upon his wife, and to use such reasonable force as may be necessary to that end; and, if necessary to prevent the commission of a felony upon his wife, the husband is justified even in taking the life of her assailant. The circumstances, however, must be such that the wife had the right to use the force in her own defense; for the right to defend another is no greater than such other person has to defend himself: State v. Melton, 102 Mo. 683, 15 S. W. 139. "A person has a right to use violence in defense of another only when the imperiled person would have been justified in using it in his own defense": Wharton on Homicide, 3d ed., 776.

5. Whatever may have been the state of defendant's mind as to a belief that Van Dran was intending or about to commit adultery with Mrs. Young that night, and whether such belief was well founded in fact or not, was wholly immaterial, and could in no way aid him in his defense. Mrs. Young was not present at the time of defendant's assault upon Van Dran, and therefore she could not then have been the subject of an assault to commit a felony by the latter, or in imminent danger of one. She was not under duress by Van Dran, but, on the contrary, was voluntarily acting in concert with him, for she testifies that she went to the building in response to a telephone message from him. A husband is not justified in killing or attempting to kill another [233] to prevent the seduction or debauching of his wife by artifice or fraud: Clarke & Marshall on Law of Crimes, sec. 288. But if the adultery is by the consent of the wife, the husband, taking the offender even in the act and killing him, is guilty of manslaughter: Kerr's Law of Homicide, 12; Clarke & Marshall on Law of Crimes, secs. 260e, 275. "A husband or father may justify killing a man who attempts a rape upon his wife or daughter, but not if he takes them in adultery by consent; for the one is forcible and felonious, but not the other": 4 Blackstone, Lewis' ed., 181. There was no error in excluding the proffered testimony.

6. The defendant requested certain instructions, which were denied. They are too extensive to be set forth here; but it is sufficient to say that they contain the same erroneous theory urged by his counsel for the admission of his testimony, which was rightly rejected. They include the proposition that, because the state makes adultery a felony, if the defendant believed that Van Dran was about to attempt to commit such crime with defendant's wife, and that the accused feared, and had reason to fear from the acts, language or demonstration of Van Dran, that he was about to carry his design into execution at, or shortly after, the time of the assault, and acting under this apprehension he made the assault, the law would justify him. But, though adultery is a felony under the statute, it is not a felony upon the party intending to voluntarily participate therein. She is particeps criminis, and not one upon whom an assault to commit a felony is being made.

7. Such circumstances, therefore, furnish no basis for a husband to invoke the principle of a necessary assault in defense of his wife. So, too, "statutes with reference to homicide, justifiable because committed in defense, relate to transactions occurring in respect to parties present at the time and place of its occurrence, and have no application to a case in which the danger is to an [234] absent person": Wharton on Homicide, 3d ed., 772. And homicide in defense of the chastity of a wife, to be justifiable, must be to prevent a present and impending violation thereof, and reasonably necessary to prevent it, not a past offense or future attempt: Wharton on Homicide, secs. 769-773.

8. Some complaint is made of the instructions as given, and also of some remarks claimed to have been made by the deputy prosecuting attorney while addressing the jury; but we find no objections or exceptions in the bill of exceptions covering either of these matters, and therefore they cannot be considered.

Finding no error, the judgment must be affirmed.

ASSAULT OR HOMICIDE TO PREVENT ADULTERY.

I. Notes on the Subject, 694.
II. To Prevent Adultery.
a. In Flagrante Delicto, 695.
b. Past Adultery, 696.
c. The Discovery, 696.
III. In Defense of the Wife's Chastity, 697.

I. Notes on the Subject.

Exhaustive notes have already been published on this subject generally to the cases of State v. Yanz, 92 Am. St. Rep. 214, and State

v. Gordon, 109 Am. St. Rep. 804, and the present note is limited to those cases in which violence, to the extent of slaying another, may be excused on the grounds of the prevention of adultery or justified in the defense of the chastity of the wife, bearing always in mind the boundary line between justifiable and excusable homicide—that of the slaying to prevent adultery comes under the latter, and the slaying to prevent rape or other felony under the former classification.

II. To Prevent Adultery.

a. In Flagrante Delicto.—The killing of an adulterer, deliberately and upon revenge, is murder; but where a man finds another in the act of adultery with his wife and kills him or her in the first transport of passion, he is only guilty of manslaughter. The reason for this rule of law being the existence of an uncontrollable passion, naturally induced, it must logically follow that it suffices if such passion has been so induced in the mind of the slayer by the sight of his wife in the embrace of the adulterer: Jones v. People, 23 Colo. 276, 47 Pac. 275; State v. Yanz, 74 Conn. 177, 92 Am. St. Rep. 205, 50 Atl. 37, 54 L. R. A. 780; Sawyer v. State, 35 Ind. 80; State v. Holme, 54 Mo. 153; State v. France, 76 Mo. 681; State v. Young, 52 Or. 227, ante, p. 689, 96 Pac. 267, 18 L. R. A., N. S., 688.

The rule at common law is that if a man catches another in the act of adultery with his wife and slays him on the spot, the crime is extenuated to manslaughter; such provocation, in legal contemplation, being sufficient to produce that brevis furor which for the moment unsettles reason: Reed v. State, 62 Miss. 405. "If a man" says Blackstone, "take another in the act of adultery with his wife and kills him directly, upon the spot, though this was allowed by the laws of Solon, as likewise by the Roman civil law (if the adulterer was found in the husband's own house) and also among the ancient Goths, yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter. It is, however, the lowest degree of it, and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation": 4 Blackstone's Commentaries, 191.

"In the act of adultery" does not mean in flagrante delicto, nor that the husband must stand by and witness the actual copulative conjunction of the guilty parties. If he sees them in bed, or the man leaving the bed, or finds them together in such position as to indicate with reasonable certainty to a rational mind that they had just then committed the adulterous act, it will be sufficient to satisfy the requirements of the law in this regard; and if he then and there strikes a mortal blow at the man, his offense amounts to manslaughter only; the law from the earliest ages, recognizing and considering the passions and frailties of man, in its mercy has said that deliberation cannot be predicated of the deeds of a man situated as would be the outraged husband at the moment of the homicide: State

v. Pratt, Houst. C. C. 265; Mays v. State, 88 Ga. 399, 14 S. E. 560; Rowland v. State, 83 Miss. 483, 35 South. 826, 1 Ann. Cas. 185; State v. Young, 52 Or. 227, ante, p. 689, 96 Pac. 1067, 18 L. R. A., N. S., 688; Price v. State, 18 Tex. App. 474, 51 Am. Rep. 323.

b. Past Adultery.—And therefore, past adulterous intercourse affords no such protection to the slayer. The law clearly is that "no suspicion, however vehement, no belief, however well founded, no knowledge, however positive and absolute, that adulterous intercourse had previously existed can have the effect of excusing or justifying the killing, or of mitigating or reducing the crime below the grade of murder. If a husband deliberately killed an adulterer under the impulse of anger, jealousy, hatred, or revenge, created or incited by the belief of such previous adultery, such killing was not only without adequate provocation, but was willful and malicious, and constituted the crime of murder": State v. Powell, 5 Penne. (Del.) 24, 61 Atl. 966.

And the cases are numerous that though the position of the injured husband may command a certain share of sympathy, he is not justified in taking vengeance in his own hands. In the eye of the law the killing of the adulterer can only be regarded as unjustifiable, and therefore murder.

The following cases are illustrative of the principle: The deceased had boasted of his improper relations with the prisoner's wife, and admitted them to him, and the prisoner went home, got his pistol and waited for the deceased to come out of church and killed him. These facts authorized no theory other than murder: Perry v. State, 102 Ga. 365, 30 S. E. 903; Bugg v. Commonwealth, 18 Ky. Law Rep. 844, 38 S. W. 684; where, after learning that the deceased had seduced the prisoner's wife, the prisoner twice met him, and on a third interview killed him, the prisoner was not entitled to have the charge reduced to manslaughter: Hardcastle v. State, 36 Tex. Cr. 555, 38 S. W. 186; where the husband slew the adulterer at the second meeting after knowledge: Orange v. State, 47 Tex. Cr. 337, 83 S. W. 385; where the prisoner having learned on a Saturday that on the day previous the prisoner had committed an offense on his, the prisoner's, wife, shot deceased on the Monday following: Perry v. State, 102 Ga. 365, 30 S. E. 903. The question of "cooling time" is not involved where the killing is in cold blood and deliberately planned: Perry v. State, 102 Ga. 365, 30 S. E. 903; State v. Botha, 27 Utah, 289, 75 Pac. 731. The law will not permit the husband to say that he slew the defiler of his wife in a sudden heat of passion after deliberating upon it for twenty-four hours: People v. Halliday, 5 Utah, 467, 17 Pac. 188; Price v. State, 18 Tex. App. 474, 51 Am. Rep. 322.

c. The Discovery.—The exception from the rule expressed in State v. Powell, ante, p. 696, as to past adulterous intercourse being adequate cause, is that if the killing occurs as soon as the fact of an illicit connection is discovered, and under the immediate influence of the passion arising in the mind from such information, and that such

passion was sufficient to render the accused's mind incapable of cool reflection, the crime is properly charged as manslaughter: Richardson v. State, 28 Tex. App. 216, 12 S. W. 870; Tucker v. State (Tex. Cr. App.), 50 S. W. 711; Hopkins v. State (Tex. Cr. App.), 50 S. W. 381; Finch v. State (Tex. Cr. App.), 70 S. W. 207; Canister v. State, 46 Tex. Cr. 221, 79 S. W. 24. And it does not affect the question whether the report of the adultery is true or not if the accused believed it to be true: Canister v. State, 46 Tex. Cr. 221, 79 S. W. 24.

III. In Defense of the Wife's Chastity.

The law governing the justification of slaying another appears to be that a man may oppose force to force in defense of his person, or his family, against one who endeavors by surprise or violence to commit a felony, the intent to commit which being apparent, even though it should afterward turn out that the real intention was less criminal or even not criminal at all. This intention is to be collected from the circumstances about each case, and lastly the justification is to be buttressed by the imminence of the danger, and the species of resistance used must be necessary to avert it: United States v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738. The right to repel force by force is founded upon the law of nature, which is not superseded by the law of society: United States v. Outerbridge, 5 Saw. 620, Fed. Cas. No. 15,978.

Imminent danger means immediate danger to be prevented on the instant, and therefore not to be warded off by cries for help or the police: United States v. Outerbridge, 5 Saw. 620, Fed. Cas. No. 15,987. The rule more concisely put is that homicide in defense of the wife's chastity, to be justifiable, must be to prevent a present and impending violation thereof and reasonably necessary to prevent it, not a past offense nor a future attempt: State v. Young, 52 Or. 227, ante, p. 689, 96 Pac. 1067, 18 L. R. A., N. S., 688.

Applying the rule so laid down to the subject of this subdivision it is not only the right, but the duty, of the husband to resist an assault about to be made upon his wife, and to use reasonable force therein, necessary to that end, even to taking the life of the assailant. To this there is the qualification that the circumstances must be such that the wife had the right to use the same degree of force in her own defense: State v. Young, 52 Or. 227, ante, p. 689, 96 Pac. 1067, 18 L. R. A., N. S., 688; for the right to defend another is no greater than such other person has to defend himself: State v. Melton, 102 Mo. 683, 15 S. W. 139.

Where the evidence showed that the deceased came to the accused's house armed, and, after breaking in the door, attempted by force and threats to compel the accused's wife to leave her husband and accompany him, it was the duty of the trial judge to instruct the jury that if the accused had reasonable ground for thinking that the deceased was trying to abduct his wife, he was justified, up to the point of killing, in taking steps necessary to prevent it. The right to

defend the person of his wife was greater and more sacred than that of defending his "castle," and he was justified in resisting the attempt to abduct or by menace or force to take her for carnal or other purposes: Saylor v. Commonwealth, 97 Ky. 184, 30 S. W. 390.

In Georgia the principle is carried further, to even an affianced wife, and an instruction was upheld that if the jury believed the killing was done by the accused to prevent the debauching of the intended bride, and that she was a virtuous woman, it was for them to say whether this stood upon the same footing of reason and justice as other instances enumerated in the laws; and further, that even if she were a debauched woman, and the accused, her intended husband, did not know it, then her lewdness could not be taken into account against him: Futch v. State, 90 Ga. 472, 16 S. E. 102.

In Mississippi, where the statute provides that homicide is justifiable when committed in the lawful defense of a wife, when there shall be a reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished, the section has received the construction that the danger referred to is not limited to danger to life, but a just apprehension of immediate danger of the commission of a felony, or of some great personal injury or bodily harm: Staten v. State, 30 Miss. 619.

The majority of the cases, however, establish the rule almost by necessity, by negative and qualified rulings, because the number of cases of immediate prevention of offenses is very much less than those in which the aggrieved husband learns later of the rape or attempt on his wife's chastity.

Where the accused knew on the night of the homicide that the deceased had visited his daughter, threatened to kill him, went off some distance to procure a pistol, and, when the deceased had left his house and proceeded some distance therefrom, shot him down, and there was no evidence to show that the killing was to prevent further illicit intercourse with the daughter, the court properly refused an instruction justifying the slaying for such purpose: Bone v. State, 86 Ga. 108, 12 S. E. 205.

The act of a husband in going into a field where a man is at work and killing him, because he has committed adultery with the slayer's wife, when there is no necessity for the killing to prevent a future act of adultery is not justifiable homicide: Jackson v. State, 91 Ga. 271, 44 Am. St. Rep. 22, 18 S. E. 298. This case was followed in Farmer v. State, 91 Ga. 720, 18 S. E. 987, which emphasized the principle that the killing of another because of a past attempt to debauch the slayer's wife is not justifiable homicide.

Numerous cases are to the same effect, notably State v. Samuel, 3 Jones, 74, 64 Am. Dec. 596, and note; Price v. State, 51 Am. Rep. 328-330; People v. Pierson, 2 Idaho, 76, 3 Pac. 688; People v. Cook, 39 Mich. 236, 33 Am. Rep. 380, in which the deceased had administered drugs to the defendant's sister in the unaccomplished endeavor to effect her seduction; and State v. Young, 52 Or. 227, ante, p. 689,

96 Pac. 1067, 18 L. R. A., N. S., 688, in which it is laid down that a husband is not justified in killing another to prevent the seduction or debauching of his wife by artifice or fraud.

The Revised Statutes of Utah, section 4168, which provide inter alia that homicide is justifiable "when committed in a sudden heat of passion caused by the attempt of the deceased to commit a rape upon or to defile the wife of the accused, or when the defilement has actually been committed," do not, however, protect a defendant who has had sufficient time for deliberation before killing the deceased, and he cannot rely for justification upon rumors heard or appearances observed at any distance of time before he commits the fatal act: State v. Botha, 27 Utah, 289, 75 Pac. 731.

STATE v. WAYMIRE.

[52 Or. 281, 97 Pac. 46.]

CRIMINAL LAW—Statutes—Offenses Against Good Morals.—Section 1930, B. & C. Comp., was intended by its language to cover such offenses against the public peace, the public health, and the public morals as were not elsewhere made punishable by the code, and which were known at common law as "indictable nuisances." (p. 702.)

CRIMINAL LAW—Offenses Against Good Morals—Essentials. The Common-law Definition is that whatever grossly outrages public decency and tends to corrupt society is "an offense against good morals," and is punishable as a nuisance. The crime need not be a continuous one, but may consist of a single act, and need not affect the public at large, but only such as come in contact with it. (p. 703.)

CRIMINAL LAW—Information—Sufficiency.—An information which charges a male and a female defendant with having, in pursuance of a conspiracy for that purpose, made a plot to get a certain man, in an indecent and compromising situation with the female defendant in a public place, and, while in such position, to direct the attention of a large concourse of citizens to them, and to an alleged attempt by such man to ravish the female defendant, thereby making a public exposition of their indecent and compromising attitude, sufficiently alleges an act which openly outraged public decency and was injurious to good morals within the meaning of section 1930, B. & C. Comp., rendering such persons liable to punishment. (pp. 703, 704.)

CRIMINAL LAW—Information—Duplicity.—An information which alleges that a male and a female defendant, in conspiracy for the purpose, made a plot to get a certain man in an indecent and compromising situation with the female defendant in a public place, and while in such position to direct the attention of a large concourse of citizens to them, and to an alleged attempt by such man to ravish the female defendant, thereby making a public exposition of their indecent and compromising attitude, and further alleges that in pursuance of such conspiracy the male defendant, on hearing the outcry of his codefendant, broke open the door of the room in which she and the man were, and directed the attention of the assembled

citizens thereto, etc., charges only one offense, the second allegation constituting a part of the crime charged and not an independent offense. (p. 704.)

CRIMINAL LAW—Trial—When Ended.—A trial is not concluded until the verdict is received and recorded. (p. 704.)

CRIMINAL LAW—Trial.—The Jury may be Polled on the request of either party after the verdict is given and before it is filed. (B. & C. Comp., sec. 150.) (p. 704.)

CRIMINAL LAW—Trial—Polling of the Jury.—A defendant, charged with a misdemeanor, has a right to be present at the rendition of the verdict, in person or by counsel if so desired, for the purpose of polling the jury, and if he is in custody or is otherwise deprived of this right without his fault, the verdict cannot properly be taken. (B. & C. Comp., secs. 150, 1378.) (p. 704.)

CRIMINAL LAW—Trial—Polling of the Jury—Waiver.—The rights conferred by section 1378, B. & C. Comp., upon defendants charged with misdemeanor to be present in person or by counsel at the rendition of the verdict may be waived expressly or by implication; and where a defendant so charged is on bail, but present throughout the trial, and, while the jury is deliberating, voluntarily departs from the court without leave and before its adjournment, he will be deemed to have waived his rights, and the verdict may be legally received in his absence. (pp. 704, 705.)

CRIMINAL LAW—Trial—Presence of Defendant—Waiver.—Where a defendant charged with misdemeanor has waived his right of presence at the rendition of the verdict, the failure of the deputy sheriff to intimate to him when the jury were ready to report is immaterial to the legal rendition of the verdict in absentia. (p. 705.)

Seneca Fouts, for the appellant.

George J. Cameron, district attorney, Dan J. Malarkey, John Manning and Richard W. Montague, for the state.

282 BEAN, C. J. The charging part of the information is as follows: "That during all the times hereinafter mentioned, the city of Portland, in the county of Multnomah, and state of Oregon, was a municipal corporation, existing in said state. That Harry Lane was at all of the times hereinafter mentioned the duly elected, qualified and acting mayor of said city of Portland. That on the twenty-sixth day of September, A. D. 1907, in the said city of Portland, county and state aforesaid, the said Belle Waymire and the said E. E. Radding, then and there willfully and unlawfully conspiring with each other, committed an act which then and there grossly injured the person and property, to wit, the reputation, of another, and which then and there grossly disturbed the public peace, and which then and there openly outraged the public decency, and was then and there injurious to public morals, to wit: That the said Belle Waymire and E. E. Radding then and there so willfully conspiring, confederating, and agreeing thereto, with the intent then and there to

defame [283] and blacken the reputation of him, the said Harry Lane, as aforesaid, and to falsely make it appear to the public that the said Harry Lane was then and there committing a crime, to wit, the crime of assault with intent to commit rape by the said Harry Lane as aforesaid, upon the person of her, the said Belle Waymire, by force and arms and against her consent, the said Belle Waymire did then and there in a public place, to wit, in the Hamilton Building, in the city of Portland, set upon him, the said Harry Lane, and grasp and hold his person, and tear and dishevel his clothing, and seek to indecently expose his person, and did make a loud outcry and falsely accuse to the persons who were then and there assembled at said public place as aforesaid, the said Harry Lane of then and there attempting to forcibly ravish her, the said Belle Waymire, against her consent. And the said Belle Waymire and the said E. E. Radding, so unlawfully and willfully conspiring together thereto as aforesaid, the said E. E. Radding, in pursuance of the said conspiracy, confederation and agreement, and with the intent as aforesaid, did then and there willfully and unlawfully lie in wait in said public place, to wit, in said Hamilton Building, in said city of Portland, and did then and there, upon hearing the said outcry of the said Belle Waymire, break and shatter the door of the said Harry Lane's office in said building, in which the said Belle Waymire and he, the said Harry Lane, then and there were, and then and there attracted thereby a concourse of the citizens at said time and in said public place, who then and there witnessed the said pretended assault in said public place and heard the said accusation, and that the said acts of said Belle Waymire and of the said E. E. Radding, so unlawfully and willfully conspiring together in said public place, and with the intent as aforesaid, was then and there an act which grossly injured the person and property, to wit, the reputation, of the said Harry Lane as aforesaid, and which then and there grossly disturbed the public peace of the city of Portland, and which then and there openly outraged the public decency of the people of the said city of Portland and state of Oregon, and was then and there injurious to the public morals of the said city and state, and against the statutes in such cases made and provided."

[284] The defendants were arrested and duly admitted to bail pending trial. They subsequently demurred to the information on the ground that the facts stated do not constitute a crime and that more than one crime is charged therein. The

demurrer was overruled, defendants pleaded not guilty, and a trial was had. The cause was submitted to the jury, and they retired for deliberation about 5 o'clock in the afternoon; the court at the time notifying counsel to have the defendants in court to receive the verdict, if one should be rendered. The jury returned a verdict of guilty about one hour later, and neither of the defendants, nor their counsel, were in court at the time, and the verdict was received in their absence. A motion for a new trial was made, and defendants were sentenced to imprisonment in the county jail, from which judgment they appeal, assigning as errors the overruling of the demurrer to the indictment and the receiving of the verdict in the absence of themselves and their counsel.

1. It is contended that the acts charged in the indictment do not constitute a crime within the meaning of the statute under which the information was filed, and which provides "that if any person shall willfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, such person, if no punishment is expressly prescribed therefor [285] by this code, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than six months, or by fine not less than fifty nor more than two hundred dollars." This statute was intended by its language to cover offenses against the public peace, the public health, and the public morals, not elsewhere made punishable by the code, and which were known at common law as "indictable nuisances": State v. Bergman, 6 Or. 341; State v. Nease, 46 Or. 433, 80 Pac. 897; State v. Ayres, 49 Or. 61, 124 Am. St. Rep. 1036, 88 Pac. 653, 10 L. R. A., N. S., 992. It is true that the word "nuisance" does not appear in the statute; but, as said in State v. Nease, 46 Or. 433, 80 Pac. 897, "the language used is essentially descriptive of the general character of such offenses, and quite equivalent thereto." We are, therefore, required to resort to the common law to ascertain what act "grossly outrages public decency and is contrary to good morals," as applied to criminal prosecutions.

2. There was a time when it was thought that the subject of morals, public and private, belonged exclusively to the ecclesiastical courts, and therefore but little mention is made in the common-law reports of punishments for offenses contra bonos mores until the reign of Charles II, when Sir Charles

Sedley was indicted and severely punished for standing naked on a public balcony in the city of London: 1 Keble, 620; 17 Howell's State Trials, 154. This case was subsequently frequently cited, often doubted, and sometimes followed, until Rex v. Delaval, 3 Burr. 1438, which was a prosecution for conspiracy to place a young woman in the possession of a man for prostitution, and publicly to exhibit her as a kept mistress, when Lord Mansfield put the question at rest by holding that the common-law courts, being custos morum of the people, had jurisdiction of all offenses contrary to good morals and public decency, citing in support of his conclusion the opinion of Lord Hardwicke, who ordered the prosecution of a man for formerly assigning [286] his wife to another as "being grossly against public decency and public morals." It is, therefore, now settled that acts of public indecency, such as lewdness (Wharton on Criminal Law, 1432), exhibiting obscene pictures (Commonwealth v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632), standing naked on a balcony in a public place (1 Keble, 620), conspiring to place a young woman in possession of another for purposes of prostitution (Rex v. Delaval, 3 Burr. 1438), casting a dead body into a river (Kanavan's Case, 1 Greenl. (Me.) 226), the publication of an indecent book (2 Strange, 789), and the like, are indictable and punishable at common law because they outrage public decency and are injurious to good morals. Mr. Chief Justice Tilghman says, in Commonwealth v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632, that the true principle upon which this doctrine rests is that whatever tends to corrupt society is a breach of the peace and an offense against good morals, and the courts, being guardians of the public morals, have jurisdiction thereof.

3. The authorities cited show that the crime need not be a continuous one, but may consist of a single act, and that it need not affect the public at large, but only such as come in contact with it. Now, applying these principles to the present case: The defendants are charged by the information of having, in pursuance of a conspiracy for that purpose, laid a plot or plan to get the prosecuting witness in an indecent and compromising situation with one of the defendants in a public place, and, while in such position, to direct the attention of a large concourse of citizens to them, thereby making a public exposition of their indecent and compromising attitude. This, we think, if true, was an act which openly outraged pub-

lic decency, was injurious to good morals, and is within the statute.

It is claimed that the indictment charges more than one crime, because it alleges that the defendant Radding broke and shattered a door of the prosecuting witness' [287] office; but this was merely an act committed in pursuance to the general purpose of the conspiracy and in furtherance thereof, constituting a part of the crime charged, and not an independent one.

4. Error is also assigned based on the action of the court in receiving the verdict in the absence of the defendants and their counsel. The statute (B. & C. Comp., sec. 1378) provides that if the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel, and (section 150) that after the verdict is given and before it is filed the jury may be polled on the request of either party. It is settled that a trial is not concluded until the verdict is received and recorded.

5. And therefore, under the statute, a defendant charged with a misdemeanor has the right to be present at the rendition of the verdict, either in person or by his counsel, for the purpose of polling the jury, if he so desire, and if he is in custody, or otherwise deprived of this right without his fault, the verdict cannot properly be taken in the absence of himself or counsel.

6. The right, however, is conferred upon him for his own protection and benefit, and, like many other rights accorded him by law, may be waived, either expressly or impliedly; and by the weight of authority, when a defendant charged with a misdemeanor is on bail, and is present either in person or by his counsel at the commencement of and during the trial, until the cause is submitted to the jury, and afterward voluntarily departs from the court before its adjournment and without leave, he will be deemed to have waived the right to be present on the rendition of the verdict, and it may be legally received in his absence: 12 Cyc. 528; 22 Ency. of Pl. & Pr. 929. Indeed, many of the courts hold that this rule will apply in a trial for a felony: Frey v. Calhoun Circuit Judge, 107 Mich. 130, 64 N. W. 1047; Commonwealth v. McCarthy, 163 Mass. 458, 40 N. E. 766; [288] Sahlinger v. People, 102 Ill. 241; State v. Way, 76 Kan. 928, 93 Pac. 159, 14 L. R. A., N. S., 603. The theory is that it is the duty of the defendant to be present until the close of the trial, and if he voluntarily

absents himself, the court is not obliged to await his pleasure, but may proceed without him.

7. Now, in this case it appears that the defendants and their counsel, without leave, voluntarily retired from the court after the case had been submitted to the jury and before the court had adjourned; and under the authorities this operated as a waiver of their right to be present at the rendition of the verdict, and authorized the court to receive it in their absence. The failure of the deputy sheriff to telephone defendants' counsel when the jury were ready to report, in accordance with his promise, cannot affect the question, or make the absence of counsel without the consent of the court any the less voluntary.

Judgment affirmed.

The Question Whether the Presence of the Accused is Necessary when the verdict or judgment is rendered in a criminal case is considered in the note to Warren v. State, 68 Am. Dec. 219; and in the subsequent cases of Bond v. State, 63 Ark. 504, 58 Am. St. Rep. 129; Summeralls v. State, 37 Fla. 162, 53 Am. St. Rep. 247; French v. State, 85 Wis. 400, 39 Am. St. Rep. 855; State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 299.

As to the Criminal Liability for Indecent Exposures or exhibitions, see Williams v. State, 64 Ind. 553, 31 Am. Rep. 135; Commonwealth v. Wardell, 128 Mass. 52, 35 Am. Rep. 357; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170.

EATON v. BLACKBURN.

[52 Or. 300, 96 Pac. 870, 97 Pac. 539.]

SALE OF GOODS—Right to Inspect—At What Place.—Where goods are sold under an agreement for delivery f. o. b. cars at the place of shipment, no time of payment, inspection, or acceptance being mentioned, the buyers have the right of inspection after the arrival of the goods at their destination. (pp. 708–711.)

SALE OF GOODS—Right to Inspect—Time and Place.—Under an executory contract for the future sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them; and, unless he does so, he is not liable therefor. This gives the vendee the right of inspection, and he is entitled to an opportunity therefor before becoming liable for the price. (p. 709.)

SALE OF GOODS—Right to Inspect—Time and Place.—Where articles are to be delivered to a common carrier by the vendor, to be forwarded to the vendee at a distant point, and no provision is made

for inspection and acceptance before or at the time of shipment, the vendee is entitled, under the law, to a reasonable time, after the goods arrive at their destination, in which to exercise the right of inspection, and to accept or reject them, if they do not comply with the contract. (p. 709.)

SALE OF GOODS—Payment, When Due.—Where no time or place of inspection, acceptance or payment is agreed upon, the payment becomes due on complete delivery; i. e., after opportunity for inspection. (pp. 709–711.)

SALE OF GOODS—Right to Inspect—Waiver.—The question of whether the buyer has waived his right of inspection is one for the jury. (p. 711.)

SALE OF GOODS—Acceptance.—The fact that the buyer has offered to sell the goods before he had inspected them is not conclusive of an intent to accept them. (pp. 711, 712.)

SALE OF GOODS—Acceptance.—The unauthorized sale by an employé before inspection of part of the goods purchased is not conclusive of the acceptance by the buyers of the entire shipment, and may be rebutted by evidence of their repudiation of that sale and replacement of the goods. (p. 712.)

SALE OF GOODS—Acceptance—Question for Jury.—The question of the acceptance of goods is ordinarily for the jury. (p. 712.)

APPEAL AND ERROR—Admission of Hearsay.—The subsequent proof of what was originally hearsay evidence admitted after objection renders the error of admitting it harmless and unprejudicial. (p. 712.)

APPEAL AND ERROR—New Trial—Remittitur—Instructions—Remediable Error.—Where an instruction to the jury contained an error as to the quantity of goods in respect to which they were to assess the damage, such error not affecting the real controversy and being easily remediable by reason of the amount of damages being severable from the rest of the verdict, a new trial will not be granted if the damages are remitted by consent. (pp. 712, 713.)

Lomax & Anderson, for the appellants.

John L. Rand and Samuel White, for the respondents.

301 BEAN, C. J. This is an action to recover the purchase price of two carloads of hay. The defense is that the hay, which plaintiff agreed to sell and deliver to defendants, was 302 to be "good, number one, merchantable hay," and that furnished was not of this quality, for which reason it was rejected. The defendants are commission merchants, residing and doing business in Baker City. Plaintiff resides in Union county, some miles distant from Baker. In March, 1906, he contracted and agreed to sell to defendants five carloads of hay, for use in their business, at eleven dollars and fifty cents per ton, f. o. b. cars, Nodine Spur, Union county. The contract was made at Baker City, and defendants were to pay the freight from place of shipment to that point, but nothing was said about the time or place of payment, or the inspection or acceptance of the hay. Shortly after making the contract,

plaintiff loaded two cars with hay at Nodine Spur, and the same were carried by the railroad company to Baker, reaching there Sunday morning, March 25th. On the following day defendants, before they had examined or inspected the hay, made some effort to sell it, but were unable to do so. On the morning of the 27th, in company with Abercrombie—a prospective purchaser—Mr. Breck, one of defendants, opened the cars, in which the hay had been shipped, and examined it, but Abercrombie was unwilling to purchase. In the afternoon of the same day they made a further and more careful examination, and Breck, claiming that the hay was not of the kind and quality contracted for, refused to accept it, and so notified plaintiff and the railroad company on the following morning. At the time Breck and Abercrombie were examining the hay on the afternoon of the 27th, two bales were taken out of one of the cars for inspection, and on the same afternoon one of defendants' employés, without their knowledge or authority, sold one of such bales to a shipper of stock passing through Baker City, and paid the money over to defendants. As soon as they learned of the sale, they repudiated the act of their employé, and directed him to return to the car another bale equally as good, or better, than [303] the one sold by him. At the time of the trial it was contended by plaintiff that, under the contract between him and defendants, it was the duty of defendants to inspect and accept or reject the hay at Nodine Spur, where it was to be loaded on the cars; and, if they neglected to do so, they were bound to receive such hay as it was actually shipped, and rely upon a claim of damages for breach of contract, if it was of inferior kind and quality, but, if this was not so, defendants' conduct, after the hay reach Baker City, was such as to amount, in law, to an acceptance thereof. The court instructed the jury that if the hay, delivered on the cars by plaintiff at Nodine Spur, was substantially the kind and quality called for by the contract, it would amount to a full and complete performance, and enable him to recover the contract price, whether the hay was subsequently accepted by defendants or not; and, if the hay was different or inferior to that which plaintiff agreed to sell, notwithstanding which the defendants accepted it, or did something amounting to an acceptance, they could not thereafter repudiate their liability by returning or tendering a return of the hay, but that defendants had a reasonable time in which to inspect the hay after it reached Baker City, and if it was, in fact, of an inferior quality, and not

according to the contract, they could reject it, and refuse to accept or pay for it, and if they did so, plaintiff could not recover in this action. The court also held that the question as to whether defendants accepted the hay after it reached Baker was one of fact, to be determined by the jury under proper instructions from the court, which were given accordingly. The cause was tried before a jury, and a verdict rendered in favor of defendants. From the judgment subsequently rendered thereon this appeal is taken. The errors assigned are in the giving and refusing of certain instructions and admission of testimony.

[304] 1. The principal point relied upon by plaintiff for a reversal of the judgment is the ruling of the court that, under the contract for the sale of hay in question, defendants had a right to inspect it after it reached Baker City, and, if it did not conform to the contract, to refuse to accept or pay for it. The argument is that the place of inspection and acceptance or rejection was at Nodine Spur, where the hay was to be delivered by the plaintiff, f. o. b. cars; and, if defendants neglected to exercise the right of inspection at that time and place, they were liable for the value of the hay so delivered. But we do not so find the law. No place or time of payment or of inspection or acceptance was stipulated in the contract. All parties concur in this point. The contract was made between plaintiff and defendant Breck. These gentlemen both say that Breck met plaintiff at the depot at Baker City, and inquired of him if he had any hay for sale, and that he (plaintiff) said he had; that the price was eleven dollars and fifty cents per ton, f. o. b. cars at Nodine Spur, and that Breck said he would take five carloads at that price, and under the conditions named.

2. The only difference between the witnesses is in reference to the terms of the contract regarding the kind and quality of hay to be delivered, and that matter is concluded by the verdict of the jury. Some stress is laid by counsel for plaintiff upon a statement by Mr. Breck, on cross-examination, that he would have had the privilege of examining the hay if he had gone down to Nodine Spur, but this was merely the opinion of the witness, and was not part of the contract.

[305] 3. Indeed, when asked as to whether he was to be present at Nodine Spur to receive the hay for shipment, he replied: "Mr. Eaton knew it was impossible for me to be there. There was no understanding of that kind at all."

So that it is manifest from the testimony that there was no time or place of inspection or acceptance agreed upon by the parties, or for the payment of the purchase price. The payment, therefore, became due and payable on a complete delivery, and there could be no such delivery without an opportunity for inspection. Under an executory contract for the future sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them; and, unless he does so, he is not liable therefor. This necessarily gives to the vendee the right, and imposes upon him the duty, of inspection, and he must therefore be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides; and where articles are to be delivered to a common carrier by the vendor, to be forwarded to the vendee at a distant point, and no provision is made for inspection and acceptance before or at the time of shipment, the vendee is entitled, under the law, to a reasonable time, after the goods arrive at their destination, in which to exercise the right of inspection, and to accept or reject them, if they do not comply with the contract: Brigham v. Hibbard, 28 Or. 386, 43 Pac. 383; Johnson v. Hibbard, 29 Or. 184, 54 Am. St. Rep. 787, 44 Pac. 287; Steiger v. Fronhofer, 43 Or. 178, 72 Pac. 693; Puritan Mfg. Co. v. Westermire, 47 Or. 557, 84 Pac. 797. Pierson v. Crooks, 115 N. Y. 539, 12 Am. Rep. 831, 22 N. E. 349, is much in point. That case construed a contract between a New York importer and a London [306] dealer for the sale of iron by the latter to the former. The iron was to be delivered f. o. b. at Liverpool, and paid for by bills of exchange at sixty days, on delivery of the shipping documents at New York. The iron shipped by the London dealer was not in compliance with the contract, and the New York merchant refused to accept it, and brought an action against the vendor to recover money paid for duties and expenses at the port of New York. The seller contended that the buyer was bound to inspect the iron and ascertain its quality at Liverpool; and, not having done so, it was in law an acceptance, which precluded him from subsequently questioning the quality or returning the goods. But the court refused to concur in this view, and Mr. Justice Andrews says: "When and at what place the right of inspection was to be exercised was not definitely fixed by the contract. The intention of the parties,

when ascertained, is to govern. They might have provided that the inspection should be made either at Liverpool or at New York. The contract is silent on this point; and the defendants insist that, in the absence of express words, the law ascertains and fixes the intention that examination should be made at the place where the defendants were to deliver the iron, to wit, at Liverpool. We are, however, of the opinion that where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier, to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination, and that the carrier is not the agent of the vendee to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them." In answer to the argument made there, as here, that the title vested in the vendee upon the delivery of the goods to the common carrier, and that the vesting of such title [307] implies an acceptance, and is inconsistent with the alleged right of inspection and rejection of the goods on their arrival at the place of destination, the learned justice says: "But assuming that the title to the iron, for some purpose, vested in the plaintiffs on delivery to the steamers, it was, as between the vendors and vendees, a conditional title, subject to the right of inspection and rejection of the inferior quality on arrival at New York. The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule—more injurious even to the dealer or manufacturer than to the purchasers—if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered."

The same doctrine was applied by the supreme court of Massachusetts in Alden v. Hart, 161 Mass. 576, 37 N. E. 742. In that case the defendants, residing at New Bedford, ordered a quality of coal to be shipped from Weehawken, New Jersey, by certain line of barges, defendants to pay the freight. The coal shipped was not of the kind and quality ordered, and the court held that the defendants had the right to reject it on its arrival at New Bedford, Mr. Chief Justice Field remarking: "Whether in such case as this is the title to the property passes to the vendee when the coal is delivered on

board the barge is not free from doubt, and we have not found it necessary to decide the question. If it be assumed, in favor of the plaintiffs, that the title to this coal passed to the defendants when it was selected by the plaintiffs, and laden free on board upon the barge at Weehawken, and when bills of lading were given to the plaintiffs, under which the cargo was to be delivered to the defendants or their assigns at the port of New Bedford, they paying the freight, we are yet of the [308] opinion that the rulings at the trial were correct. If the title passed to the defendants, it was a conditional title, and the condition was that the coal should be found to be of the quality purchased, and the defendants could reject the coal if, upon examination, it did not conform to the implied warranty that it should be merchantable." To the same purport, see Morse v. Moore, 83 Me. 473, 23 Am. St. Rep. 783, 22 Atl. 362, 13 L. R. A. 224; Holt v. Pie, 120 Pa. 425, 14 Atl. 389; Fogel v. Brubaker, 122 Pa. 7, 15 Atl. 692.

4. We are of the opinion, therefore, that no error was committed by the court below in its ruling on this phase of the case. In Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795, cited by plaintiff, the contract required payment to be made for the goods at the place of shipment, which the court held was necessarily inconsistent with a right of inspection at another place. But here, as we have seen, no time or place of payment was specified, and therefore it did not become due until the goods were delivered. The cases of Barr v. Borthwick, 19 Or. 578, 25 Pac. 360, and Meyer v. Thompson, 16 Or. 194, 18 Pac. 16, have no particular bearing here. The question in the former case was one of title, and in the latter whether there had been a sufficient delivery to take a parol contract, for the sale of personal property, out of the statute of fraud.

5. It is also insisted that defendants waived the right to reject the hay for defective quality, by their action and conduct in relation thereto after it reached Baker City. But this question was for the jury, and, we think, was fairly submitted to them. The defendants were not precluded from rejecting the hay by merely receiving it. They still had a reasonable time in which to inspect and reject it, if not according to the contract.

6. Nor did their offer to sell and dispose of the hay before they had examined it amount to an acceptance. [309] This was before they ascertained that it was of an inferior quality, and was on the assumption that plaintiff had complied with his

contract, and shipped hay of the kind and quality agreed upon. It was therefore not conclusive in law of an intent to accept the hay, in performance of the contract: Benjamin on Sales, sec. 703.

7. Nor, again, was the unauthorized sale of one bale by an employé of defendants conclusive of the acceptance by them of the entire shipment. The evidence shows, or tends to show, that the employé had no authority, either express or implied, to make such sale, and that it was promptly repudiated by the defendants as soon as they learned of it. The question of the acceptance of goods is ordinarily for the jury (Benjamin on Sales, sec. 895), and there is nothing in this record to take this case out of the operation of the rule.

8. After the defendant Breck had testified on the trial that, in company with Abercrombie, he examined the hay on the morning of the 27th of March, and found that it was not of the kind and quality called for by the contract between his firm and the plaintiff, he was asked, by his counsel, the question, "Did Mr. Abercrombie take it?" and was permitted, over the objection and exception of plaintiff, to answer, "No, sir." It is claimed that the admission of this testimony was error, and calculated to mislead the jury. It was probably admitted as tending to show the hay was not merchantable, because Abercrombie, after examining it, refused to purchase it. But as he was subsequently called as a witness by defendants, and testified fully as to the quality of the hay, it is not apparent how the ruling assigned could have been prejudicial to the plaintiff even if erroneous.

Finding no error in the record, the judgment is affirmed.

810 ON PETITION FOR REHEARING.

BEAN, C. J. 9. The court instructed the jury, in substance, that if the plaintiff agreed to sell and deliver to defendants fifty tons of good merchantable hay, and failed to do so, the defendants would be entitled to a verdict for the market value of such hay at the place of delivery, less the contract price, with freight added. The jury found a verdict in favor of defendants, and assessed their damages at ten dollars.

The attention of the court is called to the fact, by a petition for rehearing, that the instruction was erroneous, because it is admitted that the failure of the plaintiff to deliver the hay, except the carload in dispute, was by the consent and at the request of defendants, and therefore they are not entitled to recover damages for such failure. The error in giv-

ing the instruction referred to, however, did not affect the real controversy between the parties, and, as the amount of damages allowed by the jury can be segregated from the rest of the verdict, the error does not call for a reversal of the case, if the defendant will, within ten days, remit the amount of such damages; otherwise, a new trial will be ordered: Mackey v. Olssen, 12 Or. 429, 8 Pac. 357; Cochran v. Baker, 34 Or. 555, 52 Pac. 520, 56 Pac. 641.

The other points made in the petition were all considered by the court on the former hearing, and need not be further alluded to at this time.

Affirmed; rehearing conditionally denied.

Under an Executory Contract of Sale the buyer is ordinarily not required to accept the goods until he has had an opportunity to inspect them and ascertain whether they are such as are stipulated for: Deutsch v. Dunham, 72 Ark. 141, 105 Am. St. Rep. 21; Livesley v. Johnston, 45 Or. 30, 106 Am. St. Rep. 647; E. F. Main Co. v. Field, 144 N. C. 307, 119 Am. St. Rep. 956. As to whether he may be required to inspect the goods at the shipping point, or is entitled to a reasonable opportunity to do so after they arrive at their destination, see Kuppenheimer v. Wertheimer, 107 Mich. 77, 61 Am. St. Rep. 317; Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831; Thick v. Detroit etc. Ry. Co., 137 Mich. 708, 109 Am. St. Rep. 694.

THOMAS v. BOOTH-KELLY COMPANY.

[52 Or. 534, 97 Pac. 1078.]

APPEAL AND ERROR—Waiver of Right Pending Appeal.—The rule is settled in Oregon that evidence dehors the record is admissible to establish the fact that, since a judgment was rendered or a decree given, the party appealing therefrom has so dealt with the subject matter of the suit or action as to preclude him from further asserting his alleged right on appeal. (p. 714.)

RELEASE—CONSTRUCTIVE—Operation on Subject Matter of Suit.—When the plaintiff in a suit to enjoin the defendants from maintaining a dam which caused damage to his lands failed in such suit, and appealed from the dismissal of it, and subsequently sold the land referred to, to the defendants without reserving any rights therein, such deed operated as a release of his claim to injunctive relief as against the entire land, including any injury thereto, and the appeal should be dismissed. (p. 715.)

Weatherford & Wyatt, for the appellant.

Absalom C. Woodcock and Albert H. Tanner, for the respondent.

[535] MOORE, J. This is a suit by Jonathan J. Thomas against the Booth-Kelly Company, a corporation, to enjoin the maintenance of a dam alleged to have been built in such a manner as to interfere with the natural flow of water in certain streams, and to restrain the driving and storing of sawlogs therein. The complaint sets forth the preliminary facts necessary to give the court jurisdiction, describes the plaintiff's premises and the channels extending through them, and alleges that the defendant built a dam in one of the streams, causing backwater to overflow a part of plaintiff's cultivated land, rendering it unproductive, making his fords impassable, and forming stagnant pools, which menace his health; that the defendant stored sawlogs in such watercourses, which injured [536] their banks and prevented the plaintiff from crossing the streams with teams; and that the damages thus inflicted are continuous, and the injury imposed is irreparable, for the redress of which actions at law will not afford adequate remedies.

The answer denies the material averments of the complaint, and alleges that the defendant and its predecessors in interest have for more than forty years continuously operated mills at Coburg, driving and holding sawlogs in the streams mentioned, which watercourses are navigable for that purpose, and that the right to continue such use and to set back the flow of water by a dam has been acquired by prescription, stating the manner of securing and retaining such possession.

The reply put in issue the allegations of new matter in the answer, and, the cause having been referred, the court made findings of fact from the testimony taken, and dismissed the suit. From this decree the plaintiff appeals.

1. It appears from the uncontradicted affidavit of the defendant's attorneys that, after this cause was determined in the lower court, the plaintiff executed to their client a deed, conveying to it twenty-nine and thirty-five hundredths acres of land, through and along which two of the specified streams flow, which tract is a part of the premises described in the complaint; and, based on the sworn written declaration, it is contended that the appeal should be dismissed. The rule is settled in Oregon that evidence dehors the record is admissible in this court to establish the fact that, since a judgment was rendered or a decree given, the party appealing therefrom has so dealt with the subject matter of the suit or action as to preclude him from further asserting his alleged right on appeal: Moore v. Floyd, 4 Or. 260; Portland Con. Co. v.

O'Neil, 24 Or. 54, 32 Pac. 764; Ehrman v. Astoria Ry. Co., 26 Or. 377, 38 Pac. [537] 306; Bush v. Mitchell, 28 Or. 92, 41 Pac. 155; Moores v. Moores, 36 Or. 261, 59 Pac. 327; Merriam v. Victory Mining Co., 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; Livesley v. Johnston, 48 Or. 40, 84 Pac. 1044.

2. The testimony given at the trial has been examined with care, and, if it conclusively appeared therefrom that the relief which the plaintiff originally sought should have been granted, the conveyance referred to makes such an award impossible, for it is not manifest from the affidavits mentioned that any reservation was made in the deed of a right to a continuation of equitable intervention as to the remainder of the real property which might be affected by the alleged overflow, or by the driving or storing of sawlogs in the streams specified. The plaintiff at the trial, referring to the injury to his land which he maintains he sustained, testified as follows: "I consider the value is lost on about ten or fifteen acres, taken on the whole place." It will be remembered that he conveyed to the defendant a greater area of land, and, in the absence of any reservation in the deed, it must be taken for granted that he thereby released to the defendant all claim to injunctive relief as against the entire premises, including any injury thereto.

3. Believing that the deed brings the case within the legal principle announced in the cases adverted to, the appeal must be dismissed, and it is so ordered.

If, After an Appeal has been Taken, the parties thereto settle the matter in litigation between themselves, the appeal will be dismissed, although the case has been argued and submitted to the supreme court: Wedekind v. Bell, 26 Nev. 395, 99 Am. St. Rep. 704, and see the cases cited in the cross-reference note thereto.

COQUILLE MILL AND MERCANTILE COMPANY v. JOHNSON.

[52 Or. 547, 98 Pac. 132.]

NAVIGABLE WATERS.—The Title to the Bed of a Navigable Stream is prima facie in the state. (p. 717.)

NAVIGABLE WATERS—Booms.—Riparian Owners upon navigable fresh rivers and lakes may construct, in the shoal water in front of their land, wharves, piers, landings, and booms, in aid of and not obstructing navigation. This is a private riparian right, derived from a passive or implied license by the public, dependent upon title to the bank and not upon title to the bed of the river, and its exercise is subject to state regulations or prohibition. (p. 719.)

NAVIGABLE WATERS—Booms.—The Rights of Riparian Owners to Construct Booms, etc., in the shoal water in front of their land is a franchise only as distinguished from appropriation and occupation of the soil under the water. It is not personal to the shore owner, but is the subject of grant and may be severed from the soil. (p. 720.)

REAL PROPERTY—License—Estoppel.—The licensees from a riparian owner to construct a boom on water in front of his shore land are estopped from denying his right or that of others claiming through him, and such estoppel inures also against their privies. (p. 720.)

ADVERSE POSSESSION—Tenant Disavowing Landlord's Title. When a tenancy is once shown to exist, in order to set the statute of limitations running in favor of the tenant desiring to avail himself of it, to acquire title by adverse possession, he must openly and explicitly disclaim and disavow any and all holding under his former landlord; and unreservedly and steadily assert that he himself is the owner of the true title, all of which must be brought to the knowledge of the rightful owner. (p. 720.)

ADVERSE POSSESSION—Interest Claimed—Quality and Extent.—It is not possession alone, but possession accompanied with the claim of the fee, that gives character to adverse possession; for possession per se may evidence only the mere act of rightful occupation, consistent with a present interest under a lease. The quality and extent of the interest claimed is the sole basis on which the presumption of law will stand in the claimant's favor. (p. 720.)

ADVERSE POSSESSION, Consistent With License.—Where the riparian owner gave a license to erect a boom, the licensee to pay the taxes on the land, which he did for a long term, and the license was transferred several times, always with an acknowledgment of the riparian owner's boom privilege, and ultimately a claim was made to the boom by adverse possession of the licensee, such claim failed on the ground of the distinction in ownership of the license to construct the boom and of the boom itself, the claimant's so-called adverse possession being consistent with possession under the license. (p. 721.)

NAVIGABLE WATERS—Bed of Stream—Adverse Possession Against State.—Until it is shown that one owning and operating a boom for storing logs in front of the property of a shore owner has explicitly and openly disclaimed any and all holding under the presumed riparian right, and has unequivocally asserted ownership of the bed of the stream and brought notice to the state of that claim, the statute could not begin to run against it so as to devest it of

its title, and it is an open question whether a state can be so devested at all. (p. 721.)

EJECTMENT—Incorporeal Hereditaments.—The right to the continued enjoyment of a franchise granted by a shore owner to one to operate a boom in a navigable stream is an incorporeal hereditament, for the possession of which an action in ejectment will not lie. (pp. 721, 722.)

Walter Sinclair and E. D. Sperry, for the appellant.

A. J. Sherwood and John S. Coke, for the respondent.

548 SLATER, C. This is an action in ejectment to recover possession of certain described real property, being, as stated in the complaint, "inclosed by a boom for catching and holding logs and timber and being in the navigable water of the Coquille river in front of lot 2 in section 7, and lots 6 and 7 in section 18, all in township 28, south of range 12, west of Willamette Meridian, and known as the 'Gilman Boom.'"

The answer denies plaintiff's alleged ownership of the fee and right to the possession thereof, and avers that defendants are the owners, and of what their title consists, and that they are entitled to the possession. Upon a trial being had, a verdict was rendered in favor of defendants, upon which judgment was entered, and from which plaintiff appeals.

At the close of the testimony plaintiff moved for a directed verdict in his favor, which was denied by the 549 court, and this is assigned as the principal error upon which a reversal of the judgment is sought. Plaintiff was not able to show any paper title in itself, but relied upon title by adverse possession, not only as against defendants, but as against the state.

1. But there are two reasons why it cannot maintain its position in this action: (1) Because it is estopped from denying that defendants' grantors ever had any right to construct and maintain a boom abutting upon their property, or to grant such right to another; and (2) because whatever right, if any, it has therein, or to the possession thereof, is not such a title or right that could be the basis of an action in ejectment. The premises, the possession of which is sought to be recovered, are, as stated in the complaint, the bed of the Coquille river, a navigable stream, the title to which is prima facie in the state: Bowlby v. Shively, 22 Or. 410, 30 Pac. 154; Hume v. Rogue River Packing Co., 51 Or. 237, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865. Plaintiff deraigns such title as it has from one James A. Lyons, who, it claims, built the boom in 1889, and that ever since then,

and to at least 1903, he and his successors in interest occupied, used and maintained an open, notorious and exclusive possession thereof under a claim of ownership, so that the fee-simple title to the bed of the stream became devested out of the state and lodged in Lyons. But the record shows that, at and prior to the construction of the boom, John Gilman was the owner, by mesne conveyance from Wm. P. Bushnell, of one hundred and forty-three and twenty hundredths acres of land, which was patented to him by the general government on December 20, 1869. This land abutted upon the Coquille river, adjacent to and opposite the location of the boom, and it is admitted in the pleadings that the river at that point is a navigable stream, and by virtue of the act of October 21, 1876, of the legislative assembly of this state (Sess. Laws 1876, p. 69) Gilman's title was extended to low-water mark. [550] On October 10, 1889, Gilman executed, in favor of A. J. Smith, an instrument termed a "lease," which purports to grant to the latter "the right and privilege of putting in and maintaining a boom for holding logs and timber along the line of the premises of the said Gilman where the same adjoins the Coquille river, in Coos county, state of Oregon, being along the river-front, and is to be built and constructed so as to do as little injury to the bank as practicable and to the approval of Albert Gilman." As a consideration therefor, Smith agreed to pay the tax thereafter levied and assessed on the land of the said Gilman, which he then owned, and which adjoins said Coquille river where said privilege of putting in a boom was granted. It was further stipulated in the agreement that, in case Smith, his heirs, executors, administrators, or assigns, shall fail to pay such tax and allow the same to become delinquent, then the agreement and the privilege of maintaining the boom shall cease and determine. In the fall of 1889 Smith and Lyons constructed a boom in the river adjacent to and along the shore of Gilman's land, by driving piling into the bed of the river, about one hundred and twenty to one hundred and thirty feet from the bank and parallel therewith, in sets or dolphins of three piles, at considerable distances apart. These dolphins were joined by logs or boom sticks fastened to them by means of cleats. The upper and lower ends of the boom were joined to the bank or shore by logs attached to piling driven in the shore at about low-water mark, the bank forming one side of the inclosure. It is shown that Smith and Lyons used this boom for the purposes for which it was designed until July 19, 1894, when

Smith assigned to Lyons this instrument, termed in the assignment an "agreement" or "lease," as well as all his interest thereunder. Lyons and his successors in interest continued in the use and possession of the boom, claiming to own it, until in the year 1902, when William Jess, who had [551] succeeded to all the rights of Gilman in the abutting lands, conveyed a one-half interest therein to defendant Johnson, who thereafter took from Jess a lease of the remaining one-half interest in the boom, and claiming that, by failure of Smith and his assigns to pay the taxes upon the land, the lease to Smith was subject to annulment, Johnson took possession of the boom in 1903, and thereafter excluded plaintiff from the occupation and use thereof. Hence this action to recover from Johnson the possession of the boom.

2. The first question to be determined is, What right, if any, has a riparian owner to construct, in navigable water adjacent to his property, a boom to store logs, and is such right assignable? Plaintiff claims that the riparian owner has no such right, and relies to some extent upon a statement made by us in the opinion in Hume v. Rogue River Packing Co., 51 Or. 237, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, recently decided, to the effect that the owner of upland bordering upon navigable water has no title in the adjoining lands below high-water mark, nor any rights in or over the adjoining waters as appurtenant thereto. But that statement was confined to the rights of an upland owner, as distinguished from a tideland owner or one who owns to low-water mark, which was Gilman's situation. But "riparian owners upon navigable fresh rivers and lakes may construct, in the shoal water in front of their land, wharves, piers, landings and booms, in aid of and not obstructing navigation. This is a riparian right, being dependent upon title to the bank, and not upon title to the bed of the river. Its exercise may be regulated or prohibited by the state; but, so long as not prohibited, it is a private right, derived from a passive or implied license by the public. As it does not depend upon title to the soil under water, it is equally valid in those states in which the river-beds are held to be public property and in those states in which they are [552] held to belong to the riparian proprietors usque ad filum aquae": 2 Gould on Waters, 2d ed., sec. 179; Montgomery v. Shaver, 40 Or. 244, 66 Pac. 923; Stevens Point Boom Co. v. Reilly, 44 Wis. 295; Mississippi & R. River B. Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

3. Such right, however, is a mere franchise (2 Gould on Waters, sec. 179), and is distinguished from appropriation and occupation of the soil under the water: Deidrich v. North Western N. Ry. Co., 42 Wis. 248, 24 Am. Rep. 399. It is not personal to the shore owner, so that it must be exercised by him alone, or not at all, but is the subject of grant, and may be severed from the soil: Montgomery v. Shaver, 40 Or. 244, 66 Pac. 923.

4. No statute has ever been enacted by this state, at least none has been brought to our attention, regulating or prohibiting the construction and operation of booms; and hence, on October 10, 1889, Gilman, the shore owner, possessed this right, which he might lawfully grant to another. Smith and Lyons having constructed the boom under a license from Gilman, they and their privies are thereafter estopped from denying his right, or that of anyone claiming under him.

5. And when a tenancy is once shown to exist, in order to set the statute of limitations running in favor of the tenant desiring to avail himself of it, to acquire title by adverse possession, he must openly and explicitly disclaim and disavow any and all holding under his former landlord; and, further, he must unreservedly and steadily assert that he himself is the owner of the true title, all of which must be brought home to the knowledge of the rightful owner: Nessley v. Ladd, 29 Or. 354, 45 Pac. 904. Neither of these necessary things has plaintiff attempted to show. On the contrary, the record discloses that for a number of years Lyons paid Gilman's taxes in accordance with the original agreement, and in the chain of its title each transfer is of the Gilman boom 553 privilege, a distinct recognition of the original right under which the boom was built.

6. Nor has there been any showing made by plaintiff that, while it and its predecessors in interest were in possession of the boom, any claim was made, by any of them, of an ownership adverse either to Gilman and his grantees, respecting a right to maintain the boom, or to the state in respect to the soil under the water. It is true it has shown possession of the boom, "but it is not possession alone, but the possession accompanied with the claim to the fee, that gives this effect, by construction of law, to the acts of the party. Possession, per se, evidences no more than the mere act of present occupation by right, for the law will not presume a wrong; and that possession is just as consistent with a present interest, under a lease for years or for life, as in fee. From the very nature

of the case, therefore, it must depend upon the collateral circumstances what is the quality and extent of the interest claimed by the party; and to that extent, and that only, will the presumption of law go in his favor": Rickard v. Williams, 20 U. S. 59, 5 L. ed. 398.

7. Now, the proof that plaintiff and its predecessors in interest, while using and occupying this boom, claimed to own it is not inconsistent with the fact that it was built and operated under a lease from the shore owner, for it was not a boom already constructed and ready for use that Gilman leased to Smith, but a license to build a boom at a particular place, adjacent and abutting upon his shore. Smith and Lyons did in fact own the boom, but maintained it by license of the owner of the abutting property. Plaintiff has indeed shown possession of the boom and a claim of ownership thereof. but nothing independent of such possession which is qualified by their own acts and declarations.

554 8. Nor is such claim adverse to the ownership by the state of the fee to the bed of the stream. As we have shown, the inception of this claim was under a license by the shore owner, whose right is subordinate to the paramount ownership of the fee by the state. The two rights exist together, not in antagonism to one another, but one is superior to the other; and a shore owner, or one by his license occupying and using a portion of a navigable stream adjacent to the shore for booming logs, must be presumed to do so under his riparian right, and not as one claiming to be the owner of the bed of the stream. Until it is shown, then, that one owning and operating a boom for holding and storing logs in front of the property of a shore owner has explicitly and openly disclaimed any and all holding under the presumed riparian right, and has unequivocally asserted ownership of the bed of the stream, and brought some notice to the state of that claim, the statute could not begin to run against it so as to devest it of its title, if indeed in any event it could be devested of the title to the bed of a navigable stream by adverse possession, which has recently been doubted by this court: Trullinger v. Howe, 53 Or. 219, 97 Pac. 548, 99 Pac. 800, 22 L. R. A., N. S., 545.

9. This conclusion reduces the matter attempted to be litigated to the right to the continued enjoyment of a franchise, granted by an abutting owner to another, to operate a boom in a navigable stream adjacent to his property, which right, as a thing distinguished from appropriation and occupation of

the soil under the water, is an incorporeal hereditament, for the possession of which an action in ejectment will not lie; 15 Cyc. 16; Parker v. West Coast Packing Co., 17 Or. 510, 21 Pac. 822, 5 L. R. A. 61.

This conclusion renders it unnecessary that we should consider any of the other errors assigned, and calls for an affirmation of the judgment.

Prescriptive Title to Water is the subject of a note to Oregon etc. Co. v. Allen Ditch Co., 93 Am. St. Rep. 711. Recent cases on this question are Alabama Cons. Coal etc. Co. v. Turner, 145 Ala. 639, 117 Am. St. Rep. 61; Pew v. Johnson, 35 Mont. 173, 119 Am. St. Rep. 852; Strong v. Baldwin, 154 Cal. 150, 129 Am. St. Rep. 149.

Adverse Possession by a Tenant Against His Landlord is discussed in the note to Davis v. Williams, 89 Am. St. Rep. 62. The general rule is well understood that a tenant and those who enter under him are estopped to question their landlord's title: Johnson v. Tucker, 136 Wis. 505, 128 Am. St. Rep. 1097, and cases cited in the cross-reference note thereto. Yet the mere fact of tenancy does not necessarily prevent the acquisition by the tenant of an adverse title against his landlord: Armstrong v. Wilcox, 57 Fla. 31, 131 Am. St. Rep. 1080.

Each Shore Owner on Navigable Water has the Right to Build Piers, wharves, and other structures in front of his land out to the point of navigability: McCarthy v. Murphy, 119 Wis. 159, 100 Am. St. Rep. 876; Thomas v. Ashland etc. Ry. Co., 122 Wis. 519, 106 Am. St. Rep. 1000; Taylor v. Commonwealth, 102 Va. 759, 102 Am. St. Rep. 865; Mobile Transportation Co. v. City of Mobile, 153 Ala. 409, 127 Am. St. Rep. 34, and note.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

COMMONWEALTH v. BALTIMORE AND OHIO RAILROAD COMPANY.

[223 Pa. 23, 72 Atl. 278.]

HIGHWAYS, Maintaining Railway Across.—An indictment charging that the defendant unlawfully maintained a railroad track and way across a highway and used it for the frequent passing of trains, whereby the use of the highway was dangerous and obstructed, there being no averment that the track created any obstruction, charges no offense. (p. 724.)

INDICTMENT, Defects in not Curable by Bill of Particulars. A Bill of Particulars is not the remedy for an indictment so defective that it charges no offense. (p. 724.)

INDICTMENT—Particulars, When must be Stated.—Where an act is not in itself necessarily unlawful or a nuisance, but becomes so by its circumstances, all the matters necessary to show its illegality must be stated in the indictment. (p. 725.)

HIGHWAYS—Speed of Railways at Crossings.—Railroad Companies may not habitually run their trains over highway crossings at an unreasonable and unsafe rate of speed without giving reasonable and proper signals of approach for the protection of life and property. (p. 725.)

RAILWAYS—High Speed of Trains.—The very purpose of locomotion by steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight, and this the law authorizes. (pp. 725, 726.)

Norman E. Clark and Winfield McIlvaine, for the appellant.

C. L. V. Acheson, district attorney, T. H. W. Fergus, assistant district attorney, and Owen C. Underwood, for the appellee.

[25] BROWN, J. The appellant was convicted in the court of quarter sessions of Washington county on a common-law indictment charging it with maintaining a nuisance. A

motion to quash, on the ground that no crime was charged in the indictment, was overruled, as was a motion in arrest of judgment based on the same reason. The lower court was sustained by the superior court: 35 Pa. Super. Ct. 474; and the narrow question passed upon by each of them is now before us.

The indictment charges that the defendant unlawfully kept and maintained a railroad track and way across a public highway, "and did use the said track and way for the frequent passing and repassing of trains, whereby the use of the said road, street and public highway was, and continues to be, dangerous, obstructed and straitened, so that the good citizens of [26] this commonwealth could not and have not been able since to pass and repass upon and use the said public highway as they ought, and of right should and were wont and accustomed to do." There is no averment that the appellant, in laying its track across the highway, created any obstruction, and the case does not belong to the class in which railroad companies have been held guilty of maintaining nuisances, because they placed actual obstructions on the highways in constructing their tracks across them: Northern Central Ry. Co. v. Commonwealth, 90 Pa. 300; Commonwealth v. Northern Central Ry. Co., 7 Pa. Super. Ct. 234. The learned judge of the superior court properly said that it is not the existence of the track on the highway that is complained of, but the alleged unlawful use of it.

Boiled down, the substance of what is charged in the indictment to be the offense of the appellant is the frequent and rapid passing and repassing of its trains over the highway, whereby the same was obstructed and rendered dangerous. Nothing more is to be found in the indictment, and counsel for the commonwealth frankly so admit, for their statement of the question involved is, "Can a railroad company be indicted and convicted under the common law for maintaining a nuisance at a grade crossing, arising from the manner of operating its trains, where no permanent physical obstruction of the highway is occasioned by the construction of its roadbed?" The question for determination, then, is not one of the sufficiency of the indictment under the act of March 31, 1860 (Pub. Laws, 427), which provides that every indictment shall be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of assembly prohibiting the crime, or, if at common law, so plainly that the nature of the offense charged may be easily

understood by the jury, but is whether any offense at all is charged. The court below was of opinion—concurred in by the superior court—that if the defendant was dissatisfied with the sufficiency of the indictment, its remedy was an application for a bill of particulars. This is never a remedy for an indictment so defective that it charges no offense: 1 Bishop's New Criminal Procedure, sec. 646. [27] A bill of particulars cannot give life to what was dead when it left the grand jury. By this indictment the commonwealth charges a nuisance arising from the frequent and rapid passing and repassing of the trains of the appellant over a public road or street—acts which are entirely lawful in themselves. If, in the exercise of an undoubted franchise, the railroad company so exercises it as to commit a public nuisance, its offense is the improper exercise of its franchise, which must be set forth and described in the indictment as the substantive offense. Where an act is not in itself necessarily unlawful or a nuisance, but becomes so by its peculiar circumstances and relations, all the matters necessary to show its illegality must be stated in the indictment: Clark's Criminal Procedure, 155. A bill of particulars, prepared by a district attorney, can never take the place of what must affirmatively appear on the face of an indictment to which the accused must plead.

The passing and repassing of appellant's trains over the highway are not complained of, and it is not even averred that they are allowed to cross it negligently. The frequent and rapid passing, without more, is the sole offense charged. Railroad companies may not habitually run their trains over highway crossings at an unreasonable and unsafe rate of speed without giving reasonable and proper signals of their approach for the protection of life and property. If they fail in the discharge of this duty, they are liable to indictment for nuisance: Wood's Law of Nuisances, 74; Louisville etc. R. R. Co. v. Commonwealth, 80 Ky. 143, 44 Am. Rep. 468. But there is no such allegation here, and without it there is no essence in the offense charged.

With the statutory permission given to railroad companies to cross public highways with their tracks there necessarily goes the right to frequently cross them, if the needs of the public, for whom railroad companies are incorporated, require the frequent movement of trains; and this is so of their speed. The indictment charges that the highway is obstructed by the rapid passing of trains. Slow passing would obstruct it more. But we need not dwell upon this, for the "very purpose of

locomotion by steam upon railways is the accomplishment of a [28] high rate of speed in the movement of passengers and freight. It is authorized by law": Reading & Columbia R. R. Co. v. Ritchie, 102 Pa. 425. In the exercise of this lawful right a railroad company is under a constant duty to protect life and property by the proper regulation of the speed of its trains at danger points or by giving, without regard to their speed, reasonable and proper notice of their approach. Its failure to do so is not, however, presumed even in civil actions, but must be averred and proved, and when the criminal process of the commonwealth is invoked against it, this is still truer, for in all criminal prosecutions the presumption is always in favor of innocence and that no public duty was neglected. For neglect of such a duty in connection with the passing and repassing of its trains over the public highway this appellant might have been indicted, and an indictment containing the charge properly laid would be sufficient to support a conviction. No such neglect is here charged, but, instead, the appellant was indicted for what it lawfully had the right to do. As no crime was charged against it, the judgment on the verdict cannot stand. That judgment is that the appellant "abate the nuisance charged in the indictment." Upon the failure of a defendant to abate a nuisance after having been sentenced to do so, a writ will be directed to the sheriff, commanding him to abate it: Taggart v. Commonwealth, 21 Pa. 527; Barclay v. Commonwealth, 25 Pa. 503, 64 Am. Dec. 715. If this defendant continues to run its cars frequently and rapidly across the highway and the judgment against it is to stand, is the high sheriff of Washington county to prepare a schedule regulating the frequency of the passing of the trains and their rate of speed at the crossing and take his stand there to see that his regulation is enforced? In no other way could he execute the sentence of the court, if commanded to do so, and yet this is the situation that might actually arise if the contention of the commonwealth should prevail, that the defendant has been convicted of a nuisance.

The judgment of the superior court, as well as that of the court below, is reversed.

That the Obstruction of a Street by a Railway Company may constitute a public nuisance, see Jackson v. Kiel, 13 Colo. 378, 16 Am. St. Rep. 207; Palatka etc. R. R. Co. v. State, 23 Fla. 546, 11 Am. St. Rep. 395. And it has been held that the running of trains across highways at a speed of fifteen or twenty miles an hour without warning is a public nuisance: See the note to Acme Fertilizer Co. v. State, 107 Am. St. Rep. 249.

WEIDMAN v. UNITED CIGAR STORES COMPANY.

[223 Pa. 160, 72 Atl. 377.]

MASTER AND SERVANT—Hiring, Presumed Duration of.—In a contract of hiring, where no definite period is expressed, in the absence of facts and circumstances showing a different intention, the law will presume a hiring at will. The fact that the hiring is at so much per week or month or year will raise no presumption that the hiring was for such period. Where, however, a contrary intention can be fairly derived from the contract itself, the law will allow such intention to prevail; and where the contract is in writing, the court, in construing the instrument, will take into view the situation of the parties, and the objects they had in view. (p. 727.)

MASTER AND SERVANT—Hiring, when Deemed to be at Least for a Year—Presumption of Hiring at Will Rebutted.—In a contract of hiring where no definite period is expressed, the law generally presumes a hiring at will; but if the future employment of a vendor at a stated sum per year is part of the consideration of a sale, it is not contemplated that a large portion of the consideration was to be subject to disappointment at the pleasure or caprice of the employer, and in such case the ordinary presumption of a hiring at will is rebutted, and an instruction that the person employed, if entitled to recover, is entitled to a year's salary less what he could reasonably have earned by due diligence, is not incorrect, and will not be disturbed by the court on appeal. (pp. 728, 729.)

A. Leo Weil and Charles M. Thorp, for the appellant.

Charles A. O'Brien and Charles W. Ashley, for the appellee.

161 STEWART, J. In a contract of hiring, where no definite period is expressed, in the absence of facts and circumstances showing a different intention, the law will presume a hiring at will. The fact that the hiring is at so much per week or month or year will raise no presumption that the hiring was for such period. Where, however, a contrary intention can be fairly derived from the contract itself, the law will allow such intention to prevail; and where the contract is in writing, the court, in construing the instrument, will take into view the situation of the parties, and the objects they had in view. The present case is to be adjudged in the light of these well-established rules. The plaintiff and his partner were the owners of a cigar and tobacco store in the city of Pittsburg. The defendant company owned and conducted several stores of like character in the same city with headquarters in New York, where they also own and conduct other stores of like kind. By written article of agreement the company contracted with the plaintiffs for the purchase of the latter's store in Pittsburg. The clause in the article under which the question arises is as follows: "Immediately upon the completion of said inventory and appraisement, the said first

parties shall become and be responsible for the general management of all the stores of the said second party in Allegheny county, Pennsylvania, each giving his entire services as such; the said Charles Weidman to receive [162] the sum of three thousand three hundred dollars per year and the said Charles J. Moye to receive the sum of two thousand two hundred dollars per year for such services as aforesaid." If this clause were the whole of the agreement, the rule first above stated would unquestionably require us to construe the hiring to be at will. But it is only part of the agreement, which, because it embraces other matters, contains several parts, mutually depending on each other and necessary to be brought under the same view, in order to ascertain the meaning of the parties. The prime object of the agreement, regarded as a whole, was to effect a purchase of the store owned by plaintiff and his partner, to the end that it might become one of the associated stores owned and conducted by the defendant in the city of Pittsburg. It was above all things a contract of sale. It recites a covenant on part of plaintiff and his partner, to sell and convey to the defendant company the stock of materials and the fixtures in their store, upon terms and conditions thereafter expressed. The first of these conditions is that the price is to be determined by inventory and appraisement; the second, that upon completion of sale the plaintiff and his partner were to pass into the employment of the defendant company as general managers of all its stores in Allegheny county. It is not only a reasonable, but we think an almost necessary, inference, that the employment here stipulated for was part of the consideration on which the agreement to sell rested. If the business that plaintiff and his associate were engaged in had been a profitable one, it is hardly probable that they would have been content to part with it for simply what the store and fixtures would be found to be worth on an appraisement. If not a business success, it is no more probable that defendant company would be desirous to place men who had failed to make a success of a single store in charge of an extensive group of stores of its own. So far as the future employment entered into the contract, it was of largest concern to those who were to be employed. We think the contract clearly shows that the employment was stipulated for as consideration moving to the vendors. If correct in this, then it is manifest that the parties intended something wholly different from that which the law will presume from the language used in the hiring clause of the

163 agreement. If the future employment of the plaintiff was part of the consideration of the sale, certainly it was not contemplated that so much of the consideration was to be subject to disappointment at the pleasure or caprice of the employer. To impose on this contract a strictly legal construction of the terms used in the hiring clause would allow the employer, for no breach whatever on the part of the plaintiff, to deprive the latter of his employment within the first hour after he had entered upon his duties. Any such construction would lead to results which could not reasonably have been intended, and would be in plain disregard of the true meaning and spirit of the agreement. The court's refusal to give binding instructions, and later to enter judgment non obstante, was rested on other considerations than those we have indicated. We place our affirmance of the judgment solely upon the reasons we have indicated. The assignments of error are overruled.

The judgment is affirmed.

If One is Employed to be Paid by the Month a Designated Price, this constitutes an entire contract by the month, which the employer cannot terminate at will, and under which he is liable for a month's wages if he discharges his employé without cause before the expiration of the month: Moss v. Decatur Land etc. Co., 93 Ala. 269, 30 Am. St. Rep. 55. And a contract of employment, entered into by telegraphic correspondence, agreeing to serve for "one thousand dollars a year," unexplained, is a contract for a year's service for that sum, to be paid in gross: Liddell v. Chidester, 84 Ala. 508, 5 Am. St. Rep. 387.

LEHNER v. PITTSBURG RAILWAYS COMPANY.

[223 Pa. 208, 72 Atl. 525.]

STREET RAILWAY — Apprehension of Accident — Passenger Leaping from Car.—If a street-car is running away backward and rapidly down a dangerous grade, and a passenger has a well-grounded fear of imminent danger, he is justified, in obeying the instinct of self-preservation, in jumping from the car, if that seemed to be the best method of escape. (pp. 730, 731.)

NEGLIGENCE.—The Presumption of a Common Carrier's Negligence is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it, when made on a well-grounded belief that it will occur. (p. 731.)

NEGLIGENCE — Jury Question.— In actions of negligence, where there is a doubt as to the inference to be drawn from the facts, or where the measure of duty is ordinary and reasonable care,

and the degree of care required varies with the circumstances, the question of negligence is necessarily for the jury. (p. 731.)

STREET RAILWAY—Injury—Mode of Occurrence—Apprehension of Danger.—When, under apprehension of a dangerous accident, a woman, alarmed at the rapid backward movement of a street-car, is seen pushing her way through the car to the platform, and immediately thereafter is found lying injured in the street, it is not unreasonable in the jury to draw from the circumstances the inference that she had fallen in an attempt to alight from the car. (p. 731.)

APPEAL AND ERROR—Evidence in Support of Finding.—The Objection that There is No Evidence to support a finding is not well taken, when there is evidence from which the jury may reasonably infer the necessary fact, nor is it any objection that more than one inference may be drawn from such testimony. (p. 732.)

Craig Smith, Clarence Burleigh, James C. Gray and William A. Challener, for the appellant.

J. L. Ritchey and David S. McCann, for the appellee.

209 POTTER, J. It appears from the evidence in this case that on the morning of November 6, 1902, the plaintiff was a passenger upon an electric car of the defendant company. The route led up a long and rather steep and winding grade, and when near the top the car stalled and began to run backward. The motorman was unable to stop the car, and opened the front door and the gate which permitted exit by the passengers down the steps from the front platform. There was no sand in the boxes, and the conductor attempted to check the progress of the car by throwing pebbles under the wheels, but to no purpose. The car gained speed and rapidly approached a point where the tracks were closely bordered by a ravine some sixty feet in depth. The passengers became excited and apprehensive of danger, and made efforts to escape from the car, some jumping from one end, and some from the other. Miss Lehner, the plaintiff, was seen by two passengers to go to the rear or uphill end of the car, and immediately thereafter was seen lying upon the street by a passenger who was following her, but who did not see her in the act of jumping from the car. She was picked up bleeding and dirty and found to be severely 210 injured. The flight of the car was eventually stopped by colliding with a team of horses, one of which became wedged under it.

Counsel for appellant complain of the submission of the case to the jury, and contend that there was not sufficient evidence that the negligence of the defendant was the proximate cause of the injuries to the plaintiff, and that the testimony did not show how plaintiff got from the car to the street.

It is true that the plaintiff could not recall the precise manner in which she passed from the rear platform to the street; but it was shown that she as well as other passengers pressed to the rear platform, and directly afterward she was seen lying upon the street. The obvious inference was that she jumped from the platform of the car to the ground. If the car was running away rapidly down a dangerous grade, and the plaintiff had a well-grounded fear of imminent danger, she was justified in obeying the instinct of self-preservation, and in jumping from the car, if that seemed to be the best method of escape. As our Brother Brown said, in Palmer v. Warren St. Ry. Co., 206 Pa. 574 (580), 56 Atl. 49, 63 L. R. A. 507: "The company had confronted her with the peril from which she would have escaped, and it is, and ought to be, responsible to her for whatever naturally followed. In trying to save herself she was, at the same time, unconsciously trying to save the company from the consequences of its negligence, and of her effort to do so it ought to be the last to complain, unless it is manifest that she acted rashly and imprudently. A well-grounded fear that a collision is about to take place, which will result in fatal or even serious injury to the passenger, is a justification to him to leap from the car; and the presumption of the common carrier's negligence is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it, when made on a well-grounded belief that it will occur." The same principle was applied in Willis v. Second Avenue Traction Co., 189 Pa. 430, 42 Atl. 1, and in Pennsylvania R. R. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323.

We regard as very far fetched the objection that the testimony was not sufficiently specific in describing the manner [211] in which the plaintiff passed from the platform to the ground, to enable the jury to reasonably infer that her injuries were the natural and proximate result of her effort to escape the effect of defendant's negligence. When you have given the fact of a rapidly moving car, and the plaintiff seen at one instant pushing her way through the car and out upon the platform, and the next instant found lying upon the street, it is certainly not unreasonable in the jury to draw from the circumstances the inference that she had fallen in an attempt to alight from the car. The objection that there is no evidence to support a finding is not well taken, when there is evidence from which the jury may reasonably infer the necessary fact, nor is it any objection that more than one inference may be

drawn from the testimony. In the case of Cohen v. Philadelphia etc. R. R. Co., 211 Pa. 227, 60 Atl. 729, we said: "As applied to negligence cases, the rule has been stated by this court to be that where there is a doubt as to the inference to be drawn from the facts, or where the measure of duty is ordinary and reasonable care, and the degree of care required varies with the circumstances, the question of negligence is necessarily for the jury."

The facts of this case, and the inferences to be drawn from them, were undoubtedly for the jury; and to the manner in which the case was submitted appellant has taken no exception.

The assignments of error are overruled, and the judgment is affirmed.

Whether or not a Person, Brought to Face an Emergency, has acted with due care for his own safety is to be determined in all cases by the method of conduct. If what was done was no more than might have been expected from an ordinarily prudent person, placed under the like circumstances, then due care is not wanting. And if in the situation presented there is room for reasonable minds to differ as to the proper conclusion to be drawn, the question is one for a jury: Burger v. Omaha etc. Street Ry. Co., 139 Iowa, 645, 130 Am. St. Rep. 343.

If a Railroad Company, by Negligence, puts a person under reasonable apprehension of injury, and he is injured in a reasonable effort to escape, it is answerable therefor: Tuttle v. Atlantic City R. R. Co., 66 N. J. L. 327, 88 Am. St. Rep. 491. As to the application of this rule to a passenger who attempts to leave a moving car, see Kruger v. Omaha etc. Street Ry. Co., 80 Neb. 490, 127 Am. St. Rep. 786; Chretien v. New Orleans Ry. Co., 113 La. 761, 104 Am. St. Rep. 519.

MORGAN'S ESTATE (No. 1).

[223 Pa. 228, 72 Atl. 498.]

SPENDTHRIFT TRUST—Principle of Protection.—Cujus est Dare, Ejus est Disponere, is the fundamental principle on which the law rests its protection of what is known as the spendthrift trust. It allows the donor, within the law, to condition his bounty as suits himself. (p. 734.)

SPENDTHRIFT TRUSTS, When Protected and When not.—Spendthrift Trusts have No Other Justification than is to be found in considerations affecting the donor alone. They allow the donor so to control his bounty, through the creation of the trust, that it may be exempt from liability for the donee's debts, not because of any monitory care for the donee, but because it is concerned to protect the donor's right of property, but when he substitutes the pleasure of the donee for his own absolute right of disposition, the gift is absolute. (pp. 734, 735.)

SPENDTHRIFT TRUST—Character of Estate.—Where by her will a woman gave all her estate to a trustee for the use and benefit of her husband, and created what is known as a spendthrift trust, and directed that at the end of three years the trustee should give over the whole of the estate to the appointee of the husband, and in default of appointment the husband should have testamentary powers over the estate, and in case he did not dispose of it by will then it was to go to his heirs at law, her declared object being to keep it free from his debts, the husband takes an estate in fee, and his creditors are entitled to proceed against the estate the moment the merger of the legal and equitable estates takes place. (p. 736.)

TRUSTS AND TRUSTEES—Considering as Done What Equity Would Decree to be Done.—Whatever a chancellor would decree to be done shall be considered as though it were actually done. (p. 736.)

ALIENATION, Attempts to Restrain as Against Creditors.—The law will not sanction an attempt to give title to property without the incident of ownership. The reasoning is that a man shall not be the real owner of property with full right to deal with it, and reap its benefits to the exclusion of the rights of creditors, and as he cannot do this for himself, another may not do it for him. (p. 736.)

S. W. Cunningham and Sion B. Smith, for the appellant.

James R. Sterrett, John D. Evans and William H. McClung, for the appellees.

229 STEWART, J. By her will, Martha B. Morgan, testatrix, gave her entire estate, real and personal, to the Safe Deposit and Trust Company of Pittsburg, in trust, exclusively for the use and benefit of her husband, Benjamin W. Morgan. The terms of the trust directed that the trustee—adopting the language of the will—"shall and will receive and hold my personal estate for the period of three years after my decease, and permit my husband Benjamin W. Morgan to use the same, and shall and will during the aforesaid period, collect and receive the rents and profits of my real estate (if any), and after paying the taxes, and the necessary expenses of keeping up the improvements, and the insurance upon the same, shall and will pay over the balance of said rents and profits into the hands of said Benjamin W. Morgan, or such person or persons as he may designate to receive the same; or at the option of said company permit the said Benjamin W. Morgan to occupy said real estate during the period aforesaid; but so that none of my estate, real or personal, shall be in the control or liable for the debts or engagements of the said Benjamin W. Morgan. And upon the further trust and confidence that the said Safe Deposit and Trust Company, after the lapse of the period aforesaid (or sooner if desired by said Benjamin W.

Morgan) shall and will [230] convey in fee any or all my real estate, and deliver any or all of my personal property absolutely, to such person or persons as the said Benjamin W. Morgan shall by any writing under seal appoint." The will further provided that in case the husband failed to so appoint, he was to continue to enjoy during his life the use of the personal property, and to receive the rents of the real estate, but so that none of the estate should be liable for his debts or engagements. It gave him the right to appoint by last will, and in the event of failure to appoint, the estate was to go to his legal heirs. This appeal is by a creditor of Benjamin W. Morgan from the decree distributing the estate of Martha B. Morgan, his contention being that Benjamin W. Morgan took an absolute estate under the will of the said Martha B. Morgan.

The question we have to consider is the sufficiency of the spendthrift trust attempted to be created under the will of Martha B. Morgan. The law rests its protection of what is known as a spendthrift trust fundamentally on the principle of cujus est dare, ejus est disponere. It allows the donor to condition his bounty as suits himself, so long as he violates no law in so doing. When a trust of this kind has been created, the law holds that the donor has an individual right of property in the execution of the trust; and to deprive him of it would be a fraud on his generosity. For the law to appropriate a gift to a person not intended would be an invasion of the donor's private dominion: Holdship v. Patterson, 7 Watts, 547. It is always to be remembered that consideration for the beneficiary does not even in the remotest way enter into the policy of the law; it has regard solely to the rights of the donor. Spendthrift trusts can have no other justification than is to be found in considerations affecting the donor alone. They allow the donor to so control his bounty, through the creation of the trust, that it may be exempt from liability for the donee's debts, not because the law is concerned to keep the donee from wasting it, but because it is concerned to protect the donor's right of property. Does the will of this testatrix express direction or purpose that the property given her husband thereunder shall in any and every event be exempt from liability for his debts? If it does, and no rule of property is transgressed in connection therewith, the law will see to it that [231] her wishes and directions are observed. Of course, the testatrix had exemption from liability for debt in mind, and she expressly provides for it; but she provides for it in a way

that makes it quite manifest that the only purpose she had was to provide her husband a shield equal to a defense of the property she was about to leave him against the demands of his creditors which he might use if he chose, and abandon when he was so disposed. What other meaning can be gathered from the provision requiring the trustee, after the lapse of three years, or sooner if desired by the said Benjamin W. Morgan, to convey in fee any or all the real estate, and deliver all the personal property absolutely, to any person or persons the said Benjamin W. Morgan may appoint in writing under seal? The termination of the trust—and that is what this provision contemplates, and it is not in any way qualified by other expressions in the will—would necessarily vest the absolute dominion and ownership of the property in the husband, and with such vesting the exemption from liability would cease. Had the will provided that the trust was to continue so long as there was any existing indebtedness of the husband enforceable against him, it would have been another thing; but the time of its determination was left entirely in the discretion of the husband. At once upon the will becoming operative, it was in his power to destroy the trust and acquire full power of alienation. True, he did not choose to exercise the power given him in this regard; but that is wholly immaterial. So long as the trust continued after the right to terminate attached, the exemption from liability for his debts which the trust was intended to secure, survived, not because it was so directed by the testatrix, but solely because it was the pleasure of the husband that it should so continue. The very fact that power is given which may be used by the cestui que trust to apply the fund in whole or in part to the payment of his debts, is an investiture pro tanto of ownership. We repeat, spendthrift trusts are allowed not because the law concerns itself for the donee; he may conserve or dissipate as he pleases; the law's only concern is to give effect to the will of the donor as he has expressed it. When a donor substitutes for his own absolute right of disposition the pleasure of the donee, the gift is absolute.

[232] The provision in the will referred to is entitled to a still larger significance. The right absolute given the donee to require the trustee to convey the real estate in fee, and surrender the personal estate absolutely, strips the trust of every active duty and of every right of control, beyond the pleasure of the donee. The result, as we have said, is not dependent on the exercise of the right; it inheres in and

results from the very power itself. It determines the quality of the donee's estate, and operates to merge the two estates, legal and equitable. The true test, as said in Rife v. Geyer, 59 Pa. 393, 98 Am. Dec. 351, is whether a court of equity would decree a conveyance of the legal title. Can there be any question that equity would have compelled a conveyance in this instance, and a surrender of the entire estate? To have refused it would have been to disregard a positive direction of the testatrix. It is an invariable rule that whatever a chancellor would decree to be done shall be considered as though it were actually done. While a merger of the two estates here would have rendered the property liable for the debts of the husband, it cannot be said that such result would defeat the object of the donor, since the merger is exactly what she directed to take place whenever her husband demanded it. In Keyser's Appeal, 57 Pa. 236, there was a trust of a fee giving the cestui que trust the beneficial estate, with a provision that it should not be liable for his debts. This provision, it was there said, if there had been no trust, would have been repugnant to the estate devised as a condition not to alien. It was stricken down because the cestuis que trust had an equitable estate in fee, with full power to alien or devise, and because it was an attempt to deprive their estate of a necessary lawful incident, made so by statute and consonant with every reason of justice and policy. It is impossible to avoid the conclusion that in the present case it was an attempt to give title to property without the incident of ownership. This the law will not sanction. In Hahn v. Hutchinson, 159 Pa. 133, 28 Atl. 167, it is said: "The whole course of reasoning is that a man shall not be the real owner of property with full right to deal with it as he pleases, taking the full income of it to his own exclusive use and keep the same from the claims of his creditors. What he cannot do for himself in this regard cannot be done for him by another. When the grant comes [233] from another, and yet has these incidents, it is as obnoxious to the foregoing objections as when it arises upon his own grant to third persons as trustees for him."

The right of alienation in the present case was given the donee in unmistakable and unrestricted terms; and this of itself defeats the attempted trust. The assignments of error are sustained, the decree of the orphans' court is reversed, and it is now directed that distribution be made in accordance with the views here expressed.

Spendthrift Trusts are discussed in the notes to Garland v. Garland, 24 Am. St. Rep. 686; Smith v. Towers, 9 Am. St. Rep. 405. To create such a trust the following conditions must be observed: 1. The gift must be of the income only; 2. The legal title must be vested in the trustee; 3. The trust must be an active one, not a mere dry trust which may be executed under the statute of uses: Kessner v. Phillips, 189 Mo. 515, 107 Am. St. Rep. 368. The nature and validity of spendthrift trusts are further considered in the recent cases of Merchants' Nat. Bank v. Crist, 140 Iowa, 308, ante, p. 267; Huntress v. Allen, 195 Mass. 226, 122 Am. St. Rep. 243; Wenzel v. Powder, 100 Md. 36, 108 Am. St. Rep. 380.

WOODLAND OIL COMPANY v. BYERS & COMPANY.

[223 Pa. 241, 72 Atl. 518.]

LIMITATION OF ACTIONS—Subsequent Damage.—Time Runs from when a cause of action accrues and not from the time when consequential damage ensues, and if the action rests on a breach of contract, it accrues as soon as the contract is broken, though the injury from the breach is not suffered until afterward, the commencement of the limitation being contemporaneous with the origin of the cause of action. (p. 741.)

LIMITATION OF ACTIONS — Breach of Warranty — Subsequent Damage.—If one delivers goods which are not what he undertakes to sell, and the purchaser uses them and suffers damage, or resells them under his mistake and is obliged to pay damages, his claim against the first seller must in either case be enforced within six years from the first sale. (pp. 740, 741.)

LIMITATION OF ACTIONS—Setoff—Pleading.—Where the Statute of Limitations may be successfully set up against a claim sought to be enforced in an action of assumpsit, it may also be set up against the same claim if it occur in a setoff, and it makes no difference if the statute was not pleaded by the plaintiff in reply to the defendant's plea of setoff. (p. 742.)

LIMITATION OF ACTIONS—Setoff—Pleading.—A plaintiff may avail himself of the statute of limitations against a setoff given in evidence by the defendant without pleading the statute in any way. (p. 742.)

LIMITATION OF ACTIONS—Setoff—Replication—If the defendant goes to trial without demanding a replication to his plea of setoff, the defense to the setoff is unrestricted, and the plaintiff may avail himself of the statute of limitations or any other defense. (p. 742.)

John McCleave and John S. Wendt, for the appellant.

Horace T. Thomas, J. M. Stoner and Samuel M. Meals, for the appellee.

242 POTTER, J. In May, 1895, the Woodland Oil Company engaged M. J. Gormley to drill for it an oil well. The

company undertook to supply the casing for the well, and in the latter part of May it purchased about twelve hundred feet of casing from A. M. Byers & Company, a corporation engaged in the manufacture and sale [243] of such material. The casing was made of iron pipe in joints from twelve to twenty feet in length, intended to be screwed together at the ends. After Gormley had placed about eleven hundred and forty feet of the casing in the well, and had screwed on an additional joint, the collar, or shoulder of the last joint, gave away and separated from the pipe, and permitted the entire string of casing to fall to the bottom of the well. Gormley and the oil company claimed that the accident was due to a fault in the manufacture of the pipe, or in fastening the collar upon it, which was done by machinery. Attempts by Gormley to reach and withdraw the casing were only partially successful, and after considerable effort the well was abandoned. The oil company refused to pay Gormley for drilling the lost well, or for his work in attempting to recover the casing; and upon July 22, 1896, he brought suit against it to recover for both. The oil company notified Byers & Company, and the latter employed counsel who appeared in the case, and assisted in the trial, it being to the interest of both parties to prevent recovery, if possible. The suit resulted in a verdict for Gormley on June 20, 1899, and a judgment was entered thereon in the sum of twelve hundred and forty-three dollars and fifteen cents.

On November 25, 1902, the present suit in assumpsit was brought by the Woodland Oil Company for use of M. J. Gormley against A. M. Byers & Company, a corporation. In the statement plaintiff claimed to recover the amount of the judgment obtained by Gormley, alleging that the same was "for loss occasioned entirely and altogether by the defective casing furnished" them by the defendant, which the latter had by its sale and delivery warranted to be fit for the purpose for which it was sold. Defendant pleaded nonassumpsit, payment, setoff and the statute of limitations. Under the plea of setoff it claimed to recover six hundred and ninety-eight dollars and twenty-one cents, the price of the casing furnished by it. This claim was on its face barred by the statute. Plaintiff filed a denial of setoff, in which it claimed the sum of six hundred and twenty dollars and fifty-five cents for expenses incurred in connection with the alleged defective casing. This claim was also barred upon its face.

Upon the trial the court refused a point asking for binding [244] instructions in favor of the defendant and submitted the questions of fact to the jury. The verdict was for nineteen hundred and fifty-nine dollars and forty-four cents, being the amount of the Gormley judgment, with interest thereon and costs. Defendant moved for judgment in its favor non obstante veredicto, but the court dismissed the motion and entered judgment on the verdict. Defendant has appealed and by the assignments of error raises two questions: 1. Was plaintiff's claim barred by the statute of limitations? 2. Was defendant's claim barred in the same way? While not material to this issue, yet it appears from the record that plaintiff on October 25, 1900, brought suit for the same cause of action against the administrator of A. M. Byers, who was alleged to have traded as A. M. Byers & Company. In this action, the plaintiff was nonsuited, because it transpired on the trial that the purchase was made from A. M. Byers & Company, a corporation, not from Byers individually or trading under that name. Thereupon the present suit was brought against the corporation. But during the pendency of the first suit the period of six years from the date of the sale and delivery of the goods elapsed.

The parties in this suit differ as to when the cause of action arose. The appellant contends that the suit was upon an alleged breach of warranty, and that the plaintiff was at liberty to sue for this as soon as the defective pipe was delivered, or at least as soon as it was discovered, which was shortly afterward. On the other hand, the appellee maintains that the suit was based upon an implied contract of indemnity, and that no right of action accrued until the subsequent injury resulted to it in the recovery of damages against it. Under this view the statute would not begin to run until the date of the Gormley judgment, which was within six years from the beginning of this suit. If we turn to the plaintiff's statement of claim, we find that after setting out the purchase of the pipe from Byers & Company and the contract with Gormley it avers, "that A. M. Byers & Company, the defendant, well knew the purpose for which said casing sold by it was to be used, and by the sale and delivery thereof warranted the casing so sold to be reasonably fit for the purpose of being [245] lowered into and used in an oil well for which it was intended." It is further averred that the casing was defective, specifying the faults, and charging that by reason of such defects the accident had occurred, that plaintiff

had immediately notified defendant of the accident and of its cause, and at defendant's request made every effort to remove the casing and clear the well, and that the contractor Gormley had sued them and obtained judgment against them in the sum of twelve hundred and forty-three dollars and fifteen cents, for his time and expenses, in sinking the well and trying to remove the casing. Also that defendant had been notified of the suit, and by their counsel had taken part in defending against Gormley's claim at the trial.

It thus clearly appears that in the statement the plaintiff claimed for a breach of warranty in the sale of the goods, and laid as its damages the amount of the Gormley judgment, with interest from its date. We can find no evidence in the record of any agreement to indemnify the plaintiff against claims by Gormley or anyone else. The only contract set up by plaintiff in his statement is one of implied warranty. The Gormley suit and judgment were properly introduced as proof of, and as measuring the extent of, the damages sustained, but they are not the foundation of the claim. That rests upon the defective quality of the goods sold; and in such case, under all the authorities, the statute of limitations begins to run from the date of the sale. The general rule is thus stated in one of the latest publications (25 Cyc. 1091, 1092): "A cause of action for breach of warranty in a sale of personal property accrues at the time the warranty is broken, and the statute of limitations then begins to run. Where unsound personal property is sold with a warranty of soundness, the warranty is broken as soon as made, and the statute begins to run from the date of the sale, not from the time when the buyer sustains consequential damages." A long line of our own cases, from Rankin v. Woodworth, 3 P. & W. 48, down to Lehigh Coal & Nav. Co. v. Blakeslee, 189 Pa. 13, 69 Am. St. Rep. 788, 41 Atl. 992, and Noonan v. Pardee, 200 Pa. 474, 86 Am. St. Rep. 722, 50 Atl. 255, 55 L. R. A. 410, holds that the statute runs from the time the cause of action accrues, without regard to the time when actual consequential damage is suffered.

[246] And a statement of the law which applies more closely to the facts of this case is found in 3 Parsons on Contracts, ninth edition, *92, where it is said: "And if the action rests on a breach of contract, it accrues as soon as the contract is broken, although no injury results from the breach until afterward. As if one delivers goods which are not what he undertakes to sell, and the purchaser resells under his mistake

and is obliged to pay damages, he has a claim against the first seller, but must bring his action to enforce it within six years from the first sale." In support of this principle the author cites Battley v. Faulkner, 3 Barn. & Ald. 288, where it was held that the cause of action accrues when the contract is broken, and not at the time when special damage in consequence is suffered. This decision was followed by the supreme court of the United States in Wilcox v. Plummer, 29 U. S. 172, 7 L. ed. 821, and both cases were cited and followed by this court in an opinion by Woodward, J., in Campbell's Admr. v. Boggs, 48 Pa. 524, wherein the principle involved was applied, in holding that an attorney in fact who collects money for his principal is bound to pay it over at once, and his neglect to do so is a breach of the implied contract, for which action will lie, and which marks the date from which the statute of limitations begins to run. And this case was again cited with others by Gordon, J., in Owen v. Western Saving Fund, 97 Pa. 47, 39 Am. Rep. 794, where he said: "All these authorities, and many more which might be cited, only serve to illustrate that which the statute itself makes plain enough, namely, that the commencement of the limitation is contemporaneous with the origin of the cause of action."

As the present action was brought to recover for a breach of warranty, as to the quality of the goods sold and delivered, we reach without hesitation the conclusion that the cause of action must be deemed to have accrued when the defective casing was delivered; and as this was more than six years prior to the bringing of this action, the plaintiff was too late, and the statute of limitations is a complete bar to the successful urging of his claim.

The counterclaim for the price of the pipe, which was made by way of setoff by the defendant, was also barred by the
247 statute. That the statute applies to a claim of setoff has been consistently maintained by this court from Hinkley v. Walters, 8 Watts, 260, down to State Hospital v. Philadelphia County, 205 Pa. 336, 54 Atl. 1032, which holds, as set forth in the syllabus, that: "Where the statute of limitations may be successfully set up against a claim sought to be enforced in an action of assumpsit, it may also be set up against the same claim when it is sought to be used as a setoff." Nor does it matter that the statute was not pleaded by the plaintiff in reply to the defendant's plea of setoff. It was decided in Levering v. Rittenhouse, 4 Whart. 130, that a plaintiff may avail himself of the statute of limitations against a setoff

to defendant on a contract under which the plaintiff was to sell on commission the product of the defendant's packing operations; that the plaintiff had refused to take the whole product and by reason thereof part of it was left over and lost; that plaintiff had not accounted for the whole of the goods actually taken, had overcharged commissions on the part sold and accounted for; and that plaintiff upon these transactions was indebted to the defendant in a greater sum than the amount of the note sued upon. In Kennett Square Nat. Bank v. Shaw, 209 Pa. 313, 58 Atl. 622, it was held in an action on a promissory note by the payee against the maker that an affidavit was sufficient which averred that the note was to be discounted for the benefit of a certain corporation, and setting up a written agreement by payee to look to the dividends of said corporation for payment. In Keller v. Cohen, 217 Pa. 522, 66 Atl. 862, an action on two promissory notes, an affidavit was held sufficient which averred, inter alia, that the maker was induced to accept the loan, sign the notes and execute and deliver the assignment on the faith of the representation made by the payee that the loan should be paid out of the immediate proceeds or profits derived from the sale of umbrella tubes made, and not otherwise, without which assurance and inducement the maker would not have accepted the loan, signed the notes or executed the assignment.

[571] We agree with the plaintiff's counsel that there is a "variety of statements made by the defendant in his two affidavits of defense"; and confusion naturally results as to what defense he really intends to rely upon. Several of the averments in the affidavits are wholly without merit as a defense on the notes in suit, and will be so declared if presented on the trial of the cause. The affidavits are neither concise nor clear, and if the matters therein averred were submitted to a jury, it would have great difficulty in arriving at a conclusion. There is sufficient, however, we think, to send the case to the jury, and it will be the duty of the trial judge to submit for the consideration of the jury any meritorious defense the defendant may present.

After admitting the due execution of the notes in suit and the receipt of the money thereon, the affidavits aver, inter alia, that at the time of and previous to the execution of the notes. an oral partnership arrangement existed between the plaintiff and the defendant, and that it was engaged in the purchase and sale of certain stocks in the stock market. By the terms of this partnership or joint venture the parties were to con-

tribute to a joint fund which was to be used by the defendant in purchasing stocks from time to time in his own name, the purchase being for the joint interests of both parties. Any profits arising, either from dividends from the stock purchased or from the sale of any of the stocks at a subsequent date, were to be divided between the parties, and "in the event of the investment proving a loss, involving wholly the amounts to be advanced by the plaintiff, he would release the defendant from all obligations assumed by defendant under and by virtue of the said three notes given by defendant to plaintiff." The three notes in suit were given by the defendant to the plaintiff to secure moneys used in the purchase of stock for the joint interest of the parties in pursuance of the partnership agreement. The defendant made certain purchases and sales of stock as provided by their agreement, and a schedule is attached to the affidavit and made part of it which exhibits the purchases and sales made by the defendant on account of the partnership. The affidavit avers that there were "losses aggregating three thousand one hundred and ninety-three dollars and seventy-five cents, and that there were other and greater losses involved [572] in the said transactions, which, over and above the sum of three thousand dollars contributed by the plaintiff as aforesaid, were borne wholly and exclusively by the defendant." It is further averred in the affidavit that defendant "contributed more largely to the fund used in the purchase of said stocks than did the plaintiff, and that his losses already aggregate much more than three thousand dollars, the amount advanced by the plaintiff." The defendant alleges that by reason of the losses resulting from the sales of the stock purchased in the joint venture that the three notes have been satisfied in full and that there is nothing due the plaintiff thereon; "and that until there is an accounting and a balance struck between him and the plaintiff, he is not indebted to the said plaintiff in the sum of three thousand dollars or in any other sum whatever." Finally, it is averred "that but for the mutual understanding and agreement, he [the defendant] would not have signed or delivered the said notes to the said plaintiff."

These and other allegations of the affidavits the defendant "avers to be true, and expects to be able to prove upon the trial of this cause." The allegations in the affidavits seem to bring the case within the rule of the cases we have cited above, and that the defendant has the right to show that while conceding the execution and delivery of the notes, they were

paid in the way agreed upon by the parties at the time they were executed. The action being between the original parties to the notes, they could make any agreement as to the manner of payment they thought fit, and having made such an agreement neither party can be permitted to violate it.

The plaintiff's counsel seems to think that conceding this to have been a partnership transaction between the parties, the plaintiff can maintain an action for the balance due on an accounting between the parties. The question does not arise here and we give no opinion upon it. This is an action on the notes, and the rule entered by the plaintiff in this case was "for judgment for want of a sufficient affidavit of defense on the above case," and not for judgment for a part of the plaintiff's claim under the act of July 15, 1897 (Pub. Laws, 276). The plaintiff did not take a rule, as he might have done, for want of a sufficient affidavit as to a specified and designated portion [573] of the claim under the statute just named. Had he done so, he then might have contended that he was entitled to judgment for the specific sum which apparently seems to be due under the affidavit of defense. Having, however, taken a rule for judgment for the whole claim for want of a sufficient affidavit of defense, he was not in a position in the court below to ask that judgment be entered for part of his claim.

The judgment is reversed with a procedendo.

Evidence is Properly Received that Certain Promissory Notes were executed because of an agreement between the payee and the maker that the latter would do certain acts, and that until they were done the transaction should not be deemed complete nor the notes enforceable. This is not a varying by parol of the terms of a writing, but amounts to a collateral agreement postponing the legal operation of the writing until the happening of a contingency: Hughes v. Crooker, 148 N. C. 318, 128 Am. St. Rep. 606. If one is induced to make a promissory note by parol promise to him that before it falls due it shall be paid out of the proceeds of another transaction, the breach of such promise amounts to a want of consideration and is a defense to an action on the note. Though the note was not procured by fraud nor by any pre-existing intention not to perform the promise, yet if the payee attempts to exact payment without making good his promise, he is thereby guilty of such fraud as precludes his recovery: Gandy v. Weckerly, 220 Pa. 285, 123 Am. St. Rep. 691. In Kessler v. Parelius, 107 Minn. 224, 131 Am. St. Rep. 459, in an action to recover on a promissory note, parol evidence was held admissible to show that the parties had previously made an oral agreement to purchase a commodity, in pursuance of which the note was given, and under this the payee of the note was to make its maker a certain loan which in fact he did not make. For other authorities to the effect that parol evidence is admissible to prove an agreement collateral to a promissory note, see Carroll v. Nodine, 41 Or. 412, 93 Am. St. Rep. 743; Citizens' Bank v. Millett,

103 Ky. 1, 82 Am. St. Rep. 546; Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559. One sued upon a contract signed by him is entitled to prove by parol evidence that it was delivered to an agent of the principal under a parol agreement that it was to be altered in certain respects before delivery to the agent's principal: Main v. Oliver, 88 Ark. 383, 129 Am. St. Rep. 110.

SMITH v. MARKLAND.

[223 Pa. 605, 72 Atl. 1047.]

DEED—Acknowledgment by False Personation.—Where a deed is forged and the forger procures some one to personate the grantor, the certificate of the notary is not conclusive against the grantor even in favor of a bona fide purchaser for value who has relied on the pseudo title. A forged deed, recorded on a false certificate of acknowledgment, can never affect the real owner of the property. (p. 748.)

DEED—Forgery—Bona Fide Purchaser or Mortgagee.—No man can be deprived of his property by a forged deed or mortgage, no matter what may be the bona fides of the party who claims under it. (p. 749.)

Lewis Lawrence Smith, for the appellant.

John Weaver and S. E. Megargee, for the appellees.

[628] BROWN, J. The inevitable finding in this case was that the deed from Fanny M. Smith, executrix and widow, to Mary Markland was a forgery. How it was perpetrated by Skinner and how, in his ingeniously fraudulent scheme to deceive a number of persons, he succeeded in imposing upon the appellant, the West End Trust Company, the worthless mortgage of the grantee named in the forged deed clearly appear in the finding of facts, each one of which was based upon competent evidence. As a result of these findings the court below correctly concluded that the appellees were entitled to the relief granted. The reasons for this conclusion are set out at length in an exhaustive and well-considered opinion by the learned chancellor who heard the case, and to it nothing can be here profitably added, unless it [629] be as to the contention that the certificate of the notary public, being a judicial act, is conclusive of Fanny M. Smith's acknowledgment of the deed in this proceeding, in which the appellant is to be regarded as a bona fide purchaser, without notice of any fraud practiced upon the alleged grantor in the deed to the mortgagor.

Mrs. Smith never appeared before the notary public, and the case is not one of the conclusiveness of the truth of the

certificate of a notary public of what had been acknowledged before him by a grantor in a deed, who had actually appeared before him for the purpose of acknowledging the execution of it. This deed was a forgery, and the certificate of acknowledgment, fraudulently procured by the forger's inducing someone to appear before the notary public to personate Mrs. Smith, is as false as the deed itself. The certificate, deceitfully procured from the notary, was but the culmination of Skinner's forgery, making it possible for him to have the forged deed recorded. No one of the cases cited by the counsel for appellant approaches the limit to which it was attempted to lead the court below. The distinction, apparently overlooked, between those cases and this one is that here there was no appearance by the alleged grantor before the notary public, and no acknowledgment at all by her. A decree of a court resulting from the fraud practiced upon Mrs. Smith would be a dead letter upon the exposure of it. "In the eye of the law, fraud spoils everything it touches. The broad seal of the commonwealth is crumbled into dust, as against the interest designed to be defrauded. Every transaction of life between individuals, in which it mingles, is corrupted by its contagion. Why, then, should it find shelter in the decrees of courts? There is the last place on earth where it ought to find refuge. But it is not protected by record, judgment or decree; whenever and wherever it is detected, its disguises fall from around it, and the lurking spirit of mischief, as if touched by the spear of Ithuriel, stands exposed to the rebuke and condemnation of the law": Mitchell v. Kintzer, 5 Pa. 216, 47 Am. Dec. 408. The certificate of the notary in this case, procured by fraud, is nothing but cumulative evidence of the attempt of Skinner to steal Mrs. Smith's [630] property, and the doctrine of the rights of a bona fide purchaser has no place in the controversy. There are no such rights when the real owner of property stolen, or attempted to be stolen, from him has done nothing to lead the purchaser of it to buy it under the belief that it was not stolen. Reliance on a forged deed, recorded on an absolutely false certificate of acknowledgment, may bring loss upon him who so relies, but neither such deed nor such certificate appended to it can ever affect the owner of the property. This is the rule that the learned court below should have unhesitatingly announced.

In Michener v. Cavender, 38 Pa. 334, 80 Am. Dec. 486, the action was a sci. fa. sur mortgage given by Eveline E. Michener and her husband on her separate estate to Cavender,

the plaintiff below. The mortgage had appended to it the certificate of an alderman that Eveline E. Michener had appeared before him and acknowledged the execution of the mortgage, as required by the act of February 24, 1770. On the trial, it was clearly established that she had not appeared at all before the alderman, but the court below held that the certificate of that officer was conclusive, in the absence of evidence that the mortgagee had knowledge that it was false. In reversing the judgment against the mortgagors and in holding that there could be no recovery upon the mortgage, this court said. "To call the mortgagee a bona fide purchaser, and to put her to proof that he knew she had been cheated, would be like making her right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a forgery out and out, and Cavender chose to invest his money in a purchase of it, must it be enforced because he did not know he was buying a forged instrument? An instrument known to be forged would not be purchased, and would, therefore, be worthless to the forger. Counterfeit notes would never be issued if a herald went before to proclaim their spuriousness. But because they are taken without notice, do they become genuine? Is every bank and individual to redeem whatever obligations bona fide holders may obtain against them, without regard to the question whether the obligation was ever issued or not? To carry the doctrine of notice to such extent would [631] subvert all law and justice." In a later case—Reineman v. Moon, 12 Pitts. L. J., N. S., 167—the defense in a sci. fa. upon a mortgage was that it was a forgery. The court below refused plaintiff's point that, "Plaintiff appearing to be a bona fide holder for value, without notice of any fraud, the magistrate's certificate of acknowledgment is conclusive, and the verdict should be for the plaintiff." The refusal of the point was held to be correct, and we said: "No man can be deprived of his property by a forged deed or mortgage, no matter what may be the bona fides of the party who claims under it." In the very nature of things there can be no other rule.

No one of the twenty-four assignments can be sustained as pointing out any error calling for reversal, and, on the opinion of the court below, as we have briefly supplemented it, the decree is affirmed at appellant's cost.

Decree affirmed.

This Case was Cited and Followed in Gustine v. Westenberger, 224 Pa. 455, 73 Atl. 913, which was a trial of a scire facias sur mortgage, and forgery was set up as the defense, and the court properly refused to charge that the notary's certificate of acknowledgment was sufficient, and strong evidence of the genuineness of the mortgage, where the execution of it was denied by the owner and the notary was unable to identify him, and in addition there was evidence that some one had been procured to personate the alleged mortgagor.

One can Acquire No Interest in Land Through a Forged Deed, whether or not he has notice of the forgery: Gross v. Watts, 206 Mo. 373, 121 Am. St. Rep. 662.

The Conclusiveness of Certificates of the Acknowledgment of Deeds is the subject of a note to American Freehold etc. Co. v. Thornton, 54 Am. St. Rep. 150. As a general rule, a proper certificate of acknowledgment to a conveyance is conclusive as to the facts stated therein, except upon proof of fraud or imposition in the procurement of the acknowledgment or conveyance: Hayes v. Southern Home etc. Assn., 124 Ala. 663, 82 Am. St. Rep. 216; Gray v. Law, 6 Idaho, 559, 96 Am. St. Rep. 280.

DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY'S PETITION.

[224 Pa. 55, 73 Atl. 175.]

MUNICIPAL CORPORATIONS — License Taxes.— General Revenue for the support of the municipal government cannot be raised under the guise of a license tax for police regulation. (pp. 751, 752.)

MUNICIPAL CORPORATIONS—Measure of Right to Impose. If there is no inspection or supervision by the municipality, there can be no license fee imposed; if there is inspection, then its actual cost is the measure of the license fee. (p. 752.)

MUNICIPAL CORPORATIONS—License Tax—Telegraph and Telephone Companies—Charge not to be General Throughout Commonwealth.—In determining a dispute between a municipality and a telegraph, telephone, etc., company under the act of April 17, 1905, (Pub. Laws, 183), the court is controlled by the imperative rule that no flat per pole or per mile charge can be made applicable throughout the commonwealth, because in no two cases will the cost of inspection be the same. (p. 753.)

MUNICIPAL CORPORATIONS — Telegraph and Telephone Companies, Duties Which may be Imposed upon.—Though the duty of inspection and maintenance imposed by law upon telegraph and telephone companies can be more safely relied on than if casually made by a borough officer without technical knowledge, the municipality may properly, by way of police regulation, require poles to be kept in proper condition, wires in safe repair, and see that conduits and other appliances do not interfere with the public use of the streets. (pp. 753, 754.)

MUNICIPAL CORPORATIONS—License Tax—Telegraph and Telephone Companies—Inspection.—Reasonable latitude is allowed to municipalities in dealing with the supervision of the appliances of telegraph and telephone companies which go through their streets, but they must not make useless and unnecessary inspections at the cost of the operating companies, and if they do, the court may take the question into consideration in a dispute to be settled under the act of April 17, 1905 (Pub. Laws, 183). (p. 754.)

MUNICIPAL CORPORATION — License Tax — Telegraph and Telephone Companies, Power of Court to Reduce License Charge.—A municipality has power to levy a license tax to recoup the cost of inspection of the appliances of telegraph and telephone, etc., companies, but an ordinance to that effect cannot be sustained on the presumption that it was reasonable without reference to whether it is based upon the cost of inspection or not, and where license fees were fixed at certain sums per pole, per mile of wire, and per mile of conduits, and the court found that the aggregate of the license fees paid by the various companies was three times the amount paid to the municipal policeman for inspecting, and that to a great extent such inspection consisted of looking at filled in excavations which were settling, and looking at new poles and wires, the court properly reduced them on the ground that the cost of necessary inspection was the proper rule to be adopted in every case by the court under the act of April 17, 1905 (Pub. Laws, 183). (p. 754.)

William I. Schaffer and John G. Johnson, for the appellant, Delaware etc. Co.

Edward P. Bliss, for the appellant, Sharon Hill Borough.

[62] ELKIN, J. For many years controversies growing out of the imposition of license fees or taxes have arisen between public service corporations and the municipalities in which they do business. [63] A large number of such cases have been considered by our appellate courts, and the rules of law heretofore applicable thereto may be found in repeated decisions of the supreme court from Allentown v. Western Union Tel. Co., 148 Pa. 117, 33 Am. St. Rep. 820, 23 Atl. 1070, to Kittanning Borough v. Consolidated Nat Gas Co., 219 Pa. 250, 68 Atl. 728, and of the superior court from Ridley Park Borough v. Electric Light etc. Co., 9 Pa. Super. Ct. 615, to Kittanning Borough v. Water Co,, 35 Pa. Super. Ct. 174. These cases are all founded upon ordinances passed prior to the act of 1905, and while they were actions at law, they were considered as if upon certiorari to determine the legal rights of the parties and without reference to the statutory proceedings authorized by said act. The right to impose these license fees was sustained as a police power, but it was uniformly pointed out that general revenue for the support of the municipal government could not be raised under the guise of a license tax for police regulation. This principle has been recognized in every

case, and in no instance has it been suggested that it might be modified or varied or weakened in its application. It is true that under the old forms of action it was often difficult for an appellate court to pass upon questions of fact necessary to determine whether a particular ordinance under consideration did impose a revenue tax or a license fee. Because of this limitation upon the courts the practice became quite general throughout the commonwealth to establish flat rates per pole, per mile or per car as the case might be, upon an arbitrary basis and without reference to the cost of police inspection or supervision. An examination of the cases will show that the municipalities were given a wide latitude in the imposition of these license charges, and their right to do so was not interfered with unless for gross abuse. This was the situation when the act of 1905 was passed, and this legislation grew out of the unsatisfactory methods then existing for the determination of such controversies. The purpose of the act is stated to be the providing of a method for the determination by the courts of common pleas, with the right of appeal, of all disputes between municipalities and telegraph, telephone, light and power companies, relating to the reasonableness of the amount of license fees. In the third section of the [64] act the duty is imposed upon the court hearing the cause to determine the amount of the annual license fees necessary to properly compensate the municipality for the cost of the services performed, or to be performed, by it for the inspection and regulation of the poles, wires, conduits or cables belonging to such public service corporations and located within the limits of the municipality. This is a statutory rule binding upon the courts. The amount of the license fees to be charged is measured by the cost of the service performed or to be performed during the year for municipal inspection and regulation. If there be no inspection or supervision by the municipality, there can be no license fee imposed, because under such circumstances no expense would be incurred for which the statute makes the companies liable. If there be inspection and supervision, the measure of liability imposed by the act is the cost of the same to the municipality. The cost of the service is the rule adopted by the legislature to guide the courts in determining the disputes between the parties. This rule cannot be ignored or lightly set aside, and it should be the central and controlling thought in the mind of the court in the determination of such disputes. Of course, when the ordinance is passed in advance of any service rendered, it may,

and no doubt will, be difficult to fix with mathematical precision the amount of the license fee before the cost of the service is definitely known, and some reasonable allowance must necessarily be made for contingencies that may happen. However, the courts should see to it that under the guise of a reasonable allowance the municipality is not permitted to impose a tax for general municipal purposes, or to disregard the rule which limits the license fee to the cost of inspection. Under this rule no flat per pole or per mile charge can be made applicable throughout the commonwealth, because in no two cases will the cost of inspection be the same. Many boroughs do not inspect at all, and in such cases no license fee can be charged. Other boroughs may require very little inspection, while others may need more, but in each instance the inquiry must be, What is the cost? The legislature fixed the rule and imposed the duty to determine all such controversies according to that rule upon the courts [65] when proper proceedings are instituted. The rule is imperative and cannot be disregarded.

Another question raised by this appeal is whether the borough authorities in the present case were justified in making any provision for inspection and regulation. It is contended that the inspection by the companies was ample and sufficient to protect the public, and that no municipal inspection was necessary. It is true that the courts have held companies furnishing electricity or operating by electrical forces to the very highest degree of care by way of inspection and maintenance. It is meet and right to do so, because of the great danger to the public having to deal with such agencies. The duty of inspection and maintenance imposed by law upon these companies can be more safely relied on as a protection to the public than the casual and indifferent inspection made by a borough officer without any technical knowledge of the business. There are many things, however, which the borough may properly do by way of police regulation. It can require the poles to be kept in proper condition, the wires in safe repair, and see to it that the conduits and other appliances do not interfere with the public use of the streets. Reasonable latitude must be allowed the municipalities in dealing with this subject, but, on the other hand, they should not be permitted to make useless and unnecessary inspections at the cost of the operating companies. This is also a question for the courts to determine in a proceeding instituted under the act of April 17, 1905 (Pub. Laws, 183). In the case at bar we

think the borough was justified in requiring the inspection directed by the ordinance, and hence the only question for determination is as to the amount of the license fee imposed. The learned judge of the court of common pleas treated the question upon the theory that the borough ordinance should be sustained on the presumption that it was reasonable without reference to whether it was based upon the cost of inspection or not. In this we think there was error. When the petition was filed under the act of 1905, the proceedings were de novo, and it was the duty of the court to hear and determine the questions involved upon the pleadings, having due regard for the weight of the evidence. The superior court on appeal took [66] up the question and did modify the decree entered in the court below by fixing the amount of the license fees upon the basis of the cost of inspection, although there may be some doubt as to the strict application of the rule in arriving at the proper amount to be charged. The case was very intelligently considered by the learned judge who wrote the opinion, and since the amount involved in this particular case is small, no useful purpose can be served by prolonging the controversy. The per pole and per mile license fee charged in this case cannot be taken as a precedent on which to base charges in other municipalities throughout the commonwealth, because each case must depend upon its own facts, and in every case the cost of inspection must be the measure of liability.

Decree affirmed and record remitted to the court below, with instructions to enter judgment in favor of the borough of Sharon Hill for the amount of the license fees as fixed by the superior court.

The costs on the appeal to this court to be paid by appellant and all other costs to be paid as directed by the decree of the superior court.

The Principal Case is Cited in the recent note to Hager v. Walker, 129 Am. St. Rep. 290, on the constitutionality of license taxes.

COMMONWEALTH v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[224 Pa. 95, 73 Atl. 327.]

PRINCIPAL AND SURETY—Bond—Liability of Surety for Past Acts of Principal.—Where a surety enters into a bond for the faithful discharge by a trustee of his duties and that said trustee shall faithfully apply all the assets received by him in the trust estate, it is binding upon him, both prospectively and retrospectively. (p. 756.)

PRINCIPAL AND SURETY—Bond—Liability of Surety for Past Acts of Principal.—Where a guardian is required to give additional security, the sureties on the second bond are equally bound with those on the first bond for the full performance of the duties of the guardianship trust by their principal. (p. 758.)

PRINCIPAL AND SURETY—Judgment Against Principal—Effect on Surety.—Where a decree surcharges a principal upon the ground of gross negligence and fixes the amount of his liability, and no appeal is taken for four years, the question of gross negligence cannot be opened up in an action against the surety on his bond. (p. 758.)

PRINCIPAL AND SURETY—Judgment Against Principal—Surety Bound by.—The rule as to official bonds, bonds of indemnity, and bonds to insure the faithful performance of duty and to secure a proper accounting by persons in fiduciary relations, is that a judgment against the principal is conclusive against his sureties as to his misconduct and failure to properly account. (pp. 758, 759.)

William A. Glasgow, Jr., John H. Hall and Washington Bowie, Jr., for the appellant.

J. Carroll Hayes and Wm. M. Hayes, for the appellee.

98 ELKIN, J. In 1889 a trustee was appointed by the orphans' court of Chester county to take charge of a fund bequeathed by will for the benefit of a cestui que trust for life with remainder to her children. On the same day the trustee presented his bond with two sureties which were approved by the court and filed of record. In 1900, the trust estate not having been settled, the duties of the trustee still continuing, and one of the original 99 sureties on the bond having died, there arose some doubt as to the sufficiency of the bond to protect the trust estate, and steps were taken to secure a new bond for this purpose. Application was made to appellant, a bonding company, to become surety on the new bond. This company, organized for this and other kindred purposes, received the application and through its agents or representatives made such investigation as to the amount of the trust estate, the character of the securities held by the trustee and the investments made by him, as it deemed

necessary to be fully informed of the nature and extent of the liability of the principal in order to determine whether it was a desirable contract of suretyship to make, and for the further purpose of being advised as to the assets in the hands of the trustee to be accounted for in order to fix a limitation upon the responsibility it was willing to assume. The trustee submitted a list of securities then held and investments then made by him, and counsel for appellant after examination reported the conditions as they then existed. There was no misrepresentation or concealment of any material fact, and we do not understand that there is any allegation of fraud, accident or mistake which could affect the rights of the parties here. Being in possession of the knowledge thus obtained, which we must assume was satisfactory, appellant executed the bond upon which this suit was brought, obligating itself in the penal sum of fifteen thousand dollars to be answerable for the faithful discharge by the trustee of his duties and that said trustee "shall faithfully apply all the assets received by him in said trust estate." The contention earnestly made in the court below and ably pressed here is that the bond in question is binding upon the surety prospectively only and not retrospectively, that is to say, the burden upon the bonding company was to answer for the unfaithful discharge of his duties by the trustee after the date of the execution of the bond and not for any dereliction of duty prior to that date, and that it was only bound to answer for a proper accounting by the trustee to the extent of the value of the assets in his hands when the second bond was approved or which came into his hands after that date. Under the facts of the present case, we think this position is not tenable. The appellant through its learned counsel [100] contends that the correct rule applicable in such case is that bonds so given should be construed as intended presumptively to cover future losses and not past defaults, unless there is something in the bond itself, or in the surrounding circumstances, to indicate a different intention. With the rule thus stated as a general proposition of law we have no quarrel. However, it is one of those general rules to which there are so many exceptions under the facts of particular cases as to require the greatest care in its application in order that injustice may not be done or the legal rights of parties be defeated. We cannot agree, that taking into account the language of the bond itself, the application made by the trustee to appellant specifying the nature of the bond required and the extent of the liability there-

under, and all the surrounding circumstances, including the character of the trust, its indefinite duration, the purpose for which the bond was given, and the investigation made for the purpose of determining prior to its execution the amount of assets in the hands of the trustees for which he was accountable, the presumption is that the contract of suretyship was only intended by the parties themselves, or by the court which approved it, to apply to what may be termed future losses. Indeed, as we read the conditions of the bond in connection with the application and the surrounding circumstances, there is no escape from the conclusion that it was intended to cover all losses to the trust estate resulting from the unfaithful discharge of duty by the principal in his fiduciary relation, and of his failure to account for all assets in his hands at the time of the execution of the bond or which came into his hands afterward. No other conclusion can be reached without disregarding the application upon which the contract of suretyship is based, and which must be read in connection with the bond in order to properly understand and interpret its meaning. In paragraph 5 of the application, the bond required was stated to be one in a penal sum of fifteen thousand dollars, which was to secure the principal sum of twelve thousand dollars, being the amount of the entire trust estate. In paragraph 12, the estate is described as all that trust estate which came "into my hands in cash from a former trustee, under the will of Daniel B. Hinman, deceased." All the [101] cash which did come into his hands as trustee under the will mentioned was represented by the securities and investments, a list of which was shown appellant before the execution of the bond, and the amount of the liability was fixed to cover the entire estate consisting of these securities, the value of which either was known or should have been known by the bonding company when, for a consideration, it assumed the burden of answering to the cestuis que trustent for the faithful performance of duty by the trustee and the accounting for all assets belonging to the trust estate. In paragraph 6 the nature of the bond is stated to be to secure the parties in interest, the cestuis que trustent here, the proper application of the principal and interest of the trust estate created by the will of the testator above mentioned. Under these circumstances, how can there be any doubt as to the nature of the obligation or the extent of the liability the bonding company voluntarily took upon itself. When the new bond was given and approved, the entire assets

of the trust estate had already been received by the trustee, and were represented by the securities and investments on hand at that time and about which appellant was informed prior to its becoming a surety. No default had then been declared, and neither the trustee nor the cestui que trust, nor the surety, was in position to say that there was an existing default. These securities may or may not have been good at that time. If they should subsequently be realized on, there would be no default; if not realized on in full, there might or might not be a default depending upon the gross negligence of the trustee. The entire trust estate was intact in the hands of the trustee to the extent of the securities held by him and exhibited to the bonding company when the new bond was taken. The most that can be said of the situation at that time is that the value of the securities may not have been known or ascertained. The moneys of the trust estate were invested in western mortgages under an agreement that the trustee was not liable for losses unless for gross negligence, and of course his surety had no greater burden than the principal. It could be held liable for losses on these investments only upon the ground of the gross negligence of the trustee. [102] The question of gross negligence was raised and determined when the trustee filed his account in the orphans' court. The attempt was there made, and successfully made, to surcharge the accountant upon the ground of gross negligence which was the only ground upon which a surcharge could be made under the agreement. The account was first referred to an auditor, who took the testimony, which was afterward fully considered by the court with the result that the charge of negligence was sustained and the accountant surcharged accordingly. From the order or decree surcharging the accountant and fixing the amount of his liability as trustee, no appeal was taken, and now, after the lapse of four years, we think the question of gross negligence cannot be opened up in a collateral proceeding. The trustee is bound by the decree of the orphans' court, unappealed from, and why should not his surety be likewise bound? As to official bonds, bonds of indemnity, and bonds to insure the faithful performance of duty and to secure a proper accounting by persons in fiduciary relations, the rule of our cases seems to be that a judgment against the principal is conclusive against his sureties as to his misconduct and failure to properly account. In this class of cases, the surety submits himself to the acts of his principal and to the judgment as a legal conse-

quence, following the scope of the suretyship: Masser v. Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668; Giltinan v. Strong, 64 Pa. 242; Commonwealth v. Gracey, 96 Pa. 70. To permit appellant to raise the question of the gross negligence of the trustee already determined in the orphans' court against the principal, in this collateral action, as a defense to the bond in suit, the rule of these cases must be disregarded.

Again, there is no distinction in principle between the case at bar and Commonwealth v. Cox's Admr., 36 Pa. 442, in which it was held that where a guardian was required to give additional security, the sureties on the second bond are equally bound with those on the first bond for the full performance of the duties of the guardianship trust by their principal.

Judgment affirmed.

THE ADMISSIBILITY AND EFFECT AGAINST A SURETY OF A JUDGMENT AGAINST HIS PRINCIPAL.

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II. The Law as It is.

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III. The Law as Uniformity of Decision Would Render It, 769.

I. The Law as It was.

In a note to the case of Charles v. Hoskins, 14 Iowa, 471, 83 Am. Dec. 380, the editor summed up the law on this subject in the following words: "The question how far a judgment or decree is conclusive against a surety of defendant, or against one who is liable over to a

defendant, and who was not a party to the action, is involved in the greatest confusion. Between the intimate relations which exist between such a person and the defendant in the suit on the one side, and the fundamental principle that no one ought to be bound by proceedings to which he was a stranger, on the other, the courts have found it difficult to steer."

Mr. Freeman, in Judgments, section 180, says: "The law in relation to the effect of a judgment against a principal, for the purpose of charging the surety is differently understood and applied in the different states. And in the same state distinctions are made between different classes of sureties": Freeman on Judgments, 4th ed., p. 330. And again: "In respect to sureties upon bonds and contracts other than those already noticed, the contrariety of opinion concerning the effect upon them of a judgment against their principal is very marked and irreconcilable": Freeman on Judgments, 4th ed., p. 335.

II. The Law as It is.

a. Opinions Affirming Conclusiveness Against Sureties of Judgments Against Principals.—On the general proposition that a surety is concluded by a judgment against his principal, the diversity of decision is hopeless, and the sole refuge of the case lawyer is to reconcile himself to their irreconcilability.

That such a judgment, in the absence of fraud or collusion, is conclusive against the surety is affirmed in a large number of cases, and it is of interest to note the apparent finality of the reasoning in support of the three propositions that such a judgment is and is not conclusive on the surety and the midstream decisions that it is prima facie evidence only. In Charles v. Hoskins, 14 Iowa, 471, 83 Am. Dec. 380, it is laid down that the liability of the surety is dependent on that of the principal, inasmuch as the surety, though not a party to the proceedings, is nevertheless not a stranger to the judgment. He has covenanted that his principal shall or shall not do certain things, and once it has been fairly determined by a competent judicial tribunal that there has been a breach of that covenant, the liability of the surety arises, and, as he could claim the benefit of a judgment in favor of his principal, so he should be concluded by a judgment against him.

In Mitchell v. Toole, 63 Ga. 93, the court said: "When the complainant in this bill signed the bond as security for the claimant, he put himself in a boat which the claimant was to steer in behalf of both, and if there was injudicious or unskillful navigation, he must take the consequences. The judgment on the bond concludes him as well as his principal; if it did not bind both, it would bind neither. We can think of nothing that, in the nature of things, could be urged against it by either of them except fraud."

In most of the other decisions affirming the principle, it has been adopted with the full knowledge of the chaotic state of the case law on the subject, and frequently in deference to previous decisions of the courts in the respective states. Such affirmation will be found in McBroom v. Somerville, 2 Stew. (Ala.) 515; Treweek v. Howard, 105 Cal. 434, 39 Pac. 20; McCalla's Admr. v. Patterson, 18 B. Mon.

201; Brashear v. Carlin, 19 La. 395; Fusz v. Trager, 39 La. Ann. 292, 1 South. 535; Jenkins v. State, 76 Md. 255, 23 Atl. 608, 790; Way v. Lewis, 115 Mass. 26; Cutter v. Evans, 115 Mass. 27; Lothrop v. Southworth, 5 Mich. 436; Higdon v. Vaughn, 58 Miss. 572; Deegan v. Deegan, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360; Gerould v. Wilson, 81 N. Y. 573; Haight v. Brisbin, 1 How. Pr., N. S., 199; Deobold v. Oppermann, 111 N. Y. 531, 7 Am. St. Rep. 760, 19 N. E. 94, 2 L. R. A. 644; Douglas v. Ferris, 138 N. Y. 192, 34 Am. St. Rep. 435, 33 N. E. 1041; Brown v. Pike, 74 N. C. 531; Jaynes' Exr. v. Platt, 47 Ohio St. 262, 21 Am. St. Rep. 810, 24 N. E. 262; Neel v. Commonwealth (Pa.), 7 Atl. 74.

Perhaps the most sweeping of these dicta is to be found in Commonwealth v. Fidelity & Deposit Co., 224 Pa. 95, ante, p. 755, 73 Atl. 327, in which it is laid down that as to official bonds, bonds of indemnity, and bonds to insure the faithful performance of duty, and to secure a proper accounting by persons in fiduciary relations, the rule of the cases in Pennsylvania seems to be that a judgment against the principal is conclusive against his sureties as to his misconduct and failure to properly account. The reason for this appears to be that in this class of cases the surety submits himself to the acts of his principal and to the judgment as a legal consequence, following the scope of the suretyship.

b. **Opinions Opposed to Conclusiveness Against Sureties of Judgments Against Principals.**—The courts have almost of necessity adopted as the foundation of opinions that judgments against the principals are not conclusive against the sureties the old-time and well-founded rule that no man should be bound by proceedings to which he was a stranger and without the opportunity of that hearing of the other side without which justice cannot be fairly administered. They are not parties to the proceeding, and when sued on their bond they have the right to show, if they can, that the judgment should not have been rendered against their principal. This has been the continuous and uninterrupted ruling of the Georgia courts, and in Tennessee it has been held that while for some purposes, probably, sureties might be held bound by the settlement of their principal, they should not be precluded by a decree in a case to which they were not parties from showing any valid defenses. The same principle is affirmed in Bennett v. Graham, 71 Ga. 211; Commonwealth v. Bracken (Ky.), 32 S. W. 609; People v. McHenry, 19 Wend. 482; Gambill v. Campbell, 12 Heisk. 737; Muhling v. Ganeman, 4 Baxt. 88; Barksdale v. Butler, 6 Lea, 450; Glasscock v. Hamilton, 62 Tex. 143; Mumford v. Overseers of Poor, 2 Rand. (Va.) 313; Hobson v. Yancey, 2 Gratt. (Va.) 73.

c. **Opinions Affirming Judgments Against Principals to be Prima Facie Evidence Only Against Sureties.**—While there are some decisions to the contrary, as we have shown above, the more numerous cases unite in declaring the prima facie effect of a judgment against the principal as evidence against the surety, but they differ some-

what as to the means by which this prima facie evidence may be rebutted: Freeman on Judgments, sec. 180. That such a judgment should not be conclusive against the surety, unless he has been notified to defend or been made a party, is well enough based on the possibility of fraud or collusion; and while the surety was aware of his possible liability when he entered into the obligation, and the knowledge of a judgment against his principal does not come upon him as an entire surprise, still he is not a party to the action, into which not only fraud or collusion may have entered, but into which clerical error may have crept to his prejudice; and lastly he may be in a position to prove that the demand had been paid: Bradwell v. Spencer, 16 Ga. 578; Henry v. Heldmaier, 226 Ill. 152, 80 N. E. 705, 9 Ann. Cas. 150; Charles v. Hoskins, 14 Iowa, 471, 83 Am. Dec. 378; Macready v. Schenck, 41 La. Ann. 456, 6 South. 517; Roberts v. Woven Wire Mattress Co., 46 Md. 374; Parr v. State, 71 Md. 220, 17 Atl. 1020; People v. Mersereau, 74 Mich. 687, 42 N. W. 153; De Greiff v. Wilson, 30 N. J. Eq. 435; Pierpont v. McGuire, 13 Misc. Rep. 70, 34 N. Y. Supp. 150; O'Conner v. State, 18 Ohio, 225; Ihrig v. Scott, 13 Wash. 559, 43 Pac. 633; Glenn v. Morgan, 23 W. Va. 467; Berger v. Williams, 4 McLean, 577, Fed. Cas. No. 1341; Moses v. United States, 166 U. S. 571, 17 Sup. Ct. Rep. 682, 41 L. ed. 1119; Union Guarantee & Trust Co. v. Robinson, 79 Fed. 420, 24 C. C. A. 650; Johnston v. Sexton, 86 C. C. A. 260, 159 Fed. 70.

"We think," says the court in Berger v. Williams, 4 McLean, 577, Fed. Cas. No. 1341, "on reason and authority, the law is clear that a judgment against the principal is prima facie evidence against the sureties." In City of Lowell v. Parker, 10 Met. (Mass.) 309, 43 Am. Dec. 436, Chief Justice Shaw says, and his exposition of the law has been largely adopted without dissent by courts and text-writers: "But it is objected that this judgment was not admissible, because the sureties were not notified, and therefore it was res inter alios. But we think this objection cannot be supported under the circumstances of this case. When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is prima facie evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is prima facie evidence, to stand until impeached or controlled, in whole or in part, by countervailing proofs."

d. Contractual Conclusiveness—Where Sureties have Agreed to be Concluded by Judgment Against Principal.—Where the sureties have specifically agreed that the judgment against their principal shall be conclusive against them, there can be no conflict of the cases, and the decisions are, irrespective of whether the sureties had notice of the proceedings or not, that such judgments are conclusive: Shenandoah Nat. Bank v. Read, 86 Iowa, 136, 53 N. W. 96; Harrell v. Sanders, 26

La. Ann. 691; People v. Laning, 73 Mich. 284, 41 N. W. 424; Thomson v. MacGregor, 9 Abb. N. C. 138. "Wherever a surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment": Freeman on Judgments, sec. 180, and cases cited. To this class belong sureties on bail bonds and bonds on appeal: Riddle v. Baker, 13 Cal. 295; Waldrop v. Wolff, 114 Ga. 610, 40 S. E. 830; Jordan v. Thornton, 5 Ga. App. 537, 63 S. E. 601; Barber v. Rutherford, 12 Misc. Rep. 33, 33 N. Y. Supp. 89; Richardson v. People's Nat. Bank, 57 Ohio St. 299, 48 N. E. 1100; Bradford v. Frederick, 101 Pa. 445; Parkhurst v. Sumner, 23 Vt. 538, 56 Am. Dec. 94.

The preponderance of the jurisprudence on this subject is that the sureties cannot set up any defense which their principal could not raise, and that where a judgment on the merits condemns him, the surety is concluded by it, even though a regularly rendered judgment was not justified by the evidence: Fusz v. Trager, 39 La. Ann. 292, 1 South. 535; McCloskey v. Wingfield, 32 La. Ann. 38.

Where the obligation is to pay all such damages and costs as should be awarded against the defendant, it is broken as soon as a decree awarding damages is made, and the execution thereon returned unsatisfied. The condition is broken upon nonpayment, and proof of the breach maintains the action. In the cases where it is held to the contrary, it is so held because the undertaking related to the cause of action, whereas in this and other like cases the undertaking relates to the result: Lothrop v. Southworth, 5 Mich. 436.

From these and other cases to the point we think the inference to be drawn is that where the agreement is an express obligation by the surety to abide and be bound by the adverse result of an action against his principal, then, by the very terms of his own stipulation, the judgment is made conclusive against him, and the maxim, "To the willing no damage comes," applies to his liability. If, on the other hand, the obligation is merely to be surety for his principal as bail, or on judicial bonds, the spirit, if not the letter, of the obligation demands that the adjudged breach of that obligation by the principal must be visited on the surety but for whose bond the opposite party would have been in a more advantageous position as against the principal, so that in either aspect the judgment against the principal is, and in our opinion has properly been held to be, conclusive in such cases against the surety.

e. Sureties on Bonds in Special Cases.

1. **Assignees for the Benefit of Creditors.**—It would seem that the obligation assumed by the surety upon the bond of an assignee for the benefit of creditors is strictly analogous to that assumed by the surety of a personal representative. The duties imposed by the law upon these two classes of fiduciaries are almost exactly similar. Each administers the estate committed to his charge, pays the debts, and pays over to those entitled the surplus found to be due upon his set-

tlement. As the weight of authority is that judgments against administrators conclude the sureties as to the existence and character of the debt thus ascertained, and cannot be questioned or reviewed in a suit on the official bond, the liability of the sureties for an assignee for the benefit of creditors is equally concluded by a judgment against their principal, notwithstanding the fact that they had no notice of the proceedings: National Surety Co. v. Arterburn, 23 Ky. Law Rep. 281, 62 S. W. 862.

2. **Contractors' Bonds and Mechanics' Liens.**—Outside the region of official bonds, the conflict of opinion can be immediately discerned, but in the large majority of cases on contractors' bonds and mechanics' liens the decisions lean to the conclusiveness against the surety of the judgment against the principal.

In Morton v. Tucker, 145 N. Y. 244, 40 N. E. 3, it is said: "The sureties in the bond intended, and must be understood as undertaking, to pay the amount which it should be adjudged was due and owing to the plaintiffs, and which was chargeable against the property by virtue of their notice of lien. In other words, the condition was for the payment of any judgment which might have been rendered against the property had not the bond been given. The bond, as we have seen, is given to discharge the lien. It is one of the proceedings provided for by the statute, and it was evidently intended that the bond should take the place of the property, and become the subject of the lien, in the same form and manner as provided for in the case of the payment of money into court or the deposit of security under an order of the court after action brought."

In Miller v. Youmans, 13 Misc. Rep. 59, 34 N. Y. Supp. 140, it is said: "The bond upon which this action is brought having been treated by all the parties as valid, and upon the faith of which the plaintiff's mechanic's lien was discharged of record, the sureties are thereby estopped to deny the validity of the bond," and the judgment in that case was founded on and followed Goodwin v. Bunzl, 102 N. Y. 224, 6 N. E. 399; Sheffield v. Robinson, 81 Hun, 555, 30 N. Y. Supp. 799.

The sureties were held bound by judgments against the principals in Ruggles v. Bernstein, 188 Mass. 232, 74 N. E. 366; McFall v. Dempsey, 43 Mo. App. 369; Oberbeck v. Mayer, 59 Mo. App. 289; Comstock v. Cameron, 41 Neb. 814, 60 N. W. 105; Miller v. Youmans, 13 Misc. Rep. 59, 34 N. Y. Supp. 140; City of Philadelphia v. Pierson, 217 Pa. 193, 66 Atl. 321; Friend v. Ralston, 35 Wash. 422, 77 Pac. 794; Henry v. Aetna I. Co., 36 Wash. 553, 79 Pac. 42; Lake Drummond Canal & Water Co. v. West End Trust & Safe Deposit Co., 131 Fed. 147. And the contrary in McConnell v. Poor, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312; Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859.

3. **Executors and Administrators.**—The liability of sureties on administration bonds in cases of judgments or decrees against their principal stands upon a different footing than that of others. From

the earliest days it has been held in New York state that such sureties were bound by any decree which the surrogate had jurisdiction to make touching the administrator's conduct of the estate: Casoni v. Jerome, 58 N. Y. 315; Gerould v. Wilson, 81 N. Y. 573; Deobold v. Oppermann, 111 N. Y. 531, 19 N. E. 94; Power v. Speckman, 126 N. Y. 354, 27 N. E. 474. The reason for this holding, as stated by the courts, is that by his contract the surety puts himself in privity with the administrator, and, being so in privity, he is bound by any decree that the surrogate has jurisdiction to make. The surety, when he signed the bond, must have known his liability, and there is no hardship in insisting that he should be bound by the decree against his principal: McMahon v. Smith, 24 App. Div. 25, 49 N. Y. Supp. 93.

Where the sureties contended as a reason why they should not be bound by such a decree on the ground principally of misrepresentations by the principal to them when they signed the bond, the court said that if such circumstances prevailed to release sureties, very few would remain bound. The sureties must be presumed to have known his position. "Beyond this and stripped of verbiage and accessories which do not control the decision, the simple fact remains that Bowman [the executor] was insolvent, and the sureties were not aware of that fact nor of his indebtedness to the estate. The case serves to illustrate the wisdom of Solomon, where he says (Prov. xi, 15): 'He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure'": Treweek v. Howard, 105 Cal. 434, 39 Pac. 20.

The doctrine as to the bonds of personal representatives is thus stated in Brandt on Suretyship, section 811: "A settlement made by an executor or administrator with, or a judgment rendered against him in his official capacity by, the court in which his accounts must be settled, is generally held to be conclusive evidence against his sureties of the facts thus established, although the sureties were not parties to, and had no express notice of, the proceedings." The responsibility of sureties being incidental and collateral to that of the principal, a judgment in favor of a creditor against the administrator concludes the sureties as to the existence and character of the debt thus ascertained, and cannot be questioned or reviewed in a suit on the official bond: Hobbs v. Middleton, 1 J. J. Marsh. 176. In Brandt on Suretyship, section 532, occurs again further evidence of the existence of this principle: "Such sureties are in many respects like the sureties on a bail bond, and are equally bound by the proceeding against their principal. The duty they have assumed is that their principal will pay on demand all debts ascertained by judgment of a court of law against him in his capacity of administrator, if the estate be solvent. His failure to make payment is a breach of the administration bond."

Careful search of the authorities will disclose that mainly on the principles above quoted practically the whole of the decisions under

this head are that the sureties in probate matters are bound by the decree or judgment against their principals: Gorman v. Bonner, 80 Ark. 339, 97 S. W. 282; Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; McDonald v. People, 222 Ill. 325, 78 N. E. 609; Judge of Probate v. Quimby, 89 Me. 574, 36 Atl. 1049; Fuller v. Cushman, 170 Mass. 286, 49 N. E. 631; Martin v. Porter, 32 App. Div. 602, 53 N. Y. Supp. 186; Thompson v. Dekum, 32 Or. 506, 52 Pac. 517, 755; In re Yung's Estate, 199 Pa. 35, 48 Atl. 692; Meyer v. Barth, 97 Wis. 352, 65 Am. St. Rep. 124, 72 N. W. 748.

In a few cases, however, it has been held that the judgment against the principal is prima facie evidence only against the surety: Bird v. Mitchell, 101 Ga. 46, 28 S. E. 674; American Bonding & Trust Co. v. United States, 23 App. D. C. 535; Wiemann v. Mainegra, 112 La. 305, 36 South. 358. In Dawes v. Shed, 15 Mass. 6, 8 Am. Dec. 80, the reason assigned for the nonliability of the sureties is that the principal did not avail himself of the plea of the statute of limitations which was open to him.

4. **Guarantors.**—In Blanding v. Cohen, 184 N. Y. 538, 76 N. E. 1089, sureties who had notice of the proceedings against their principal were concluded by the judgment therein against him.

5. **Guardians.**—Judgments against principals have been held conclusive against the sureties in Lincoln Trust Co. v. Wolff, 91 Mo. App. 133; Botkin v. Kleinschmidt, 21 Mont. 1, 69 Am. St. Rep. 641, 52 Pac. 563; Fahey v. Boulmay, 24 Tex. Civ. App. 279, 59 S. W. 300, and Baldwin v. State of Maryland, 179 U. S. 220, 21 Sup Ct. Rep. 105, 45 L. ed. 160. In Fidelity & Deposit Co. of Maryland v. Rich, 122 Ga. 506, 50 S. E. 338, such a judgment was held only prima facie evidence against the surety.

6. **Landlord and Tenant and Lessor and Lessee.**—Where a principal is insolvent and has not defended the action against him in good faith, or where the surety has a defense peculiar to himself which the principal has no legal obligation to plead, equity will permit the surety to intervene. The general rule, however, that the surety is bound by the judgment against the principal was affirmed: Price v. Carlton, 121 Ga. 12, 48 S. E. 721; Giltinan v. Strong, 64 Pa. 242. In Stevens v. Pendleton, 94 Mich. 405, 53 N. W. 1108, the surety was permitted to intervene and defend on the ground of an alteration in the lease for the payment of the rent under which he had made himself responsible.

7. **Liquor Dealers.**—The general rule, i. e., that the judgment against the principal concluded the sureties was followed in State v. Nutter, 44 W. Va. 385, 30 S. E. 67, and Town of Point Pleasant v. Greenlee, 63 W. Va. 207, 129 Am. St. Rep. 971, 60 S. E. 601. But in City of Paducah v. Jones, 31 Ky. Law Rep. 1203, 104 S. W. 971, in which the principal had been fined for a breach of the conditions of his license and there was an attempted recovery of the whole amount of the bond from the sureties, the court laid down the principle that

sureties were not estopped by their principal's confession of guilt or conviction of an offense from showing in an action that no breach of the bond had been committed. They were not parties to the penal proceeding against him, and, as their liability upon the bond depended upon the question whether or not he had committed a breach of his obligation, they had the right in an action against them to show that he had not.

8. **Mortgagors.**—The guarantors of a mortgage debt are not concluded by the judgment against the mortgagor: American Building & Loan Assn. v. Stoneman, 53 Minn. 212, 54 N. W. 1115; Kane v. Cortesy, 100 N. Y. 132, 2 N. E. 874.

9. **Promissory Notes.**—A judgment recovered against the principals on a promissory note in a suit against them alone is prima facie evidence only of liability on the part of sureties in a separate action against the latter, and the sureties are not estopped by such judgment from pleading and proving a defense unsuccessfully urged by their principals: Curry v. Mack, 90 Ill. 606; Park v. Ensign, 66 Kan. 50, 97 Am. St. Rep. 352, 71 Pac. 230. In Beh v. Bay, 127 Iowa, 246, 109 Am. St. Rep. 246, 103 N. W. 119, a contrary opinion is apt to mislead without a careful perusal of the facts of the case. The maker of a promissory note sued for the recovery of the document itself on the ground that it was paid, and he was defeated, and the then defendant sued him and a surety for the amount of it. The surety had been a witness for his principal in the former action, and the facts in both actions were the same; the surety was held to be estopped by the first judgment from relying on the same transaction pleaded as payment.

10. **Receivers.**—Sureties of receivers are almost upon the same plane as those of executors and administrators, and are therefore ordinarily bound by the judgments and decrees against their principals: State v. Abbott, 63 W. Va. 189, 61 S. E. 369. But it is necessary that the specific default of the principal should be shown to have been made while he was acting in his official capacity; otherwise the surety has the right to rebut the prima facie evidence of the judgment against him: Preston v. American Surety Co. of New York, 104 Md. 40, 64 Atl. 292.

11. **Sheriffs and Marshals.**—The sureties of these officers are within the same category as those of receivers, and are concluded by the judgment against their principal: Meyer v. Purcell, 114 Ill. App. 472, 214 Ill. 62, 73 N. E. 392. There is not, however, any great weight of authority for it; the cases decided being more numerously in favor of such a judgment being prima facie only in the absence of notice of the original action: Fire Association of Philadelphia v. Ruby, 49 Neb. 584, 68 N. W. 939; Thomas v. Hubbell, 15 N. Y. 405, 69 Am. Dec. 619; V. Loewer's Gambrinus Brewery Co. v. Lithauer, 88 N. Y. Supp. 372; Martin v. Buffaloe, 128 N. C. 305, 83 Am. St. Rep. 679, 38 S. E. 902.

12. **United States Officials.**—A judgment against a delinquent collector of the United States internal revenue was held not to bind the surety on his bond where the surety had no notice of the proceedings and the action against such surety was not under the provisions of the statute which called for the bond from the collector with sureties, but was a suit to set aside certain conveyances made by the surety: United States v. Ingate, 48 Fed. 251.

13. **Vendor and Vendee.**—In Ross v. Woodville, 4 Munf. (Va.) 324, the surety for payment of the purchase price of land was held concluded by a decree dissolving an injunction which the purchaser had obtained against the vendor restraining him from collecting such purchase price until he showed a good title to the premises sold, and which was dissolved by consent, the purchaser waiving his objections. Practically, however, this is an authority in support of the prima facie doctrine, inasmuch as the surety was permitted to intervene in the original action for the purpose of showing the grounds of his objection to the waiver by his principal and of obtaining further assurance of title to the land sold, and the decree of dissolution was reopened for the purpose.

f. **Where Surety is Party to or has Notice of the Proceedings.**—The weight of authority seems to be that where the surety is a party to or has had notice of the action or suit, with the opportunity to be heard in defense, that a judgment against the principal will also bind him: Newton v. More, 14 Ark. 166; Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647; Carraway v. Odeneal, 56 Miss. 223; Stoops v. Wittler, 1 Mo. App. 420; United States v. Oliver, 36 Fed. 758.

g. **Collusion, Fraud or Mistake.**—There seems to be a consensus of opinion that a surety may set up the defenses of payment of the original judgment or collusion or fraud in obtaining the judgment against his principal which is relied on in the action against such surety: Elder v. Prussing, 101 Ill. App. 655; Charles v. Hoskins, 14 Iowa, 471, 83 Am. Dec. 378; Dane v. Gilmore, 51 Me. 544; Great Falls Mfg. Co. v. Worster, 45 N. H. 110; Parker v. Woodside, 29 N. C. 296; Treasurers v. Bates, 2 Bail. (S. C.) 362; Berger v. Williams, 4 McLain, 577, Fed. Cas. No. 1341.

h. **Judgment by Confession or Default.**—Judgments confessed by a principal or allowed by default do not bind the surety: Allison v. Thomas, 29 La. Ann. 732; Foxcroft v. Nevens, 4 Me. 72; Picot v. Signiago, 27 Mo. 125; Ward v. Johnston, 1 Munf. (Va.) 45; United States v. Rundle, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505. In the case of Nimocks v. Pope, 117 N. C. 315, 23 S. E. 269, the surety sought to evade a compromise judgment against his principal, but failed by reason of being a party to the negotiations which led to the compromise.

i. **Judgment in Favor of Principal.**—In an action against him on his bond, a surety may avail himself of a prior judgment in favor of his principal; and this state of the law has always furnished a strong

vice versa argument in favor of the surety being concluded by a judgment against his principal: Stevens v. Carroll, 131 Iowa, 170, 105 N. W. 653.

III. The Law as Uniformity of Decision Would Render It.

In the opinion of the writer, no necessity or excuse exists for the present diversity of opinion. The subject lends itself very readily to the mold of uniformity untrammeled by those geographical or climatic considerations which the exigency of locality sometimes demands; and from the elementary principles of the relation of principal to surety and the heterogeneous mass of decided cases, the writer has sought to extract for lawyers that which the judges, avid to define and able to interpret the law, but hampered by local precedents, have, through no fault of theirs, in this regard failed to accomplish.

The law might well be codified into the following propositions, for which support can be found in the majority of the cases already cited, and which preserve the distinction between those obligations which relate to the cause of action and those which arise from its result:

1. That a judgment (except by confession or default) against a principal is conclusive against the surety in all cases where the surety (a) has had notice of the proceedings from their inception and has had the opportunity to be heard in defense; (b) or where by the very nature of the contract the surety has agreed to be bound by the judgment against the principal, as in the case of bail bonds, etc.

2. That a judgment by confession or default of the principal should be inadmissible against the surety.

3. That judgments other than those mentioned in 1 and 2 should be prima facie evidence only against the surety, subject to right of rebuttal at all points.

4. That the principles which guide the setting aside of judgments for collusion, fraud or mistake should apply in all cases of actions against sureties supported by the judgment against the principal.

In conclusion, we would suggest that in such cases as it is intended or desired to bind the sureties by a judgment against the principal, a copy of the process, complaint, etc., should be served on the surety after service on the principal with a notice that such process was served with the express purpose that he should have notice thereof and to enable him to be joined as a party if necessary, to be heard in his or the principal's defense. In such case his rights are not prejudiced, and multiplicity of suit is avoided by the one adjudication. At all events, if the surety did not elect to appear on the hearing, the judgment would be final and properly admitted against him on his ultimate liability, and he could have no cause of complaint of the want of notice of the action against the principal.

CONN v. HUNSBERGER.

[224 Pa. 154, 73 Atl. 324.]

BAILMENT—Livery-stable Keeper—Implied Warranty of.—The relation between a livery-stable keeper and his customer is that of bailor and bailee for hire, and the former assumes the liability which the contract of bailment imposes. When the bailor lets a horse for hire he impliedly promises or warrants that the animal is fit and suitable for the purpose for which it is hired; warrants that the horse is not unruly or vicious, but is safe, manageable and suitable for the use for which the customer has hired it. (p. 771.)

BAILMENT—Livery-stable Keeper—Duty to Ascertain Habits of Horse.—It is the duty of a livery-stable keeper to inform himself of the habits and disposition of the horses which he hires out, and if he knows they are dangerous and unsuitable, or with care could have learned it, he is liable to his customers for injuries resulting from the vicious propensities of the horse hired. It will not be sufficient for him to allege that he did not know a particular horse was unsuitable, because his warranty is against defects or vicious habits which he knows, or which by the exercise of reasonable care he could have known. (pp. 771, 772.)

BAILMENT—Livery-stable Keeper—Burden of Proof.—In an action against a livery-stable keeper for hiring out a vicious horse to a customer who was injured by it, the burden of proving both the animal's viciousness and the scienter were upon the customer, and after the customer had introduced this evidence the burden was shifted to the livery-stable keeper to prove that the animal was not vicious, that if it were he was ignorant of it, and that he had exercised proper care to inform himself as to its habits. He may also use a defense that the animal's conduct was occasioned by the customer, or by some event which would have produced the same effect on a gentle horse, or that the hirer knew of the vicious habit of the horse and took the risk upon himself. (p. 773.)

TORT—Contract—Scienter.—The owner of a vicious dog which bites another person is responsible only on proof of the scienter, but there is no such burden of proof when there is a contractual relation between the parties, as in the case of hiring out a vicious horse. (p. 774.)

PLEADING—Implied Warranty—Negligence.—Where a statement in an action sufficiently avers a breach of an implied warranty by a livery-stable keeper of the suitableness of a horse hired out to the plaintiff, and also avers facts sufficient to show negligence in not ascertaining the viciousness of such horse, the plaintiff is entitled to recover for the breach of the implied warranty. (p. 775.)

ACTION—Tort or Contract.—Whether the plaintiff sues the defendant, a livery-stable keeper, in tort for negligence for not having supplied such a horse as he ought to have supplied or in contract for the breach of the implied warrant is immaterial. (p. 775.)

Louis Goodfriend, for the appellant.

Edwin M. Abbott, for the appellee.

156 MESTREZAT, J. This is an action of trespass to recover damages for injuries caused by the vicious acts of a horse. The defendant is a livery-stable keeper in the city of

Philadelphia, and for several months prior to November 12, 1906, the plaintiff had hired of him a horse to be used for drawing a delivery wagon [157] about the city. On the morning of the day mentioned the plaintiff went to the defendant's stable and obtained a mare to drive in his wagon during the day. This mare was different from the one which he had previously hired and used in his business, the defendant having purchased her that morning. The plaintiff testified that the defendant knew the purpose for which the mare was hired, that he recommended her very highly and that she was safe and suitable for the purpose; and that he had purchased her especially for the plaintiff's use. The plaintiff was familiar with and had been driving horses for twenty-five years.

The mare was harnessed to a light wagon and the plaintiff started on his drive about the city. Within half an hour after the animal was hired she suddenly, without any apparent cause, started to kick violently and finally ran off. She kicked the dashboard off, hit plaintiff above the eye, and kicked the seat from under the plaintiff. While she was running, the wagon violently struck a truck standing on the street, broke the front axle at the hub and threw the plaintiff out. He was knocked unconscious and was severely injured.

This action was brought to recover damages for the injuries which the plaintiff sustained. On the trial of the cause the above facts were made to appear; and witnesses were also called who testified that the conduct of the mare on the occasion of the accident showed that she was not mild, kind and gentle, but was wild and vicious, and that a gentle horse would not act as she did.

These witnesses were owners of horses and knew their habits, traits and dispositions. The learned judge directed the jury to find a verdict for the defendant on the ground that there was "no evidence that the defendant knew, or by the exercise of reasonable care could have known, that the mare was unsuitable for use, if in fact she was so." The plaintiff has taken this appeal.

The relation between a livery-stable keeper and his customer is that of bailor and bailee for hire, and the former assumes the liability which the contract of bailment imposes. When the bailor lets a horse for hire he impliedly promises or warrants [158] that the animal is fit and suitable for the purpose for which it is hired; he warrants that the horse is not unruly or vicious, but is safe, manageable and suitable for the use for which the customer has hired it. It is the duty of a

livery-stable keeper to inform himself of the habits and disposition of the horses which he keeps in his stable for hire, and if he knows that they are dangerous and unsuitable, or by the exercise of reasonable care could ascertain the fact, he is liable for any injuries to his customers resulting from their vicious propensities. The law will not permit him to close his eyes and his ears, thereby remaining ignorant of the vicious habits of his horses, and relieve him from liability for injuries to a customer resulting from such habits. In his contract of hiring he impliedly engages that he knows or has exercised reasonable care to ascertain the habits of his horses, and says to his customer that the horse which he lets is safe and suitable for the purpose for which he has hired it. His warranty is against defects or vicious habits which he knows, or by the exercise of proper care could know, and if he fails to exercise such care, and it occasions injury to his customer, he will not be relieved of liability though he did not actually know the horse was unsuitable for the service. It is true a liveryman is not an insurer of the suitableness of a horse or carriage let to a customer, but he is bound to exercise the care of a reasonably prudent man to furnish a horse or carriage that is fit and suitable for the purpose contemplated in the hiring. The customer is at his mercy, and must rely upon the liveryman to guard him against the danger of a vicious animal or defective vehicle; and hence he has the right to demand of the liveryman that he will use such care in supplying a horse or carriage as a reasonably prudent man exercises in the conduct of his own business affairs. While this court has not passed upon the question, the doctrine here announced is recognized and applied in other jurisdictions: 25 Cyclopedia of Law and Procedure, 1513; 19 Am. & Eng. Ency. of Law, 2d ed., 432; Edwards on Bailments, sec. 373; Fowler v. Lock, L. R. 7 C. P. 272, 10 C. P. 90; Horne v. Meakin, 115 Mass. 326; Lynch v. Richardson, 163 Mass. 160, 47 Am. St. Rep. 444, 39 N. E. 801; Windle v. Jordan, [159] 75 Me. 149, Stanley v. Steele, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561, 2 Ann. Cas. 342; Nisbet v. Wells (Ky.), 76 S. W. 120. In Lynch v. Richardson, 163 Mass. 160, 47 Am. St. Rep. 444, 39 N. E. 801, Mr. Justice Knowlton, delivering the opinion, said: "It was the duty of the defendant to furnish a horse that had no such vicious habit, and if he knew of the existence of the habit, or if, by the exercise of reasonable care to ascertain whether the horse was suitable for the use of hirers, he ought to have known that it was dangerous, he is liable for such in-

juries as resulted from his wrongful conduct. It was the duty of the defendant to try to inform himself in regard to the habits of horses kept in his stable for use in his business. It does not require a very long acquaintance with a horse to enable an ordinary livery-stable keeper to form a correct opinion of his qualities. Usually he tries to ascertain as much as possible about it before becoming its owner."

In the case at bar, therefore, the questions were whether the mare was vicious and unsuitable for the purpose for which she was hired, and whether the defendant knew, or by the exercise of reasonable care should have known, the fact. The burden of establishing both propositions was on the plaintiff. He assumed the burden and introduced evidence to show the vicious conduct of the mare at the time she became unmanageable and injured the plaintiff. In addition to this, witnesses were called whose familiarity with horses, their dispositions and habits, gave their testimony weight, and they testified that the actions of the mare on that occasion showed that she was not gentle or kindly disposed, but was wild and unmanageable. We think the evidence, if believed by the jury, was sufficient to show a breach of the defendant's implied warranty that the mare was fit and suitable for the service for which she was hired, and that the defendant was negligent in not furnishing the plaintiff a gentle and suitable animal. Such evidence having been introduced by the plaintiff, the burden was then imposed upon the defendant of satisfying the jury that the animal was not vicious or unruly, or that he was ignorant of the vicious character of the animal and had exercised proper care to inform himself as to its habits. The defendant may also show as a defense that the conduct of the animal was [160] occasioned by the hirer, or by the happening of an event that would cause such conduct by a gentle or well-trained horse and one not addicted to a vicious habit, or that the hirer knew or was informed of the habits of the horse, and he assumed the risk, or any other matter which would relieve the liveryman from the alleged negligence or breach of implied warranty. It is imposing no heavy burden upon the keeper of a livery-stable to require him to investigate the character of the horses he keeps in his stable before hiring them to persons whose safety may be endangered by their vicious habits. If he cannot get any information in regard to their habits, he can at least satisfy a jury on a trial where the conduct of an animal shows a vicious propensity that he made diligent efforts to do so.

It has been suggested that the plaintiff's statement sets forth a special warranty, and that, therefore, he cannot recover upon the implied warranty which arises from the contract of hiring. This position is not tenable. The statement is amply sufficient to show the contract of hiring out of which an implied warranty arises, and if in addition to such warranty the statement contains an averment of a special warranty, it will not prevent the plaintiff, if the evidence is sufficient, from recovering upon the implied warranty: Windle v. Jordan, 75 Me. 149. In that case it was contended that the plaintiff was confined to a special warranty, but the court said: "It is true that the plaintiff and his witness to the contract of hiring testify that both the defendant and his hostler recommended and warranted the horse, except in the matter of laziness, but that testimony was not essential to the plaintiff's case. When it was proved and admitted that the defendant was a livery-stable keeper, and that he let the horse for hire to the plaintiff for the trip, the law settles the contract upon the breach of which the plaintiff counts."

The learned trial judge evidently thought that this case belonged to that class of cases in which it is held that before a person who has been injured by a vicious animal can recover against the owner, he must show that the owner knew of the animal's vicious propensities. This was a misapprehension of the law. The owner of a vicious dog who bites another is responsible [161] only on proof of the scienter. There, there is no contract relation between the parties, and liability is not based upon such relation. In cases of the character under consideration, the liability of the owner of the livery-stable keeper rests on contract, and an implied warranty that the animal hired to the customer is free from defects and infirmities making it unsuitable for the purpose for which it was hired. The breach of this contract, by failing to exercise reasonable care and diligence in furnishing a suitable animal, imposes a liability upon the liveryman.

The statement in this case sufficiently avers a breach of an implied warranty on the part of the livery-stable keeper of the suitableness of the animal let to the plaintiff. It also avers facts sufficient to show negligence on the part of the defendant in that he did not exercise proper care in ascertaining the vicious nature of the animal, a fact which could have been known to the defendant had he used the diligence and care required of him. There was no demurrer to the statement. The courts, however, have, in this class of cases,

permitted the plaintiff to enforce his right to damages by an action for a breach of the implied warranty or by an action in tort for negligence. The question was distinctly ruled in Hyman v. Nye, L. R. 6 Q. B. D. 685. In that case Lindley, J., said (page 689): "It was objected on the part of the defendant that the plaintiff had in his statement of claim based his case on negligence on the part of the defendant, and not on any breach of warranty express or implied. But the absence of such care as a person is by law bound to take is negligence; and whether the plaintiff sues the defendant in tort for negligence in not having supplied such a fit and proper carriage as he ought to have supplied, or whether the plaintiff sues him in contract for the breach of an implied warranty that the carriage was as fit and proper as it ought to have been, appears to me wholly immaterial." None of the cases on the subject, so far as we have seen, give any attention to whether the action was founded upon a technical warranty or upon negligence.

We think the evidence was sufficient to send the case to [162] the jury, and that the court was in error in directing a verdict for the defendant.

The judgment is reversed with a venire facias de novo.

As to the Liability of a Livery-stable Keeper to persons injured by vicious horses which they have hired from him, see Lynch v. Richardson, 163 Mass. 160, 47 Am. St. Rep. 444; Copeland v. Draper, 157 Mass. 558, 34 Am. St. Rep. 314; and as to his liability for the negligence of his driver where he lets a rig, see McGregor v. Gill, 114 Tenn. 524, 108 Am. St. Rep. 919. The duty of a person to care for and protect a horse which he hires is considered in Grady v. Schweinler, 16 N. D. 452, 125 Am. St. Rep. 674; Palmer v. Mayo, 80 Conn. 353, 125 Am. St. Rep. 123.

SOMERSET COAL COMPANY v. DIAMOND STATE STEEL COMPANY.

[224 Pa. 217, 73 Atl. 442.]

GARNISHMENT.—The Effect of Attachment is to bind all funds of the defendant debtor that come into the hands of the garnishee after service of the writ and before judgment is entered. (p. 776.)

GARNISHMENT OF RECEIVERS.—Where a receiver of a foreign corporation appointed in another state controls moneys thereof and holds them as a garnishee pending the determination of an attachment in a Pennsylvania court, it cannot be attached by a creditor of the corporation in Pennsylvania. (p. 777.)

RECEIVERS—Right to Hold Property Vested Under Lex Loci —Comity.—Where property has once vested as the property of a receiver by the law of the state where the property was situated, the law of another state will not devest the receiver of his right to it if he takes it into such state in the performance of his duty. Comity in such cases prevails to exempt the property from attachment in a foreign jurisdiction, when taken there under authority from the foreign court. (p. 778.)

H. S. P. Nichols, for the appellant.

Ruby R. Vale and Ward & Gray, for the appellees.

John Douglass Brown, for the garnishee.

220 STEWART, J. The Somerset Coal Company, a corporation of this state, having here obtained judgment against the Diamond State Steel Company, a corporation of the state of Delaware, caused a writ of attachment execution sur judgment to issue, summoning the Philadelphia Warehouse Company as garnishee. The writ when first served held nothing within its grasp. The warehouse company was not indebted in any way to the defendant debtor, and held no property belonging to the latter which was subject to the attachment process. On the contrary, the Diamond State Steel Company was largely in debt to the warehouse company, and for this indebtedness it had pledged and had delivered to the warehouse company, upon the latter's storage yards in Delaware, a lot of iron and steel in various forms. The property thus pledged was beyond the reach of process issuing from a court within this state. As to it the attachment was without effect, and the warehouse company could do with it what it pleased without incurring responsibility to the attaching creditor. The effect of an attachment, however, is to bind all funds of the defendant debtor that come into the hands of the garnishee after service of the writ and before judgment is entered. Subsequent to the service of the writ, and before answer was made, the Diamond State Steel Company passed into the hands of receivers. By arrangement between the warehouse company and the receivers, approved by the court in Delaware having jurisdiction, the iron and steel held in pledge by the former were surrendered to the receivers, on the stipulation that the warehouse company should be paid its claim first from the proceeds of the sale of the same, and in addition the sum of five thousand dollars "to abide the 221 determination of the attachment issued out of the court of common pleas No. 3 of the city and county of Philadelphia,

with the right on the part of the receivers to apply for leave to intervene in the cause in which the aforesaid attachment issued, and to take such steps as they may be advised by counsel to secure the dissolution of the said attachment; the warehouse company to account to the receivers for any surplus portion of said five thousand dollars which may remain after the said attachment has been disposed of."

There is nothing in the mere circumstance that the money was placed in the hands of the garnishee to abide the result of the attachment that gives the appellant any right to it. The object of so placing it was not to benefit the creditor, but to protect and indemnify the garnishee. In no sense can the latter be said to hold as trustee of the former. The one question in the case is, Was this money in the hands of the garnishee within this state exempt from the attachment from the suit of creditors here, because of the fact that it is part of an insolvent estate being administered upon in the state of Delaware by a court of equity through receivers appointed by the court, brought here for special purpose by the receivers under the sanction of the court that appointed them? The contention on part of the appellee is, that the court of Delaware having no jurisdiction beyond the limits of that state, the money when it came into this state came released of all the right and title which the receivers had to it in the state of Delaware. The question thus raised is not a new one, though it seems never to have been expressly decided in our state. In several other jurisdictions it has been squarely met and decided, and in a way adverse to appellant's contention. If the decisions are not numerous, they are uniformly consistent both in their reasoning and conclusions, and have been accepted without challenge. In Crapo v. Kelly, 83 U. S. 610, 21 L. ed. 430, personal property located in Massachusetts was transferred to an assignee in insolvency proceedings; the property afterward being in New York was attached by a creditor of the insolvent residing there. It was held that the assignee had the prior right. In Pond v. Cooke, [222] 45 Conn. 126, 29 Am. Rep. 668, the receiver of an insolvent concern appointed by a court in New Jersey, where it was located, took possession of its assets, and for the purpose of completing a bridge in Connecticut, which the concern had contracted to build, bought some iron with the funds of the estate and sent it into Connecticut, where it was attached at a suit of a creditor there. It was held that the property having once vested as the property of a receiver by the law of the state where the

RECEIVERS—Right to Hold Property Vested Under Lex Loci —Comity.—Where property has once vested as the property of a receiver by the law of the state where the property was situated, the law of another state will not devest the receiver of his right to it if he takes it into such state in the performance of his duty. Comity in such cases prevails to exempt the property from attachment in a foreign jurisdiction, when taken there under authority from the foreign court. (p. 778.)

H. S. P. Nichols, for the appellant.

Ruby R. Vale and Ward & Gray, for the appellees.

John Douglass Brown, for the garnishee.

220 STEWART, J. The Somerset Coal Company, a corporation of this state, having here obtained judgment against the Diamond State Steel Company, a corporation of the state of Delaware, caused a writ of attachment execution sur judgment to issue, summoning the Philadelphia Warehouse Company as garnishee. The writ when first served held nothing within its grasp. The warehouse company was not indebted in any way to the defendant debtor, and held no property belonging to the latter which was subject to the attachment process. On the contrary, the Diamond State Steel Company was largely in debt to the warehouse company, and for this indebtedness it had pledged and had delivered to the warehouse company, upon the latter's storage yards in Delaware, a lot of iron and steel in various forms. The property thus pledged was beyond the reach of process issuing from a court within this state. As to it the attachment was without effect, and the warehouse company could do with it what it pleased without incurring responsibility to the attaching creditor. The effect of an attachment, however, is to bind all funds of the defendant debtor that come into the hands of the garnishee after service of the writ and before judgment is entered. Subsequent to the service of the writ, and before answer was made, the Diamond State Steel Company passed into the hands of receivers. By arrangement between the warehouse company and the receivers, approved by the court in Delaware having jurisdiction, the iron and steel held in pledge by the former were surrendered to the receivers, on the stipulation that the warehouse company should be paid its claim first from the proceeds of the sale of the same, and in addition the sum of five thousand dollars "to abide the 221 determination of the attachment issued out of the court of common pleas No. 3 of the city and county of Philadelphia,

with the right on the part of the receivers to apply for leave to intervene in the cause in which the aforesaid attachment issued, and to take such steps as they may be advised by counsel to secure the dissolution of the said attachment; the warehouse company to account to the receivers for any surplus portion of said five thousand dollars which may remain after the said attachment has been disposed of."

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property was situated, the law of another state would not devest the receiver of his right to it if he should take it into such state in the performance of his duty. The court there said: "When property has once vested in a trustee, assignee or receiver, by the law of the state where the property is situated, it makes no difference whether it is done under the local law of the state or the common law. The laws of another state will not devest the trustee, assignee or receiver of his right to the property, should he take it into said state in the performance of his duty. The courts of said state will inquire whether he has such right to the property when it comes into the state as between himself and their own citizens, but when the fact that he has such right is ascertained, they will not regard it as important by what mode the right was acquired." In Chicago etc. Ry. Co. v. Keokuk Northern Line Packet Co., 108 Ill. 317, 48 Am. Rep. 557, it was held that a receiver who had obtained rightful possession of personal property within the jurisdiction of his appointment, will not be deprived of his possession, though he takes it in the performance of his duty into a foreign jurisdiction; that it cannot there be taken by creditors of the debtor residing within such foreign jurisdiction. The present case cannot be distinguished from those we have cited in any material respect. The money in this case was derived from the sale of goods in Delaware which had passed into the possession of the receivers; the money stood in the place of the goods; the receivers, in compliance with the order of the court having jurisdiction over them and the assets, placed it in the hands of the garnishee in this state. The money thereafter continued to be the property of the receivers, and as such was as [223] exempt from attachment here as it would have been had it remained in Delaware. The debtor himself could have asserted no right to it as against the receiver; and it is a recognized rule that the rights of the attaching creditor are simply those of the debtor. In the adjudged cases above referred to the controlling fact was that the property sought to be held by the attachment had already passed into the possession of the receivers. Once in their hands, it was thereafter subject only to the control and disposition of the court having jurisdiction over them and their accounts. Comity in such cases prevails to exempt the property from attachment in a foreign jurisdiction, when taken there under authority from the proper court.

Judgment affirmed.

Where a Receiver Takes Property into a State other than the one in which he was appointed, the property is not, according to the better rule, subject to attachment by local creditors: Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668; Cagill v. Wooldridge, 8 Baxt. 580, 35 Am. Rep. 716; Chicago, Milwaukee etc. Ry. Co. v. Keokuk Northern Line Packet Co., 108 Ill. 317, 48 Am. Rep. 557. A different view, however, appears to be taken in Humphreys v. Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76. The general rule is well understood that property in the possession of a receiver is in custodia legis: State v. Reynolds, 209 Mo. 161, 123 Am. St. Rep. 468, and cases cited in the cross-reference note thereto.

FIRST NATIONAL BANK v. NEW CASTLE.

[224 Pa. 285, 73 Atl. 331.]

MUNICIPAL CORPORATIONS — Treasurer — Unauthorized Pledging of City's Credit.—The duties of a city treasurer are limited to receiving the city's moneys and paying them out on warrants, and unless specially authorized, an obligation signed by him as city treasurer does not commit the city to its discharge any more than if signed by him as an individual. (p. 781.)

MUNICIPAL CORPORATIONS — Treasurer — Unauthorized Pledging of City's Credit—Implied Liability.—If a city treasurer without authority obtains an overdraft from a bank and opens a pseudo official account with the words "city treasurer" appended, the city is not liable thereon, and the strength of its position is unaffected by the fact that he was a defaulter at the time of the transaction. (p. 781.)

MUNICIPAL CORPORATIONS—Powers of Officers to Pledge Credit.—Public policy imperatively requires that, for the safety of a municipality, its ministerial officers shall not be permitted to impose liability upon it without express authority for the special purpose. (p. 782.)

James A. Gardner, city solicitor, and Robert K. Aiken, for the appellant.

B. A. Winternitz and Oscar L. Jackson, for the appellee.

287 BROWN, J. John Blevins, who died January 7, 1899, had been treasurer of the city of New Castle for some years prior to his death. During the time he so served the city he kept an account with the appellee, the First National Bank of New Castle, depositing with it large sums of money to the credit of "John Blevins, City Treasurer." On September 19, 1898, he called at the bank and stated that he needed some money for the city, naming the amount as $5,431.49. This sum was the 288 aggregate of nine certificates of indebtedness which had been issued by the city to different persons for work

done and materials furnished. He executed a note, of which the following is the material part:

"New Castle, Pa., Sept. 19, 1898.

"$5,431.49. Four months After Date, For Value Received I hereby promise to pay to The First National Bank of New Castle, Penn'a, or order at said bank Fifty four hundred thirty-one & 49-100 Dollars, with interest at the rate of 6 per cent. per annum after due, having deposited with said bank as collateral security for the payment of this note, and also as collateral security for all other present or future demands of any and all kinds of the said bank against the undersigned due or not due, or that may be hereafter contracted, including any indorsement made or that in future may be made by me the following property, viz: Sundries cert's of indebtedness of City of New Castle, Pa., for $5,431.49, and interest."

The obligation was signed "City of New Castle, John Blevins Treasurer." The amount asked for by Blevins was placed to his credit as city treasurer. At the time the loan was made his account as city treasurer with the plaintiff showed a balance to his credit of $7,000. In addition to the proceeds of the loan he deposited on September 19, 1898, $2,568.51 in cash, making the credit balance $15,000. Between September 19, 1898, and the date of his death—January 7, 1899—he deposited various sums with the appellee, amounting in the aggregate to $67,267.50, making the total cash placed to the credit of his account during that period $82,267.50, against which checks were drawn and paid amounting to $55,767.50. Many of these checks were made payable to his own order and the cash was paid to him. At the time of his death there was to his credit with the appellee $26,500. On January 17, 1899, John H. Preston was elected as his successor, and the said balance was transferred from the account of John Blevins, city treasurer, and credited to the account of John H. Preston, city treasurer. Blevins had an account as treasurer with the Citizens' National Bank of New Castle, and the balance to his credit in that institution at the time of his death was $12,500. [289] The balance in the two banks aggregated $39,000. At no time between September 19, 1898, and January 7, 1899, was the balance in the account of Blevins as city treasurer less than $5,431.49. At the time he made the loan from the appellee he was clearly a defaulter, his default amounting at the time of his death to more than $25,000. There is no evidence, however, that the bank knew of the default at any time prior to his death. No action of the city or

its council authorized the loan made by Blevins, and the city had no knowledge of the transaction until after his death. The First National Bank of New Castle was not even a designated depository of the city. The city, under the foregoing facts, refused to pay the plaintiff's claim, and in this action recovery is sought, not upon an express contract, as evidenced by the note, nor upon the certificates of indebtedness attached to it, but upon what it is contended is the implied obligation of the city arising out of the circumstances under which the money was credited to its financial agent. The position of the appellee, as stated by its counsel on the trial, was that the claim was not on the note or on the certificates attached, but for money advanced to the city which went into the city treasury, and, therefore, the city ought to pay it back on a claim for money had and received by it. In other words, the claim against the city was upon its implied liability, and recovery was permitted on that theory.

The duties of Blevins as city treasurer were limited to receiving the moneys of the city and paying them out on warrants. He had no authority by virtue of his office to do anything else for it or in its name, and was powerless to make any promise on its behalf. An obligation signed by him as city treasurer could no more commit the city to its discharge than if signed by him as an individual. This is not questioned. The attempt of the appellee is not to enforce any valid contract executed by Blevins on behalf of the city, but is to compel payment, on the ground of the implied liability incurred by the municipality under the undisputed evidence in the case. It has been truthfully said of the extent of the liability of a municipal corporation that "the authorities are a tangled web [290] of contradictions, and it is difficult to assert any proposition with respect to the same for which adjudications on both sides may not be cited"; but we know of no case in which the doctrine of implied municipal liability was stretched to the limit to which the learned court below carried it in instructing the jury that the appellee could recover in this proceeding. The doctrine of such liability has been applied to cases of informal or irregular contracts entered into by a city and from which it has obtained substantial benefits: See cases referred to in 28 Cyc. 668 and 669. Argenti v. City of San Francisco, 16 Cal. 255, a leading case, and the one upon which the learned judge relied for his instructions to the jury, was a case of that kind. The plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which

contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city for the exclusive benefit of itself and its inhabitants; these improvements were made under the immediate supervision of an officer of the city, and, when completed, were approved of and received by him on behalf of the city; in making the improvements the plaintiff relied on the validity of the contracts and the obligations of the city to pay as therein provided; the city authorities were fully informed of these facts, but took no steps to repudiate the contracts or to inform the plaintiff as to its disposition not to pay. On the other hand, it had collected moneys to pay for the improvements. In making the contract for them certain legal requirements had not been complied with, and for that reason the city ultimately attempted to repudiate liability for the work done. This, of course, was not permitted. The city had knowledge of what was being done and had undertaken to contract for it. It was receiving the benefit from the work done and had collected moneys to pay for the same. There was simply a want of compliance with legal requirements in making the contract. In the recent case of Long v. Lemoyne Borough, 222 Pa. 311, 71 Atl. 211, 21 L. R. A., N. S., 474, in which the municipality attempted to evade the payment of money which it had borrowed and intended to borrow, because the loan had not been contracted in strict conformity to legal requirements, [291] we said, in holding that, while there was no valid, express contract upon which it could be held, it was impliedly liable for money had and received. The borough had intended to contract for the money and could lawfully have contracted for it, and, having received and used it, was bound to pay. But this is not the situation here. If it were, the appellant would have to pay. The city of New Castle never intended to borrow the money from the appellee and had no knowledge until after the death of Blevins that he had made the loan. As stated, he was unquestionably a defaulter at the time he applied to the bank for the money. Suppose at the time he borrowed the money he had done so for the purpose of settling with the city and turning over its funds in his hands to his successor in office; if the amount lent to him by the bank had been sufficient to make up his default, he would have been able to pay over to the city all of its moneys in his hands, and, in turn, would have received from it whatever security he had given for the faithful discharge of the duties of his office. After a settlement so made, can it be seriously contended that

the city should subsequently be compelled to pay to the bank the money borrowed by its defaulting treasurer for the purpose of covering up his default, simply because the money borrowed by him had been placed to his credit as treasurer of the city and paid over by him as a part of what he owed it? The mere suggestion of such a situation, possible at any time, it seems to us, is sufficient in itself to prevent recovery by the appellee. But even if he had not been a defaulter, a rule of public policy imperatively requires that, for the safety of municipalities, no one of its ministerial officers shall be permitted to impose liability upon it in the way Blevins is alleged to have done. It is because of the disastrous results that may come to municipalities if they are held impliedly liable for moneys borrowed by a municipal treasurer, without the knowledge, consent or approval of the municipality, even if placed to his official credit, that a recovery cannot be permitted in this case.

The second, third and fourth assignments of error are sustained, and the judgment is reversed.

Municipal Corporations may be Liable upon Implied Contracts if express contracts would be within the powers of the municipality delegated to it, and the city has ratified the act of its officers: Wilson v. City of Mitchell, 17 S. D. 515, 106 Am. St. Rep. 784.

The Application of the Doctrine of Ultra Vires to the contracts of municipal corporations is discussed in the recent case of Bell v. Kirkland, 102 Minn. 213, 120 Am. St. Rep. 621.

The Acts of a Public Officer for Which His Sureties are Liable are discussed in the note to Feller v. Gates, 91 Am. St. Rep. 497.

NOBLE v. POLICE BENEFICIARY ASSOCIATION.

[224 Pa. 298, 73 Atl. 336.]

BENEFICIAL ASSOCIATIONS—Beneficiary—Interest—Nature and Extent.—A beneficiary named in a certificate or policy issued by a beneficial association acquires no vested interest in it, nor a right to anything, during the lifetime of the member to whom it is issued, but merely an expectancy, which does not become a vested or absolute right to the proceeds of the certificate or policy until the death of the assured. (p. 785.)

BENEFICIAL ASSOCIATIONS—Change of Beneficiary, What is.—Where a member of a beneficial association names his sister as beneficiary, but keeps the certificate issued to him, and subsequently on his marriage surrenders it and obtains a new one, naming his wife as beneficiary, this is not a transfer to another without the consent of the beneficiary in the terms of the by-laws of the association. (p. 786.)

BENEFICIAL ASSOCIATIONS—Rights of Member to Deal with Certificate.—There is no obligation on a member of a beneficial association to pay the assessments levied on his certificate, and he may let it lapse at will, and the beneficiary, having no vested interest in it till the member's death, has no cause of complaint. (p. 786.)

BENEFICIAL ASSOCIATIONS—Certificate to Member—By-laws—Estoppel.—Where a member of a beneficial association names his sister beneficiary and subsequently surrenders the certificate and obtains another, naming his wife as beneficiary, the association is estopped from questioning the regularity of the second certificate, notwithstanding the issue of it violated their by-laws. (p. 786.)

BENEFICIAL ASSOCIATIONS—By-laws—Object.—By-laws of a beneficial association are made solely for the convenience and protection of the association, and if it waives its rights or does not claim under its rules, no one else can take its place. (p. 786.)

James Collins Jones, for the appellant.

Joseph P. Gaffney and Thomas F. McNichol, for the appellee.

[300] BROWN, J. This contest is over the proceeds of a beneficial certificate issued by the Police Beneficiary Association, of the city of Philadelphia, to James Noble, one of its members. On April 20, 1907, it issued a certificate to him, in which Margery E. Dittmer, his sister, was named as the beneficiary. He retained this certificate in his possession until December 23, 1907, when he surrendered it to the association, and, on his application for another in lieu of it, the one under which the appellee, his widow, claims, was issued to him. In this she is named as the beneficiary. He died January 22, 1908, and suits were brought against the association by his widow and sister, each claiming the fund. The association was ready to pay it to the one entitled to receive it, and, disclaiming all interest in it, leave was granted to pay it into court. There being no disputed facts, a rule to show cause why it should not be paid to Annie M. Noble, the widow, was made absolute. From this the sister has appealed, her ground of complaint being that the certificate naming the wife as the beneficiary was invalid as against the one in which she had been named as beneficiary, because issued in violation of a provision of a by-law of the association [301] that "a member may transfer his certificate heretofore issued either to his wife, child or children, heirs at law, parent or parents, affianced wife, or the person or persons dependent upon the member, consent in writing, however, to be first had of all the living beneficiaries named therein, excepting, however, that when a certificate has been made payable to a member's parent or parents, and such member

subsequently marries, the member can substitute the name of his wife, and this without the consent of the parent or parents named in the certificate, and excepting also, however, as hereinafter provided."

A beneficiary named in a certificate or policy issued by a beneficial association acquires no vested interest in it, nor a right to anything, during the lifetime of the member to whom it is issued, but merely an expectancy, which does not become a vested or absolute right to the proceeds of the certificate or policy until the death of the assured: Fisher v. American Legion of Honor, 168 Pa. 279, 31 Atl. 1089; Brown v. Ancient Order of United Workmen, 208 Pa. 101, 57 Atl. 176; Supreme Conclave, Royal Adelphia, v. Cappella, 41 Fed. 1. In this latter case it was said by Brown, Circuit Justice: "In case of an ordinary policy, the right of the person for whose benefit a policy is issued cannot be defeated by the separate or joint acts of the assured and the company, without the consent of the beneficiary (Bliss on Insurance, sec. 318); while it is entirely well settled that in cases of this description the beneficiary has no vested interest in the benefit certificate until the death of the insured member." During the lifetime of a member of a beneficial association to whom a beneficial certificate is issued the beneficiary named in it is a mere volunteer, having no contractual relations either with the association or the assured. The contract is between the association and its member alone. The first contract between Noble and the Police Beneficiary Association was for the payment to Margery E. Dittmer, upon his death, of the amount of the assessments collected from the members, provided that at the time of his death he should be a member in good standing and she continued to be his designated beneficiary. He might at any time have allowed the [302] first certificate to become null and void by neglecting to pay assessments levied upon it. This is one of the conditions of the certificate issued to him, and, if he had allowed it to lapse, the sister would have had no ground of complaint, either against him or the association. He did not "transfer" the certificate to another without the consent of the beneficiary named in it, to whom it had not been delivered, but, still having possession of it, surrendered it to the association. He then made application for a new certificate and a new contract was entered into between him and the association, in pursuance of which the certificate was issued to him, naming his wife as the beneficiary. Of this the sister could not have complained, for she had no

vested right under the certificate which was surrendered. Even if the issuing of the second certificate is to be regarded as a violation of the by-laws of the association, it would be estopped from questioning the regularity of that certificate, for, by issuing it, it waived all provisions in the by-laws as to transfers. If those by-laws were not complied with, can this appellant raise any question as to their violation? As stated, the certificate was never delivered to her, and before the time that she had acquired any rights under it it was returned to the association. If the second one was issued in disregard of the by-laws of the association, that disregard prejudiced no rights of the appellant, for she had no rights at that time. The by-laws were made solely for the convenience and protection of the association. Regulations concerning the method of changing beneficiaries are adopted for the protection of the society, and if it has, by waiver or estoppel, lost the right to object to a change in the name of the beneficiary, no one else may raise that objection; and if a change of beneficiaries has actually been consummated and acted on by the society in the member's lifetime, the original beneficiary has no standing to attack the change, because not made in compliance with the regulations of the society: See cases cited in 29 Cyc. 135. In our state, in the recent case of Pennsylvania R. R. Co. v. Wolfe, 203 Pa. 269, 52 Atl. 247, we held that such rules are for the protection of the association, and if it waives its rights or does not claim [303] them under such rules, no one else can take its place. Among other cases there cited and approved is Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213, in which the association waived a provision that no change of a beneficiary should be valid or have any binding force or effect, unless made in accordance with certain requirements in the constitution of the grand lodge. The new beneficial certificate, issued in disregard of the constitutional requirements, was upheld in a controversy with the first-named beneficiary over the proceeds of the certificate, the court saying: "In the determination of the various questions arising in this case, it must be constantly borne in mind that the Ancient Order of United Workmen, the association that issued the benefit certificate, is no longer a party, and is not taking any part in the litigation. It has paid the money into court, and has been released from all obligation respecting it. This payment, however, is an admission on its part that the benefit certificate was rightfully issued, and hence all contention as to whether its rules and regulations respecting these matters had been

complied with is out of the case, and is entirely disposed of. We mean by this to assert that when the association issues a certificate, or changes the beneficiary, all questions as to whether it is done or not in accordance with their rules and regulations are concluded."

The appellant having no right or interest of any kind which the association was bound to regard at the time it accepted from Noble the first policy issued to him and issued the second, the order of the court below is affirmed.

A Member of a Beneficial Association ordinarily has the right to change his beneficiary at will, provided that in so doing he complies with the rules of the association. Nevertheless many authorities seem to take a contrary view, and hold that the beneficiary has a vested interest before the death of the insured: See Knights of Maccabees v. Sackett, 34 Mont. 357, 115 Am. St. Rep. 532; Perry v. Tweedy, 128 Ga. 402, 119 Am. St. Rep. 393, and cases cited in the cross-reference note thereon. But if it is conceded that the insured has a right to change his beneficiaries at pleasure, still he may by contract with them lose the right: Stronge v. Knights of Pythias, 189 N. Y. 346, 121 Am. St. Rep. 902; Brett v. Warnick, 44 Or. 511, 102 Am. St. Rep. 639; Grimley v. Harrold, 125 Cal. 24, 73 Am. St. Rep. 19.

CUMMISKEY'S ESTATE.

[224 Pa. 509, 73 Atl. 916.]

PAYMENT—Presumption—Claims Against Decedents for Domestic Service.—The wages for domestic service or boarding and nursing are presumed to be paid at stated periods, and when a claim for such service is presented against a decedent's estate, extending over any great length of time, the burden is on the claimant to rebut the presumption by competent evidence, and until that is done the claim should be disallowed. (p. 788.)

PAYMENT—Presumption, When Properly Indulged.—Where a sick woman of means and regular habits of payment lodged with and was nursed by an old servant for three years, and after the death of the former the servant claimed a large sum for such services, and there was no evidence to justify a finding that she had not been paid at stated intervals, the claim was disallowed, the presumption of payment not being rebutted. (p. 790.)

John G. Johnson, Edmund Randall and Jas. A. Flaherty, for the appellant.

Michael J. Ryan, for the appellee.

511 MESTREZAT, J. This is a claim by Mrs. Sarah J. McEvoy on a quantum meruit for the board and nursing of Miss Laura E. Cummiskey, the decedent, for one hundred and

sixty-four weeks, from October 9, 1903, to November 24, 1906, at the rate of ten dollars a week. The claimant admits a credit of forty-two dollars paid her in 1906, leaving a balance of fifteen hundred and ninety-eight dollars payable out of the decedent's estate.

Laura E. Cummiskey died on November 24, 1906, intestate, unmarried, without issue and leaving certain next of kin to survive her. It appeared from the evidence that the decedent had lived at the home of Mrs. McEvoy for about three years immediately prior to her death. She had her room and took her meals with Mrs. McEvoy's family, which consisted of her husband and herself. When the decedent was sick Mrs. McEvoy gave her the attention required by an ailing person. There was no contract or agreement between the decedent and Mrs. McEvoy by which the latter was to be paid for board and nursing. One witness testified that on a certain occasion the decedent had said to him: "I will give it [the place she lived on] to Mrs. McEvoy for what she has done for me, and that will hardly pay her." Another witness testified that she knew and [512] called on Miss Cummiskey; that the latter told her she expected to end her days with Mrs. McEvoy; "she never spoke of paying, she always spoke in a roundabout way of rewarding Sarah [Mrs. McEvoy] ultimately."

The decedent left a personal estate of thirteen thousand dollars, and only a small debt due the attending physician. She owned certain real estate, and received an income on mortgages aggregating eight thousand dollars which formed part of her estate.

The claimant was formerly Miss McGinnis, and for many years prior to her marriage was the servant of the decedent. After she was married she and her husband removed to the suburbs of West Philadelphia, where the boarding and nursing for which this claim is presented were furnished the decedent. Mr. McEvoy kept a small cigar store on the first floor of his residence.

The auditing judge disallowed the claim, holding that there was no competent evidence as to the value of the board or any evidence to rebut the presumption that it was paid at periodic intervals. The judge also held that the time for which the services for nursing was claimed was not accurately fixed, and that the declarations of the decedent, testified to by the witnesses above referred to, were not sufficiently connected with the claim for board and nursing to warrant the conclusion that they were meant to cover a debt incurred.

The court in bank reversed the auditing judge and allowed the claim, holding that there was sufficient evidence to rebut the presumption of payment. The administrator has taken this appeal.

It is a well-established rule that the wages for domestic service are presumed to be paid at stated periods, and that when a claim for such service is presented against a decedent's estate, extending over any great length of time, the burden is upon the claimant to rebut the presumption. It, of course, is a presumption of fact which may be rebutted by competent evidence, but until satisfactory evidence is produced the presumption prevails and the claim must be disallowed. The same rule is applicable in cases of boarding and nursing under circumstances such as are disclosed in this case. It is the [513] habit and usage of people to pay their board bills as well as for services for nursing at stated periods. This is so well understood in this country that, as in the case of servants' wages, a presumption arises that they are periodically paid. Especially does this rule obtain where a claim for boarding and nursing for years is presented against the estate of a decedent. The protection of the estates of the dead requires its rigid enforcement. The custom of paying for such service periodically being so well known, it is no hardship upon the party who renders the service, but presents no claim for it until after the lapse of years and after the party to whom the service is rendered is dead, to require the claimant to produce satisfactory evidence that the usage or custom was not followed and that the claim has not been paid.

Conceding that the decedent lived with Mrs. McEvoy during the time alleged, there was no evidence to warrant the court in finding that the claimant had not received compensation. It is not pretended that there was any express contract imposing an obligation upon Miss Cummiskey to pay for the services rendered. The declarations of the decedent established no such contract, nor do they show an intention to pay for the boarding and nursing. As suggested by the auditing judge, they show nothing beyond a grateful appreciation of kindness shown by Mrs. McEvoy to the decedent. The simple anticipation by the claimant of receiving a legacy without more is not sufficient to impose liability for such services rendered a decedent. There is no evidence that the decedent ever promised Mrs. McEvoy to compensate her by a legacy.

So far as the evidence discloses, there was no demand made by Mrs. McEvoy of Miss Cummiskey for payment for any ser-

vices rendered. For more than three years, as alleged by the claimant, these services were continuously rendered. No suggestion comes from Miss Cummiskey that she intended to pay and no demand is made by the claimant. In the absence of evidence of these facts, there is a presumption that the services were paid for at stated periods customary in the neighborhood. This presumption is strengthened when it is recalled that the decedent asked for and paid her physician's [514] bills promptly; that she had ample means which were available to pay for the services as they were rendered; and that the apparent financial condition of the claimant and her husband, as disclosed by the evidence, was not such as to justify the belief that payment for the services would have been permitted to extend beyond the customary period for settling such claims. There is no direct evidence that Miss Cummiskey did not pay for the services rendered, nor are there any facts disclosed by the testimony which would warrant the finding that the usual rule of periodic payments was not observed in this case. The decedent had available means to meet obligations of this character as they matured, and the financial condition of the claimant does not show that payment would not have been accepted, or that it was not needed at the times compensation for such services is usually and ordinarily paid. Why a party of ample means should for more than three years board with and be nursed by a former servant with limited means without paying or having any demand made upon her for payment of a sum aggregating five hundred and twenty dollars per year due for such service seems incredible; and before such claim is awarded out of a decedent's estate satisfactory evidence of nonpayment should be produced. We find no such evidence in this case, and consequently we are required to sustain the auditing judge in disallowing Mrs. McEvoy's claim.

The assignments of error are sustained, and the decree of the orphans' court is reversed.

The Plea of Payment is Ordinarily an Affirmative Defense, and the burden of proof is on the party interposing it: Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258; Sampson v. Fox, 109 Ala. 662, 55 Am. St. Rep. 950; Indianapolis St. Ry. Co. v. Haverstick, 35 Ind. App. 281, 111 Am. St. Rep. 163.

Services Rendered by a Girl in a Man's Family wherein she has gone to live will, upon his death, support a claim against his estate: Wise v. Outtrim, 139 Iowa, 192, 130 Am. St. Rep. 301.

MULHOLLAND'S ESTATE.

[224 Pa. 536, 73 Atl. 932.]

EXECUTORS AND ADMINISTRATORS—Sale of Realty Claimed by Decedent—Application of Purchase Money—Lapse of Time—Purchaser must Take Such Title as He Accepted.—Where under power an executor sold his decedent's estate in realty and recited the title in the conveyance, received and applied the purchase money, and after the lapse of years the purchaser found the title was invalid, and the invalidity was apparent on the face of his deed, he is not entitled to a refundment of the purchase money even on the equitable ground of mistake, such so-called mistake being with a full knowledge of the facts which were disclosed in his purchase deed. (pp. 792–794.)

DEEDS—Defects in Title—Notice.—When a purchaser cannot make out a title but through a deed which leads to a fact, he will be affected with notice of that fact. (p. 795.)

DEEDS—Defects Disclosed in Recitals—Purchaser Affected by. Where the recitals in a deed disclose that there was no valid title to the premises sold, and the purchaser accepts delivery, his notice of the flaws runs from his acceptance of the deed. (p. 795.)

ORPHANS' COURT—Jurisdiction to Set Aside Sale.—The orphans' court has power in certain cases to review, set aside, and, if necessary, to order a resale of real estate made under a testamentary power, but no decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power. (p. 796.)

John F. Gorman, Leo J. Gorman and William Gorman, for the appellant.

Frederick L. Breitinger, for the appellee.

537 MESTREZAT, J. This case is so clearly and radically wrong that all that is necessary to reverse it is to state the undisputed facts. The error of the master and of the court may be attributed to the manner in which the case was presented for their consideration.

James Mulholland died in 1876, leaving to survive him five children and a brother Felix. He was seised in fee of certain real estate in the city of Philadelphia at the time of his death, and his five children conveyed to his brother Felix "one undivided sixth part of and in all the real and personal estate of which James Mulholland died seised and possessed." Felix subsequently died intestate and left to survive him a widow, Sarah, and five children, all of whom died in their minority, intestate, unmarried and without issue prior to the death of 538 their mother. Sarah Mulholland died in 1901 and by her will, duly probated, appointed James McDevitt, the appellant, her executor. The will provides, inter alia, as fol-

lows: "And for the purpose of the better carrying my will into execution and effect, I do authorize and empower my executor James McDevitt to make sale of all my estate real, personal or mixed and of which I may die seised and possessed either at public or private sale and upon such terms as he shall judge best." The testatrix devised and bequeathed the residue of her estate to her "executor in trust to distribute the same among the several churches and charitable institutions hereinabove named or in his discretion to pay same from time to time for masses for the repose of my soul and the souls of my husband and our children."

By virtue of the authority contained in the will, James McDevitt, executor and trustee, executed and delivered a deed, dated January 6, 1902, and recorded the following day, to James Conway, conveying to him "all the right, title and interest of the said Sarah Mulholland, deceased, of, in and to" three lots or pieces of ground situate on the south side of Pine street and east of Eleventh street in the city of Philadelphia for the consideration of two thousand seven hundred and fifty dollars. The deed recites that the property therein described is the same of which James Mulholland died seised and of which his five children conveyed the undivided sixth part to Felix Mulholland, who died intestate, seised of the said undivided interest in the property, and leaving to survive him Sarah Mulholland and five children, all of whom died prior to their mother, in whom all their interest in the premises vested. The deed to Conway is in the ordinary form used by an executor and trustee to convey real estate in pursuance of authority contained in the will. It recites the title to the premises conveyed from Thomas Fraley in 1848 to Sarah Mulholland, the authority conferred by the will on the executor and trustee for making the sale, and the appointment of the executor and the probate of the will. It contains the usual special warranty against acts done or committed by the executor.

Conway, in pursuance of the title vested in him by the [539] executor's deed, took possession of the premises and has since occupied and used them as his own. On January 21, 1908, he presented a petition to the orphans' court of Philadelphia county setting forth, inter alia, that Sarah Mulholland died testate and the disposition made by her will of her estate; that the executor of Mrs. Mulholland had by deed dated January 6, 1902, conveyed to him "all the right, title and interest of the said Sarah Mulholland, deceased," in the three

lots of ground in Philadelphia, referring to the recital in the deed that Felix Mulholland, the husband of Sarah, had died seised of the undivided sixth part of the premises, leaving to survive him a widow and five children, and the death of the five children unmarried and without issue, and that their interest in the premises vested in their mother; that the executor filed the account of his administration which was audited on June 30, 1902, "and by adjudication thereof distribution of the residue was awarded as directed in said will and the schedule of distribution as approved by the auditing judge." The petition further avers that the purchase money was paid; that at the time of the conveyance the executor was of the belief and opinion that the testatrix died seised of the said undivided sixth part of the premises; that testatrix, however, was not of the blood of the first purchaser of the said one-sixth interest in the premises, and, therefore, the fee thereof did not vest in her on the death of the last surviving of her children but vested in the heirs and next of kin of her husband; that the facts relative to the title did not come to the knowledge of petitioner until October 15, 1907; and that the consideration money for the conveyance forms a part of the balance remaining in the hands of the executor and trustee and is undistributed. The petitioner prayed that the executor be ordered and directed to repay to him the purchase money with interest thereon.

The executor filed an answer in which he admits most of the facts averred in the petition. He admits that Conway paid the purchase money in the belief that the executor had the right to convey to him a good title in fee, and that the executor was of the same opinion; that the executor has funds
540 awarded him sufficient to return to petitioner the amount paid by him as purchase money, but avers that he refused to repay Conway the purchase money, as the money in his hands had been set apart by the adjudication of the orphans' court for a specific purpose, "and your respondent is informed and believes in law he has no right to divert it from this purpose unless protected by an order of your honorable court." The answer further avers that the executor filed an account which was duly adjudicated by the orphans' court, and attaches a copy thereof to the answer. The final decree confirming the account and directing distribution was made by the court on June 30, 1902, and contains, inter alia, the following: "The residue of this estate is given to the executor in trust to distribute the same amongst the churches named in the propor-

tions and manner as set out in the will of deceased, and in his discretion to pay the same from time to time for masses for the repose of the soul of testatrix and the souls of her husband and their children."

The answer having been filed, the court appointed a master, who made a voluminous report, granting the prayer of the petition and awarding restitution of the money paid by Conway to McDevitt, but permitting Conway to retain the title to the property conveyed to him by the executor. The reason for the conclusion of the learned master is stated by him as follows: "The master and examiner finds as a fact that the said Sarah Mulholland was not of the blood of the first purchaser of said one-sixth part of the property hereinbefore described, and that the aforesaid consideration of two thousand seven hundred and fifty dollars was paid by the said James Conway unto the said James McDevitt, executor and trustee, by reason of a mutual mistake of fact, innocently committed and through no fault of either party thereto. It also appears that the parties to said mistake can be put in statu quo, no other rights having attached in the meantime." The learned court below in a pro forma decree dismissed the exceptions and confirmed the master's report absolutely. McDevitt, as executor and residuary devisee in trust, has taken this appeal.

It will be observed that the master committed manifest [541] error in finding, as he did, "that the facts in reference to the devolution of the title to said one-sixth part of the said property first became known to said James Conway and James McDevitt on or about October 15, 1907," as the deed executed by McDevitt and accepted by Conway recited the title and thereby disclosed the fact that Sarah Mulholland, the decedent, had no valid title to the interest in the premises in question. This was notice to Conway of the defective title in 1902: Jennings v. Bloomfield, 199 Pa. 638, 49 Atl. 135. When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact: Mertins v. Jolliffe, Amb. 311. Equally apparent is it that there is no foundation for the finding by the master "that the parties to said mistake can be put in statu quo, no other rights having attached in the meantime," as the petition and answer show that the executor filed an account of his administration of the estate which included the sum paid by Conway to McDevitt, that the account was finally confirmed and distribution made in June, 1902, and that the fund realized by the

sale of the property to Conway was distributed as part of the testatrix's residuary estate and passed to the trustee for the legatees nearly six years prior to the commencement of these proceedings. The master's findings of fact are in conflict with the evidence, and with their disappearance his conclusions must likewise fall. It may be that both parties to the deed were ignorant of the law, but with the full knowledge of the facts which the pleadings show they had, that of itself is no ground for equitable relief: Norris v. Crowe, 206 Pa. 438, 98 Am. St. Rep. 783, 55 Atl. 1125. And there are no special circumstances or facts in the case at bar that will aid the purchaser's ignorance or mistake of the law in moving a chancellor to grant the relief prayed for in the petition.

Under the undisputed facts disclosed by the evidence, the orphans' court had no power to set aside the sale and direct repayment of the purchase money to the executor. Such power would not exist in the orphans' court if this had been a sale made in pursuance of its own order. In such cases, the court unquestionably has the authority to control the sale [542] and protect a purchaser, but that authority must be invoked within a proper time and under a state of facts which will justify the exercise of the equitable powers of the court. In De Haven's Appeal, 106 Pa. 612, Green, J., delivering the opinion of the court, says (page 614): "Had the purchaser [of real estate at an administrator's sale] bought in the absence of any interference, or inducements held out by the administrator to persuade the appellant to buy, the maxim of caveat emptor would certainly have applied, and we would probably not have felt justified in reviewing the refusal of the court below to set aside the sale. So, also, if the sale had been confirmed, purchase money paid and deed delivered, the transaction would be regarded as closed and beyond the reach of the courts. But here the application for relief was made to the orphans' court which had ordered the sale before the sale was confirmed, and while the whole matter was yet within the control of the court." In such case the orphans' court retains control over the sale even until after its confirmation, but as indicated in Justice Green's opinion, it will not exercise its authority to grant relief to a purchaser in the absence of fraud and after he has paid the purchase money and received his deed. There must be an end to such proceedings, and if a purchaser desires to relieve himself of a defective title, he must exercise diligence in ascertaining the defect and invoking the aid of the court to afford him protection. The law

requires reasonable diligence in a purchaser to ascertain any defect of title: Brush v. Ware, 40 U. S. 93, 10 L. ed. 672; and when once ascertained, he must exercise a like diligence in asserting his right to have the sale set aside. The purchaser here appeals to the equitable powers of the court, and they are never called into activity except by conscience, good faith and reasonable diligence: Smith v. Clay, 3 Bro. C. C. 639, n.

We need not discuss or determine the extent of the powers of the orphans' court in setting aside a sale made by an executor in pursuance of a power contained in the will. We have held that in a proper case, the orphans' court has power to review, set aside, and if necessary to order a resale of real estate made under a testamentary power: Dundas' Appeal, 64 [543] Pa. 325. But a sale under a power in a will need not be confirmed by the court, nor is any order of court necessary to authorize the executor to convey. No decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power: Schwartz's Estate, 168 Pa. 204, 31 Atl. 1085. It may well be assumed, however, that the authority of the orphans' court to set aside a sale made in pursuance of a testamentary power is not more extensive than that exercised by the court over a sale made in pursuance of its own order. It is clear, as pointed out above, that had this sale been made by a personal representative in pursuance of an order of the orphans' court, that court would have refused, under the circumstances of this case, to set aside the sale or to order the repayment of the purchase money. Conway is affected with notice of the title which his own deed disclosed, and having accepted the title, taken possession of the premises, and retained them for more than five years, he cannot be permitted to attack the title and compel the executor to repay the purchase money. When he accepted the deed, he knew all that he knows to-day in regard to the title. The facts were all before him, and notwithstanding the finding of the master, Conway was not ignorant of or mistaken as to the facts in the chain of the title which the executor conveyed. The deed itself convicts the master of error in this respect, and shows that in 1902 Conway was in full possession of all the facts relative to the title of Mrs. Mulholland to the property which her executor conveyed.

In addition to having accurate knowledge of the facts which would deprive him of the right to any relief in the or-

phans' court at this time, the money which Conway now seeks to have returned to him was charged to the executor in the account which he filed, and was distributed in 1902 to the legatees as directed in the testatrix's will. Aside from any other reason, this of itself is an insuperable objection to the return of the money by the executor. He has disposed of it as directed in the will by order of the orphans' court, and he cannot now be required to refund it. As appears by the order [544] of the court awarding distribution, quoted above, the money is not now held by the executor for administration, but in trust for the beneficiaries named in the will of the decedent. It is not in the power of the trustee to refund it to the executor for the purpose of repayment to the purchaser of the real estate. If the orphans' court had authority to compel the repayment of the money to Conway, it is now too late to invoke it. The facts of this case do not warrant any interference by the court with the sale made by the executor to Conway.

The decree of the orphans' court is reversed, and all the proceedings are set aside at the costs of the petitioner.

A Vendee is Chargeable with Notice of Facts Affecting the Title which are recited in his deed: Turner v. Edmonston, 210 Mo. 411, 124 Am. St. Rep. 739. See, also, Honore's Exr. v. Bakewell, 6 B. Mon. 67, 43 Am. Dec. 147; Sioux City etc. R. R. Co. v. Singer, 49 Minn. 301, 32 Am. St. Rep. 554; Anderson v. Timberlake, 114 Ala. 377, 62 Am. St. Rep. 105; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726; Equitable Building etc. Assn. v. Corley, 72 S. C. 404, 110 Am. St. Rep. 615; Gross v. Watts, 206 Mo. 373, 121 Am. St. Rep. 662.

A Mistake of Law, with a Full Knowledge of the Facts, will not ordinarily be relieved against; but the rule is not inflexible: Norris v. Crowe, 206 Pa. 438, 98 Am. St. Rep. 783; Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81; note to Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 497. A contract entered into by the parties under a mutual mistake of law is held not enforceable in Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616.

Powers of Sales Given in Wills should receive a liberal interpretation in order to carry out the intention of the testator: Matthews v. Capshaw, 109 Tenn. 480, 97 Am. St. Rep. 854. Under a devise to sell, executors have a common-law authority by which they can vest the legal title in the purchaser, and the purchaser under the power takes the estate in the same manner as if the power and the instrument executing it had been incorporated in one instrument: Tudor v. Tudor, 80 Vt. 220, 130 Am. St. Rep. 977. That a court of equity has jurisdiction to compel the exercise by an executor of a power of sale contained in a will for the purpose of satisfying a debt due from the testator, see Holly v. Gibbons, 176 N. Y. 520, 98 Am. St. Rep. 694.

CASES

IN THE

SUPREME COURT

OF

RHODE ISLAND.

McGRATH v. MISCH.

[29 R. I. 49, 69 Atl. 8.]

STREETS—Sidewalks, Shopkeeper's Duty to Keep Clear from Ice.—The law imposes no obligation on a shopkeeper to keep the sidewalk in front of his shop safe for his customers by removing ice therefrom. (p. 798.)

Trespass on the case for negligence.

Albert B. Crafts, for the plaintiff.

Alfred S. Johnson and Arthur P. Johnson, for the defendant.

49 PER CURIAM. The demurrers to the declaration were properly sustained.

The declaration is founded upon an imaginary duty of a shopkeeper to keep the sidewalk in front of his shop safe for his customers by removing ice therefrom. The law imposes no such obligation. When the customer leaves the shop and steps upon the highway, the shopkeeper ceases to owe any duty to him in distinction from other travelers. As was held in Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502, this does not include responsibility for injuries occasioned by failure to remove snow and ice: See, also, Sneeson v. Kupfer, 21 R. I. 560, 45 Atl. 579.

The plaintiff's exceptions are overruled, and the cause is remitted to the superior court for further proceedings.

The Owner of Property Abutting on a Public Street is ordinarily not responsible for the condition of the street or sidewalk: See the note to Hay v. City of Baraboo, 115 Am. St. Rep. 993. As to his liability for a dangerous condition created by ice on the sidewalk, see New Castle v. Kurtz, 210 Pa. 183, 105 Am. St. Rep. 798; note to Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 540; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502; and as to the liability of the city itself for allowing ice to accumulate and remain on sidewalks, see Magaha v. Hagerstown, 95 Md. 62, 93 Am. St. Rep. 317.

JOHNSON v. UNION PACIFIC RAILROAD COMPANY.

[29 R. I. 80, 69 Atl. 298.]

GARNISHMENT—Railroads—Rolling Stock.—A freight-car belonging to a defendant foreign corporation in the possession of a domestic railroad corporation, under a universal arrangement that such corporations, in lieu of unloading freight into their own cars, should haul those of other corporations to their destination, and when emptied return them at their convenience, is not subject to attachment in a tort action brought against such defendant foreign corporation on the ground that the garnishee has an immediate interest in the property, and such a right to operate the cars that in the ordinary course of business such cars may be taken beyond the jurisdiction of both courts. (p. 804.)

GARNISHMENT—Rights of Garnishee.—Under no circumstances can a garnishee, by the operation of proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself. (p. 804.)

GARNISHMENT—Situs of Debt—Incorporations in Several States—Unity of Organization.—The moneys belonging to a defendant foreign corporation in the hands and possession of a domestic railroad corporation is subject to attachment and garnishment in a tort action brought against such defendant foreign corporation unaffected by the fact that such defendant foreign corporation was incorporated in three different states; and whether the defendant was a single corporation or a corporation with several aspects or several separate corporations, of which only one was recognized either in each or all of the creating states, the situs of indebtedness lay in any one of the states in which the defendant was incorporated. (pp. 806, 808.)

LEGAL FICTIONS—Choice Between.—In selecting a fiction, moreover, it may sometimes be wise to take one which has some slight inconvenience in practical results, if its logical development is generally convenient, rather than another which has a slight advantage in some respect, but whose logical developments would lead to such injustice that exceptions and subfictions must be numerous and strained. (p. 808.)

GARNISHMENT—Interstate Commerce.—Garnishment process can be successfully adopted against accounts payable to a foreign railroad corporation arising out of the conduct of interstate commerce. (p. 809.)

Alfred S. Johnson and Lewis A. Waterman, for the plaintiff.

Gardner, Pirce & Thornley, for the defendant, appearing specially.

80 PARKHURST, J. This cause is before the court upon a motion to dismiss, for lack of jurisdiction, made upon a special appearance entered by the defendant for this purpose only. The motion came before the superior court for hearing, and, as in the opinion of that court the questions of law arising on the motion were of such doubt and importance, and

so affected [81] the merits of the controversy that they ought to be determined by the supreme court before further proceeding, the questions arising upon this motion were certified to this court under the provisions of section 478 of the court and practice act.

The action is one of tort, arising out of an accident which occurred on the road of the defendant in the state of Kansas, and is brought by the plaintiff, Amy S. Johnson, against the defendant, the Union Pacific Railroad Company, a corporation organized under the laws of the state of Utah, and was commenced by process of foreign attachment under the provisions of section 524 of the court and practice act by service upon the New York, New Haven and Hartford Railroad Company, a Rhode Island corporation, as garnishee. Several services upon the garnishee were made before the substituted service by mail upon the defendant and before the return day of the writ; no question is raised as to the form of the writ or as to the due and lawful service thereof upon the garnishee, the only questions being as to the sufficiency of the garnishment to give jurisdiction to the court growing out of the nature of the property sought to be garnished in this proceeding.

The garnishee, in due course, filed its affidavit (omitting the formal opening), as follows: "That the service of said writ upon said New York, New Haven and Hartford Railroad Company was made on the twenty-first day of July, 1905, and also upon the first day of August, 1905, and that at the time of said several services of said writ on said New York, New Haven and Hartford Railroad Company, there was in the hands and possession of said New York, New Haven and Hartford Railroad Company no personal estate of said defendant directly or indirectly except as herein stated; that said New York, New Haven and Hartford Railroad Company at the time of both said services had in its possession in the state of Rhode Island one freight-car belonging to the defendant corporation and numbered 65,663; that both said New York, New Haven and Hartford Railroad Company and said Union Pacific Railroad Company, the defendant, are common carriers of goods by railroads and were such at the time of the several services of said writ as aforesaid; that at the time of the services of said writ upon [82] said New York, New Haven and Hartford Railroad Company, for a long time prior thereto, and ever since that time, an arrangement and understanding has existed between the said defendant, the Union

Pacific Railroad Company, and said New York, New Haven and Hartford Railroad Company, according to a custom universal in such cases among corporations operating lines of railroad throughout the United States in the management of their freight business, by which custom, instead of unloading and transferring freight from the cars of one company to the cars of another at the point of connection, each corporation receives the loaded cars of the other, direct or from and through connecting lines as the case may be, hauls them to their place of destination on its own line, and after discharging the freight contained therein returns them as soon as and when practicable in the due course of business, reloaded with freight to some point on or near or reached by the line of railway of the company owning them; that under the arrangement and understanding existing as aforesaid, the New York, New Haven and Hartford Railroad Company had the right to use in its business and for its own purposes the car aforesaid until such time as it might find it convenient and deem it proper to return the same, and the cars owned by said New York, New Haven and Hartford Railroad Company while on the lines of the Union Pacific Railroad Company were in like manner in current and constant use by the Union Pacific Railroad Company at all times; and that in accordance with said understanding and agreement, the company owning any such car or cars is compensated for the wheelage or mileage thereof by the company in whose possession the same are; that the aforesaid method of receiving and returning railroad cars of other lines by railroads facilitates traffic and is a great accommodation to the shipping public and has become a part of the general system of freight transportation throughout the United States; that it would be practically impossible for the New York, New Haven and Hartford Railroad Company to carry on its business without an arrangement and understanding of this character with other lines of railroads, and that said New York, New Haven and Hartford Railroad Company, under [83] the arrangement and understanding aforesaid, was, at the time of the several services of the writ in this action upon it, entitled to hold and use for its own purposes as aforesaid and for its business said car of the Union Pacific Railroad Company then in its possession, free and discharged of and without interference from attachment or garnishment proceedings herein; and that the maintenance of said proceedings would nullify the rights of the garnishee to said car under the arrangement and under-

standing with the defendant hereinbefore mentioned, and interfere seriously with the proper movement of traffic and the accommodation of the shipping public; and that said car, at the time of the several services of said writ upon the New York, New Haven and Hartford Railroad Company, was used in commerce among and between the different states of the United States, and in accordance with the laws of the United States whereby every railroad company in the United States, whose road is operated by steam, is authorized to carry upon and over its road freight and property on its way from one state to another state, and any interference therewith by attachment or garnishment proceedings would be in violation of section 8, article 1, of the constitution of the United States, which provides that Congress shall have power to regulate commerce among the several states.

"And I further on oath depose and say that the New York, New Haven and Hartford Railroad Company, in addition to its incorporation in Rhode Island as aforesaid, is incorporated by act of the Legislature of the State of Connecticut, in which state the corporation was first organized under that name, and the Legislature of the Commonwealth of Massachusetts, and operates various lines of railway in the States of Connecticut, Massachusetts, Rhode Island, and New York, and that the corporations incorporated by all of said states are administered by one Board of Directors and by a single corporate organization, and that the principal office of said corporation is in the State of Connecticut, the first incorporating state; that at the time of the first service of said writ as aforesaid, there was due and payable in the City of New Haven, in the State of Connecticut, from the various corporations known as New [84] York, New Haven and Hartford Railroad Company, and organized and operating as aforesaid, to the Union Pacific Railroad Company, the defendant, the sum of Eight Hundred and Four and 46/100 ($804.46) Dollars as a balance due on the accounts between said companies; and that at the time of the service of the second writ as aforesaid there was in like manner due from said New York, New Haven and Hartford Railroad Company to said Union Pacific Railroad Company the sum of Nine Hundred and Nineteen and 91/100 ($919.91) Dollars; that the consideration for the charges by the Union Pacific Railroad Company against the New York, New Haven and Hartford Railroad Company, from which said balance accrued, was in part for the use by said New York, New Haven and Hartford Railroad Company of the cars of the Union Pa-

cific Railroad Company, in accordance with the traffic arrangement and understanding hereinbefore referred to, in part for tickets sold by the New York, New Haven and Hartford Railroad Company upon some part of its system as aforesaid, the proceeds of which were payable to the Union Pacific Railroad Company, and in part for repairs made by the Union Pacific Railroad Company upon cars belonging to the New York, New Haven and Hartford Railroad Company; that all accounts out of which said balance grew were kept at said principal office of the New York, New Haven and Hartford Railroad Company in the City of New Haven, in the State of Connecticut, and that the balance so due was payable at said principal office in the city of New Haven, Connecticut; that the situs of the said indebtedness from the New York, New Haven and Hartford Railroad Company to said Union Pacific Railroad Company, the defendant, was at its said main office in New Haven, Connecticut.

"I further on oath depose and say that it is impossible to state how much, if any, of said balance was due from said New York, New Haven and Hartford Railroad Company, the Rhode Island corporation, to said Union Pacific Railroad Company, or how much thereof was due to said Union Pacific Railroad Company from said corporation, or from any of said corporations for or by reason of the use of any of its cars in the State of Rhode Island, or for tickets sold as aforesaid within said [85] State, and that such indebtedness, as this deponent is informed and verily believes, is not subject to attachment or garnishment in these proceedings."

The motion to dismiss sets forth in substance that no valid attachment of property has been made, and no personal service, and that therefore the court has no jurisdiction to entertain this suit, either as a proceeding in rem or in personam.

Upon hearing had before the superior court, the following questions were certified to this court for its determination, namely:

"1. Is a freight-car belonging to the defendant corporation, said corporation being organized and existing under the laws of the state of Utah and said car being in the possession of the New York, New Haven and Hartford Railroad Company, under the conditions set forth in the garnishee's affidavit filed by said last-named railroad company in this case, subject to attachment in a tort action brought by this plaintiff against said defendant corporation organized and existing as aforesaid under the laws of the state of Utah?"

"2. Are the moneys belonging to said defendant corporation, organized and existing under the laws of the state of Utah, in the hands and possession of said New York, New Haven and Hartford Railroad Company and held by it under the conditions set forth in the affidavit of said last-named corporation filed in this case, subject to attachment and garnishment in a tort action brought by this plaintiff against said defendant corporation organized and existing as aforesaid under the laws of the state of Utah?"

As to the first question, we are of the opinion that it must be answered in the negative. This same case was recently before the United States circuit court for the district of Rhode Island (145 Fed. 249), on precisely the same state of facts set forth in said affidavit, and in a careful and well-considered opinion Judge Brown, of that court, held as follows:

"By the garnishee's affidavit, it appears that, at the dates of several services upon it, it had in its possession certain freight-cars belonging to the defendant, but that it held the same under an arrangement with the defendant whereby the New [86] York, New Haven and Hartford Railroad Company has a right to use the cars in its own business until such time as it may find convenient and proper to return the same reloaded with freight to some point on or near or reached by the line of railway of the defendant.

"The defendant contends that the garnishee has such an immediate interest in the property, and such a right of use of the cars, that when it has exercised this right the cars will have reached the possession of the defendant in a foreign jurisdiction, and that it will be beyond the power of the garnishee to return the cars, or of the court to obtain a return. It is urged that the garnishee cannot be deprived of its right to use the property by reason of a controversy between other parties in which it has no interest; citing Drake on Attachment, third edition, page 462, as follows: 'It is an invariable rule that under no circumstances shall a garnishee, by the operation of proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself'; citing, also, Wall v. Norfolk & Western Ry. Co., 52 W. Va. 485, 94 Am. St. Rep. 948, 44 S. E. 294, 64 L. R. A. 501; Michigan Central R. R. Co. v. Chicago etc. R. R. Co., 1 Ill. App. 399; Connery v. Quincy etc. R. R. Co., 92 Minn. 20, 104 Am. St. Rep. 659, 99 N. W. 365, 64 L. R. A. 624, 2 Ann. Cas. 347.

"The plaintiff argues that, in the case at bar, there was no express agreement giving to the New York, New Haven and Hartford Railroad Company the right to use the cars; and it is objected that the defendant relies merely upon a custom, and that that custom is of the most vague and indefinite kind. It is contended that this is, in effect, merely a license or privilege to use cars for hire practically as it sees fit, and must yield to the greater right of a creditor and a resident of this state to attach the property. It is argued that the rule that the garnishee cannot be placed in a worse position by the attachment has its exceptions, and does not permit a garnishee to return the goods or articles attached, freed from the attachment, to the owner.

87 "The proposition that the plaintiff, in trustee process, cannot be placed in a better position than the principal defendant is recognized in Waldron v. Wilcox, 13 R. I. 518; Brown v. Collins, 18 R. I. 242, 27 Atl. 329; Smith v. Millet, 11 R. I. 528.

"It is difficult to see upon what principle the plaintiff can be allowed, by his attachment, to destroy the right of the New York, New Haven and Hartford Railroad Company to use these cars in the state of Rhode Island, to load them with freight, and to transport them through or into other states. It is also quite clear that the burden of returning these cars from another state to the state of Rhode Island cannot be imposed upon the garnishee. The cases cited by the defendant are direct authorities for this position. It therefore becomes unnecessary to consider the general question of the right to make garnishment of rolling stock, or whether such garnishment would constitute an obstruction of, or interference with, interstate commerce. I am of the opinion that the jurisdiction of this court cannot be supported by virtue of the attempt to attach the defendant's cars in the possession of the garnishee."

We are fully convinced by the reasoning above quoted, and believe it to be well supported by the authority of carefully considered cases, as cited in the opinion. Nor do we find among the numerous cases cited upon the plaintiff's brief to this point any cases which are in serious conflict with the position herein taken. Such cases as the plaintiff cites sustaining the attachability of rolling stock of railway corporations relate solely to rolling stock belonging to the defendants in the cases cited, and directly attached in suits against the defendants, not being subject to any such right or interest on

behalf of any garnishee as is shown in this case. The interstate commerce question was not raised. As it does not appear in the affidavit whether or not the freight-car of the defendant was in actual use by the garnishee in the course of interstate commerce, or was idle at the time of its attempted garnishment, we have not thought it necessary to decide the question whether or not the attachment of rolling stock under these circumstances is an interference with interstate commerce.

[88] As to the second question, whether the moneys of the defendant corporation shown by the affidavit to be in the hands of the garnishee are subject to attachment and garnishment, we are equally in accord with the opinion of Judge Brown, above cited, and feel constrained to answer that question in the affirmative. This question involves two considerations viz.: (1) Whether the moneys sought to be garnished were due from the Rhode Island corporation; and (2) whether such moneys arose from the operations of interstate commerce and are so intimately connected therewith that the attachment of such moneys would be an interference with interstate commerce and so void, as being in violation of the provisions of the constitution of the United States, in relation to interstate commerce. Upon both these points we feel that we can adopt the language of Judge Brown in the opinion already cited (145 Fed. 251 et seq.), as follows:

"The next question is whether the plaintiff has succeeded in garnishing a debt due from the garnishee to the defendant.

"The garnishee makes oath that the New York, New Haven and Hartford Railroad Company, in addition to its incorporation in Rhode Island, is incorporated by act of the legislature of the state of Connecticut, in which state the corporation was first organized under that name, and by the legislature of the commonwealth of Massachusetts, and operates various lines of railway in Connecticut, Massachusetts, Rhode Island, and New York; that the corporations incorporated by all of said states are administered by one board of directors, and by a single corporate organization; that the principal office is in the state of Connecticut, the first incorporating state.

"The garnishee sets forth that, at the times of various services upon it, there were due and payable in the state of Connecticut, from the various corporations known as the New York, New Haven and Hartford Railroad Company to the Union Pacific Railroad Company, certain sums, as the balances due on accounts between the Union Pacific Railroad

Company and the New York, New Haven and Hartford Railroad Company; that the consideration for the charges by the Union Pacific Railroad Company against the New York, New Haven and Hartford [89] Railroad Company, from which said balances accrued, was in part for use by the New York, New Haven and Hartford Railroad Company of cars of the Union Pacific Railroad Company, in part for tickets sold by the New York, New Haven and Hartford Railroad Company upon some part of its system as aforesaid, the proceeds of which were payable to the Union Pacific Railroad Company, and in part for repairs made by the Union Pacific Railroad Company upon cars belonging to the New York, New Haven and Hartford Railroad Company; that all accounts out of which said balance grew were kept at the principal office of the New York, New Haven and Hartford Railroad Company in New Haven, in the state of Connecticut; that the balances due were payable at said principal office; that the situs of said indebtedness was at the main office in New Haven.

"The garnishee further swears that it is impossible to state how much, if any, of said balances was due from the Rhode Island corporation, or how much was due to said Union Pacific Railroad Company from said Rhode Island corporation or from any of said corporations for or by reason of the use of any of its cars in the state of Rhode Island, or for tickets sold as aforesaid within said state.

"It sufficiently appears from the garnishee's affidavit that the New York, New Haven and Hartford Railroad Company does business in three states under a single administration.

"It is the defendant's contention that the Rhode Island incorporating act of May 17, 1893 (Acts and Resolves, January Session, 1893, p. 377), created an independent Rhode Island corporation; that it did not merely reincorporate a foreign corporation in this state; that consequently the Rhode Island corporation can be liable only for an unascertainable proportion of the balance due to the Union Pacific Railroad Company; and that this is a liability which it owes to the Connecticut corporation rather than to the Union Pacific Railroad Company directly.

"The status of the New York, New Haven and Hartford Railroad Company has been before the courts of this circuit: Smith v. New York etc. R. R. Co. (C. C.), 96 Fed. 504; [90] Goodwin v. New York etc. R. R. Co. (C. C.), 124 Fed. 358. In these cases the questions related to citizenship.

"It does not seem necessary, however, to determine whether the legislature of Rhode Island reincorporated in this state a pre-existing corporation of the state of Connecticut or of Massachusetts, or created a new corporation of Rhode Island with the same name and powers within this state. Whether the garnishee is a single corporation incorporated within three states, or three corporations which practically have become so consolidated that their affairs cannot be separated, I am of the opinion that the situs of the indebtedness on the joint or consolidated business, for the purpose of garnishment, is in either state.

"The practical inconvenience of adopting any other view is so great that we should hesitate to confuse by judicial decision what the stockholders of the various corporations of the New York, New Haven and Hartford Railroad Company have seemed to regard as a very simple arrangement. In Goodwin v. New York etc. R. R. Co. (C. C.), 124 Fed. 358, Judge Lowell said:

" 'Whether the organization is deemed (1) a single corporation, (2) one corporation with several aspects, (3) several separate corporations of which only one is recognized in each of the creating states, or (4) several separate corporations each recognized everywhere, is of no importance, except for the practical results which follow the adoption of one fiction or another. It is not a question of justice, but of ultimate convenience, in what court a corporation may sue or be sued. It is injustice, and not mere inconvenience, that an organization of any kind shall be compelled to pay its debts twice over. In selecting a fiction, moreover, it may sometimes be wise to take one which has some slight inconvenience in practical results, if its logical development is generally convenient, rather than another which has a slight advantage in some respect, but whose logical development would lead to such injustice that exceptions and subfictions must be numerous and strained.'

"What the stockholders of the New York, New Haven and Hartford Railroad Company have joined together so completely [91] for their business convenience cannot be practically separated when it comes to the question of the situs of an obligation for purposes of garnishment. There is a practical unity of organization extending over three distinct jurisdictions. If we are to separate the corporations sharply, the same reasons which exist for denying that the situs of the debt is in Rhode Island would exist for denying that it is either

in Massachusetts or Connecticut. The result would be that what, from a practical point of view, is a single obligation, would, by an artificial division, require either a difficult accounting to determine the proportional parts of the obligation assumed by each corporation, or would require us in each instance to dismiss a suit begun by garnishment of the New York, New Haven and Hartford Railroad Company. The location of a business office for the transaction of affairs of the three corporations in the state of Connecticut cannot compel the plaintiff to resort to that jurisdiction.

"It is further contended that no garnishment process can run against accounts payable to a foreign railroad corporation arising out of the conduct of interstate commerce. The defendant relies upon Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118, 30 L. ed. 1200. I am unable to see the applicability of that case. That a state tax upon the gross receipts of a steamship company, derived from the transportation of persons and property by sea, is held to be a regulation of interstate and foreign commerce in conflict with the exclusive powers of Congress under the constitution, does not lead to the conclusion that the earnings of a railroad company in interstate commerce are free from attachment for its debts. There is no analogy between the cases, and no authority is cited having any tendency to support the defendant's proposition.

"I am of the opinion that the state court acquired a limited jurisdiction by virtue of the attachment of a res."

The defendant's brief cites no case directly in conflict with the principles above set forth relating to the question of the right to garnish said moneys, on the ground that such garnishment is void as an interference with interstate commerce. [92] The closest analogy is found in the case of Davis v. Cleveland etc. R. R. Co., 146 Fed. 403, decided in the United States circuit court for Iowa, less than a month later than Judge Brown's decision, wherein it was held that sums due to a defendant railroad company (nonresident of the state where suit is brought) for its share of freight money earned on continuous interstate shipments over connecting lines and collected by the final carrier, are as much a part of interstate commerce as the actual carriage of the property; and so are not attachable by garnishment in the possession of the final carrier. As that suit relates to freight money earned, it is not directly in point. Furthermore, it does not settle the question finally, even in that suit, as it may not be affirmed on appeal. Nor

do we consider this decision as authoritative upon principle; but, on the contrary, we consider it as extremely doubtful, since in our view freight money when earned, remaining in the hands of the final carrier, would be a mere debt, with no special and peculiar character, subject to suit at law by the creditor road, if not paid, and so having only the common character of any simple contract or book indebtedness, and liable to garnishment by the common rule.

As to the question of the situs of the debt sought to be garnished in this case, and whether it was payable in Connecticut or in Rhode Island, and in support of the position above taken by Judge Brown and adopted by this court, that it may be garnished in Rhode Island, see Chicago etc. R. R. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. Rep. 797, 43 L. ed. 1144; Wyeth Hardware etc. Co. v. Lang, 127 Mo. 242, 48 Am. St. Rep. 626; Howland v. Chicago, R. I. & P. Ry. Co., 134 Mo. 474, 36 S. W. 29; Wabash R. R. Co. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594; Mobile & O. R. R. v. Barnhill, 91 Tenn. 395, 30 Am. St. Rep. 889, 19 S. W. 21; Georgia & A. R. R. v. Stollenwerck, 122 Ala. 539, 25 South. 258; Mahany v. Kephart, 15 W. Va. 609; Smith v. Boston etc. R. R. Co., 33 N. H. 337.

Upon the authority of all the above cases, we are satisfied that the Union Pacific Railroad Company, the defendant in this suit, could have maintained its action at law either in this state or in Connecticut for the balance of indebtedness in its favor disclosed by the garnishee's affidavit; hence we are of the opinion that the plaintiff in this suit has obtained a lawful attachment and garnishment of the moneys in question [93] sufficient to give to the superior court limited jurisdiction of the plaintiff's suit, so far as this money is concerned.

The papers in the cause will be returned to the superior court, with the decision of this court certified thereon.

The Attachment of Foreign Railroad Cars is a question that has been before the courts in a number of recent cases: See Southern Flour etc. Co. v. Northern Pac. Ry. Co., 127 Ga. 626, 119 Am. St. Rep. 356; Connery v. Quincy etc. R. R. Co., 92 Minn. 20, 104 Am. St. Rep. 659; Wall v. Norfolk etc. R. R. Co., 52 W. Va. 485, 94 Am. St. Rep. 948.

The Situs of Debts for Purposes of Garnishment is the subject of a note to National Bank v. Furtick, 69 Am. St. Rep. 113–127. For recent cases on garnishment against foreign corporations, see Boyle v. Musser-Sauntry Land etc. Co., 88 Minn. 456, 97 Am. St. Rep. 538; Goodwin v. Clayton, 137 N. C. 224, 107 Am. St. Rep. 479. The situs of a debt for the purpose of garnishment is, according to Kansas City etc. Ry. Co. v. Parker, 69 Ark. 401, 86 Am. St. Rep. 205, not only at the domicile of the debtor, but in any state in which the garnishee may be found, provided the law of the state permits the

debtor to be garnished, and the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the state. In this case the supreme court of Arkansas holds that a citizen of one state may garnish a foreign railroad company operating within that state for a debt due one of its employés for labor performed therein, although he is a citizen of another state. According to Baltimore etc. R. R. Co. v. Allen, 58 W. Va. 388, 112 Am. St. Rep. 975, railroad companies incorporated in one state, but owning and operating railroads and having agents in another state, have the status of residents of the latter state, though not citizens of nor domiciled therein in the technical sense of such terms, and they are subject to garnishment in the latter state without reference to the jurisdiction in which the debts due from them were contracted or are payable.

CUNHA v. CALLERY.

[29 R. I. 230, 69 Atl. 1001.]

STATUTE OF FRAUDS—Description.—A memorandum in writing purporting to be a contract for the sale of land which describes the property sold as "this place" is not sufficient to satisfy the statute of frauds. "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance wtih the statute." (p. 812.)

STATUTE OF FRAUDS—Insufficient Description—Subsequent Deed with Accurate Description.—Where a contract for the sale of land insufficiently described it as "this place," and the vendor afterward gave the purchaser a deed which contained an accurate description of a lot of land, but there was no reference to such deed in the contract, the deed did not form part of the memorandum in writing. (p. 812.)

William J. Brown, for the plaintiff.

Edward M. Sullivan, for the defendant.

231 BLODGETT, J. This case is an action in assumpsit, brought in the district court of the eighth judicial district to recover damages for the failure of the defendant to convey to the plaintiff certain real estate, in the town of Cranston, in accordance with her agreement. Said defendant had given to the plaintiff a memorandum, in writing, of said agreement, as follows: "I have sold this place to Manuel J. Cunha for $2,100 cash, and is all clear of mortgage. (Signed) Catherine M. Callery." The defendant had also given the plaintiff a deed to the defendant, which contained a description of the property so agreed to be conveyed to the plaintiff.

Upon these facts certain questions of law arose at the hearing on the defendant's demurrer to the plaintiff's amended special count of the declaration, which have been duly certified to this court under section 478 of the court and practice act. The following are the questions so certified:

"1. Was the memorandum in writing above referred to a sufficient memorandum to satisfy the statute of frauds?

"2. Did the deed alleged to have been delivered to the plaintiff by the defendant, as above referred to, constitute a part of the memorandum in writing?

"3. Was the above memorandum, together with the deed above referred to, a sufficient memorandum in writing to satisfy the statute of frauds?"

In Ray v. Card, 21 R. I. 362, 43 Atl. 846, the words of description were "that lot," and the description was held to be insufficient to answer the requirements of the statute; the court holding that "while resort may be had to parol evidence to fit the description to the land, such evidence is inadmissible where there is no description." We are of the opinion that the case at bar is ruled by this decision, and accordingly we answer the first question in the negative.

Chancellor Kent, in his observations on the requirements of the statute, says (2 Kent's Commentaries, *511): "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that [232] would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent."

The memorandum in question contains no reference to any other document, and we are clearly of the opinion that it is not competent to consider the deed alleged to have been delivered as a part of the memorandum required by the statute. It necessarily follows that the second and third questions must also be answered in the negative.

The papers in the cause may be sent back to the district court of the eighth judicial district, with the decision of this court upon the questions submitted certified thereon.

The Statute of Frauds does not require that the memorandum of sale shall consist of a single instrument. Hence, if a contract for the sale and purchase of real property is not of itself sufficient, but at the time it was executed the vendor also executed a conveyance of the property pursuant to the sale, to be delivered to the grantee on his compliance with the conditions of the sale, such memorandum and

conveyance may be considered and construed together, and if from both the contract sufficiently appears, specific performance thereof will be decreed: Schneider v. Anderson, 75 Kan. 11, 121 Am. St. Rep. 356, and see the cases cited in the cross-reference note thereto.

A Writing Relied upon to Meet the Requirements of the Statute of Frauds, in case of a contract to convey land, must contain, as a rule, either on its face or by reference to other writing, a sufficiently clear and explicit description of the property to render it capable of being identified: Kopp v. Reiter, 146 Ill. 437, 37 Am. St. Rep. 156; Alabama Mineral Land Co. v. Jackson, 121 Ala. 172, 77 Am. St. Rep. 46; Bogard v. Barhan, 52 Or. 121, ante, p. 676. But the description need not be given with such particularity as to make a resort to extraneous evidence unnecessary: Bacon v. Leslie, 50 Kan. 494, 34 Am. St. Rep. 134; Kennedy v. Gramling, 33 S. C. 367, 26 Am. St. Rep. 676; Moayon v. Moayon, 114 Ky. 855, 102 Am. St. Rep. 303. A receipt for a part of the purchase money of a well-known city hotel property, which specifically designates the hotel by name, is a sufficient memorandum to satisfy the statute of frauds: Henry v. Black, 210 Pa. 245, 105 Am. St. Rep. 802.

PECKHAM, FOR AN OPINION.

[29 R. I. 250, 69 Atl. 1002.]

INSURANCE, LIFE—Persons Entitled on Death of Assured.—The terms of the life policy decide the question of title to the proceeds. (p. 814.)

INSURANCE, LIFE—Policy in Foreign State—Lex Loci.—Where a life insurance contract is made in a foreign state, to be performed there, it must be construed in accordance with the law of that state. (p. 815.)

INSURANCE, LIFE—Construction of Policy.—Where under a life insurance policy the amount assured is made payable to the named wife of the assured, and, in the event of her prior death to their children, their executors, administrators or assigns, and no children having been born to them, the wife dies before the assured, leaving a will giving her husband a life interest in her property, with remainder to her brother's children, and the husband marries again, has a child by the second marriage and dies, having left a will dividing his property equally between his widow and his child, the second wife and her child took no interest under the policy, the first wife having taken a vested interest in the policy when issued, subject to be defeated if she bore children, and not being defeated, such interest was subject to her testamentary directions in favor of her brother's children. (pp. 815, 816.)

Royal H. Gladding and Eugene A. Kingman, for the administrator and the legatees under the will of Celia S. Peckham.

Louis L. Angell and Charles E. Salisbury, for Charles H. Peckham, Jr., and for Abby M. Peckham, his next friend and guardian, and for Abby M. Peckham, executrix.

[250] DOUGLAS, C. J. The parties in interest have agreed in submitting to the court the question of title to a certain sum of money deposited by the Aetna Life Insurance Company in the Industrial Trust Company of Providence, as the amount of a paid-up policy of insurance issued on the life of Charles H. Peckham, deceased. So much of said policy as is material in this case is as follows:

"This policy of Insurance witnesseth, that the Aetna Life Insurance Company, in consideration of the [251] surrender of Policy No. 35784 and all claim thereto, Do hereby insure the life of Charles H. Peckham (hereinafter called the insured) of Providence, County of Providence, State of Rhode Island for the term of his natural life, in the sum of Five Thousand and Seven Dollars to be paid at the office of this Company, in Hartford, Connecticut, to his wife Celia S. Peckham, or in the event of her prior death to their children, their executors, administrators or assigns, within ninety days after due notice and proof of the death of the said insured during the continuance of this policy."

Policy No. 35784 was an endowment policy for ten thousand dollars, with a period of twenty-one years, issued May 18, 1867, on the life of said Charles H. Peckham, payable to him if he should survive the term of twenty-one years; and in case of his death, to Celia S. Peckham; or if she should die before her husband, then to their children.

Premiums on this policy were regularly paid until June 2, 1873, when it was surrendered and the paid-up policy aforesaid was issued in place thereof. Mrs. Peckham died September 27, 1893, never having had any child born alive. She left a will by which she gave her property to her husband for his life and after his death to the children living, at the time of her death, of her brother, William A. Spicer, June 8, 1897. Charles H. Peckham married Abby E. May, and October 14, 1898, a son, Charles H. Peckham, Jr., was born to them, and is now living, the only issue of the marriage. Charles H. Peckham died July 21, 1907, leaving a will by which he gave one-half of his property to his widow and one-half to his son. The widow, Abby M. Peckham, has been duly appointed executrix of the will and guardian of the son.

The fund in question is claimed by William A. Spicer, as administrator d. b. n., c. t. a., on the estate of Celia S. Peckham; by Charles H. Peckham, Jr., as beneficiary under the terms of the policy; and by Abby M. Peckham, as executrix of the will of Charles H. Peckham.

The terms of the paid-up policy must decide the question of title to the fund. The former policy was surrendered by the parties interested, and the latter, with their full consent, took [252] the place of it. The only change of the provisions of payment affected the husband and the wife; the provision for the children is the same in both policies.

The contract was made in Connecticut, to be performed there, and hence must be construed in accordance with the law of that state: Leonard v. State Mut. Life Ins. Co., 27 R. I. 121, 114 Am. St. Rep. 30, 61 Atl. 52.

The exact question before us arose in Phoenix Mut. Life Ins. Co. v. Dunham, 46 Conn. 79, 33 Am. Rep. 14. The policy under consideration there was upon the life of the husband, payable to his wife for her sole use, or, in case of her death before his, to their children. They had no children, and the wife died before the husband. The court decided that the wife took a vested interest in the policy when it was issued which was liable to be devested by the death of the wife leaving children, and that the policy was payable to her representatives; and the court say (page 87): "If the amount expressed in the policy had been made payable to her without condition, she would at once have become the owner of a valuable property, which she was permitted, both by the special law and the declaration of her husband, to hold independently of him; of an interest which she could sell or assign, either absolutely or by way of security; one which, upon her death, would pass to her legal representatives, as would any other sole and separate estate. It is true that the gift to Mrs. McCammon (the wife) was made subject to a condition subsequent; if issue had survived the amount would have been payable to such issue; but as no child was ever born to either of them, the condition became void, and may be laid out of consideration."

The decision is the more conclusive as it was made after a full review of the previous cases in Connecticut, where a contrary view was apparently taken.

In Connecticut Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305, 91 Am. Dec. 725, it was held that a policy payable to a wife, but if she did not survive her husband, to her children, was not assignable by her in her lifetime, and her interest in the policy is called "contingent." In Continental Life Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 530, the same expression is applied to the interest of a wife who [253] predeceased her husband, leaving children who were to take in

such case; but it is explained that the contingency related to the possession and enjoyment, not to the right, which, though conditional, was vested in the sense of being transmissible. In Connecticut Mut. Life Ins. Co. v. Baldwin, 15 R. I. 106, 23 Atl. 105, the case of Connecticut Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305, 91 Am. Dec. 725, is cited, and the interest of the wife is said to be "contingent"; but it may be supposed that the word is used as applicable to the enjoyment rather than to the right of property.

In referring to the previous cases, the Connecticut court in Phoenix Ins. Co. v. Dunham, 46 Conn. 79, 33 Am. Rep. 14, says (page 89): "The policy in each of these cases contained the proviso in behalf of children, and in each case children survived. The respective wives had received conditional gifts. At no moment was either of them in a position to deal with her policy as its absolute owner. In each case an event occurred which put an end to any interest in her or in her estate in the fund. In each case the duty of the court was to enforce the proviso in favor of children, and whatever is said in either of them as to the nature or extent of the interest of the wife in her policy is to be understood as said of it in instances where there are children, and not as determining, where a policy is made payable without condition to the sole and separate use of the wife, in instances where there are no children, that she takes no interest unless she survives her husband."

Our conclusion, therefore, is that Celia S. Peckham took a vested interest in the policy subject to the condition subsequent of her death before her husband, leaving issue. As the contingency never happened, her interest was transmitted to her executor at her death, and the fund is now payable to her administrator, William A. Spicer, for distribution according to the terms of her will.

The Effect of the Death of a Beneficiary Before the Insured is discussed in the note to Hooker v. Sugg, 11 Am. St. Rep. 721; Estate of Dobbel, 104 Cal. 432, 43 Am. St. Rep. 123; Bell v. Kinneer, 101 Ky. 271, 72 Am. St. Rep. 410. In Perry v. Tweedy, 128 Ga. 402, 119 Am. St. Rep. 393, it is decided that where a husband designates his wife as beneficiary in his life insurance policy, and she dies before he does, her vested interest in the policy is a part of her estate, and those entitled to share in her personal property at the time of her death under the law of succession will be entitled to share in the proceeds of the policy on his death. But according to Roquemore v. Dent, 135 Ala. 292, 93 Am. St. Rep. 33, if a husband takes out a policy of insurance on his life in favor of his wife and children, "their executors, administrators, and assigns," the death of the wife before that of her husband terminates her interest in the policy.

And in Smith v. Metropolitan Life Ins. Co., 222 Pa. 226, 128 Am. St. Rep. 799, it is decided that ordinarily, where the insured survives those specified to take at his death, the insurance money, where no other disposition is made of it, becomes at his death a part of his estate, to be administered as his will, or in the absence of a will, as the law directs.

A Policy of Life Insurance, by Its Terms to be Performed in Another State, is governed by the statutes of that state: Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73. For other authorities on the law governing insurance policies in case of a conflict of laws, see Blackwell v. Mutual Reserve etc. Assn., 141 N. C. 117, 115 Am. St. Rep. 677; Leonard v. State Mutual Life Assur. Co., 27 R. I. 121, 114 Am. St. Rep. 30; Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919; note to Grevenig v. Washington Life Ins. Co., 104 Am. St. Rep. 483.

STATE v. EASTERN COAL COMPANY.

[29 R. I. 254, 70 Atl. 1.]

CRIMINAL CONSPIRACY—Definition.—Criminal conspiracy is a confederation to do something unlawful either as a means or an end. (p. 820.)

CRIMINAL CONSPIRACY—Combination to Fix Price.—If it is unlawful for one person to fix the price at which a commodity shall be sold within the limits of a city, then it is a criminal offense for several persons to combine for that purpose. (p. 821.)

CRIMINAL COMBINATION—What Constitutes.—Whenever the Act to be Done by a combination of persons necessarily tends to prejudice the public or to oppress individuals, the combination has always been held criminal. (pp. 821, 822.)

CRIMINAL CONSPIRACY—Monopoly.—No person can control, regulate, or fix the price at which an article shall be sold without having complete dominion and control of the article itself. To enable him to fix and control the price he must be free from competition; in other words, he must have obtained a monopoly of the article. (p. 823.)

MONOPOLY DEFINED.—It is said to be a monopoly when one person alone buys up the whole of one kind of commodity, fixing a price at his own pleasure. A monopoly embraces any combination, the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public. (pp. 824, 825.)

CRIMINAL CONSPIRACY—Common-law Offense—Dardanarii—Engrossing.—Under the Roman law monopolists of grain and other earth products were called dardanarii, and were variously punished, and under the common law it was also a crime to obtain similar monopolies. Under modern English law the statutes against engrossing apply chiefly to monopolies of provisions. Coal, being an article of prime necessity in Rhode Island, is legally capable of being engrossed, which is doubtless an offense at common law in that state. (pp. 824, 825.)

CRIMINAL CONSPIRACY—Common-law Offense.—Although the list of common-law offenses in Rhode Island may be said to include

that of engrossing, there do not appear any prosecutions made under it; it may be considered dormant but ready when the occasion demands. The danger to be apprehended from engrossing is monopoly. (p. 825.)

CRIMINAL CONSPIRACY—Monopolies—Reasons for Abolition.—It is not safe to allow monopolies of prime necessities of life to exist for any purpose; they are "contrary to the genius of a free government." (p. 826.)

CRIMINAL CONSPIRACY—Universality of Monopoly—Unnecessary.—In order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition. (p. 827.)

CRIMINAL CONSPIRACY—Foundation of Offense.—A charge of conspiracy that the defendants combined to exercise a certain power must proceed upon the assumption that they have or will have the power to be exercised; and the gravamen of the offense consists in combining to acquire the power. (p. 827.)

INDICTMENT—Pleading—Criminal Conspiracy.—An indictment for criminal conspiracy which charges the defendants with combining to do something that can only be done through a monopoly is ill-pleading to charge by implication, intendment and inference that the defendants conspired to create a monopoly in a certain commodity in a city. Criminal pleading must be clear and definite, and if the facts warrant, the defendants should have been charged with conspiring to create a monopoly in order to regulate and fix the price of the commodity; that they were dealers therein or had power to regulate, etc., the supply; the means whereby that end was to be attained, and precisely what the agreement or combination was. (p. 828.)

INDICTMENT—Pleading—Criminal Conspiracy.—It is not necessary to set out in an indictment for criminal conspiracy in fixing the price of a commodity that the defendants conspired to raise the price of it or to fix a price that was unlawful, exorbitant, unwarranted or oppressive; and if the offense is set out in proper particularity in other respects, the indictment need not aver that the illegal agreement was for any fixed time, or that it was a binding agreement on its parties, as the duration of the contract is not of the essence of the crime. (p. 828.)

CORPORATIONS—Capacity to Commit Crime.—Actions can be maintained against corporations for malicious prosecution, libel, assault and battery, criminal conspiracy and other torts, and the malice and wicked intent needful to sustain such actions may be imputed to corporations. (pp. 830, 831.)

William B. Greenough, attorney general, and James C. Collins, Jr., special counsel, for the state.

Dexter B. Potter, for Curran & Burton, Inc., and for Smith P. Burton.

Henry W. Hayes, for John R. White & Son, Inc., and for James A. Kinghorn and Merwin White.

Frank L. Hinckley, for Eastern Coal Company and George E. Warren.

Arthur M. Allen, for Doe & Little Co. and Harry C. Clark.

[255] DUBOIS, J. These are indictments charging the defendants with conspiracy. The cases were heard together, and came to this court upon certifications from the superior court for the counties of Providence and Bristol, under C. P. A., section 478.

The material portions of the four counts in each of the indictments set out that the defendants "unlawfully and fraudulently did combine, confederate and conspire together by divers unlawful and fraudulent devices, contrivances and acts, unlawfully to regulate and fix the price at which coal should be sold in the said city of Providence, to the prejudice of the public and of the consumers of said coal, which said coal was then and there an article of prime necessity to the public and the consumers thereof"; and that the defendants "willfully devising and intending to regulate and fix the price of a prime necessity of life in said city of Providence, did unlawfully and maliciously conspire, combine, confederate and agree together to do an illegal act injurious to the public trade in reference to a prime necessity of life, to wit, to then and there, in restraint of trade and to the injury of the public trade, unlawfully create, enter into and become members of and parties to a trust, agreement, combination, confederation and understanding, with each other wrongfully and unlawfully to regulate and fix the price at which coal should be sold in the city of Providence, which said coal was then and there an article of prime necessity to the public and consumers thereof"; and also that the defendants "unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree together to do an illegal act injurious to the public trade, to wit, to then and there unlawfully regulate [256] and fix the price at which anthracite coal should be sold in the city of Providence, which said anthracite coal was then and there an article of prime necessity to the public and the consumers thereof, and that the defendants did unlawfully and fraudulently fix and regulate the price of anthracite coal in said city of Providence"; and finally, that the defendants "unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree together to do an illegal act injurious to the public trade, to wit, to then and there unlawfully regulate and fix the price at which coal should be sold in said city of Providence, which said coal was then and there an article of prime necessity to the said public and consumers thereof."

The following are the questions certified for our determination:

"1. Is said indictment insufficient in law in that it does not show that said defendants were dealers in coal or in anthracite coal, or otherwise had any power to regulate and fix the price thereof or to restrain trade therein?

"2. Is said indictment insufficient in law in that it does not show that said defendants conspired to create a monopoly in coal or anthracite coal?

"3. Is said indictment insufficient in law in that it does not appear in and by the same that said defendants conspired to raise the price of coal or to fix a price that was unlawful, exorbitant, unwarranted or oppressive?

"4. Is said indictment insufficient in law in that it does not appear in and by the same that said alleged agreement to fix and regulate the price of coal was for any appreciable point of time or was an agreement binding on any of the parties thereto?

"5. Does an agreement or combination to fix and regulate the price of coal as the same is set forth in the indictment constitute a criminal offense?

"6. Is said indictment insufficient in law in that it does not properly or sufficiently set forth either the means or the purpose of the alleged combination or agreement?

"7. Is said indictment insufficient in law in that it does not set forth the alleged agreement or combination with sufficient precision?

257 "8. Can a corporation be guilty of the crime of conspiracy?"

To answer the questions it is necessary to consider whether the crime of conspiracy is properly charged in the indictment. We have already defined criminal conspiracy to be a "confederation to do something unlawful either as a means or an end": State v. Bacon, 27 R. I. 252, 61 Atl. 653. Is anything unlawful charged, either as a means or an end? No unlawful means are alleged in any of the counts. Therefore it must appear that something unlawful is charged against the defendants as an end. The object to be effected, as hereinbefore stated, according to the first count, is, "unlawfully to regulate and fix the price at which coal should be sold in the city of Providence, to the prejudice of the public." Under the second count it is, "to then and there, in restraint of trade and to the injury of the public trade, unlawfully create, enter into, and become members of and parties to a

trust, agreement, combination, confederation and understanding with each other wrongfully and unlawfully to regulate and fix the price at which coal should be sold in the city of Providence, which coal was then and there an article of prime necessity to the public and consumers thereof."

By the third count it is "to do an illegal act injurious to the public trade, to wit, to then and there unlawfully regulate and fix the price at which anthracite coal should be sold in the city of Providence, and that they did fix and regulate the price of anthracite coal in the city of Providence." The object to be effected according to the fourth count is "to do an illegal act injurious to the public trade, to wit, to then and there unlawfully fix the price at which coal should be sold in the city of Providence." The question may therefore be narrowed down to this: Is it unlawful for one person to fix the price at which coal shall be sold within the limits of a city? If it is, then it is necessarily a criminal offense for several persons to combine for that purpose. But if it is lawful for one, then it does not become unlawful merely because a number are engaged with him in doing it. This doctrine is announced in Macauley Bros. v. Tierney (1895), 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1, 37 L. R. A. 455, wherein Matteson, C. J., speaking for the court, says (page 264): "What a person may lawfully do a number of persons may unite with him in doing [258] without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful."

Portions of the opinion of Ball, J., in Chicago etc. Coal Co. v. People (1904), 114 Ill. App. 75, may seem to be in conflict with this doctrine, for on page 111 he reasons: "Counsel for defendants say that anyone may lawfully fix the price at which he will sell his product, or he may lawfully refuse to sell it at any price. This is true. The injury to the public, if any, from the acts of an individual are infinitesimal; and in the long run they correct themselves. Hence the law places few restrictions upon a man in the management of his own affairs. But 'men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent': Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159. Whenever the act to be done by such a combination necessarily tends to prejudice the public or to oppress individuals, the combination has always been held to be criminal. 'There is potency in numbers when combined, which the law cannot overlook

where injury is the consequence' ": Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159.

It is worthy of note that the case then being considered was tried upon an agreed statement of facts and law from which the judge was able to ascertain the consequences that naturally would flow from the agreement, and that the case of Morris Run Coal Co. v. Barclay was heard upon the report of a referee, who found that the contract was void by statute and at common law, as against public policy, and that the contracting corporations represented almost the entire body of bituminous coal in the northern part of the state; that by combination between themselves they had the power to control the whole market in the district; and that they did control it by a contract not to ship and sell coal otherwise than as therein provided; and that in order to destroy competition they provided for an arrangement with dealers and shippers of anthracite coal. All this information was not gained from an inspection of the pleadings. As was well said by Agnew, J., in Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159: "If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to [259] others injurious, their confederation will become a conspiracy. Instances are given in Commonwealth v. Carlisle, Bright. N. P. 36. Among those mentioned as criminal is a combination of employers to depress the wages of journeymen below what they would be if there were no resort to artificial means; and a combination of the bakers of a town to hold up the article of bread, and by means of the scarcity thus produced to extort an exorbitant price for it. The latter instance is precisely parallel with the present case. It is the effect of the act upon the public which gives that case and this its evil aspect as the result of confederation; for any baker might choose to hold up his own bread, or coal operator his coal, rather than to sell at ruling prices; but when he destroys competition by a combination with others, the public can buy of no one."

In People v. Sheldon (1893), 139 N. Y. 251, 36 Am. St. Rep. 690, 34 N. E. 785, 23 L. R. A. 221, the court found (page 262): "A combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it

against ruinous rivalry, and no attempt is made to charge undue or excessive prices." The court added (page 263): "The question is, Was the agreement, in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid."

Though the language of these opinions does not lay stress upon this fact, it appears that the objects of the combinations criticised, if they could have been attained by individuals, would have been unlawful; hence, the combination to secure these objects was criminal.

In the cases at bar our knowledge of the facts is derived 260 from the allegations in the several counts in the indictments. Is it an inevitable consequence of the conduct charged against the defendants that public trade will be restrained or injured or that the public will be injuriously affected thereby?

To return to the question, Can a person, natural or artificial, lawfully control and fix the price at which coal shall be sold within the limits of the city of Providence? If so, then a number of persons can lawfully combine for that purpose. But if not, then it becomes a crime to confederate for the purpose of accomplishing such unlawful act. No person can control, regulate, or fix the price at which an article shall be sold without having complete dominion and control of the article itself. To enable a person to fix and control the price he must be free from competition. In other words, he must have obtained a monopoly of the article.

"It is said to be a monopoly when one person alone buys up the whole of one kind of commodity, fixing a price at his own pleasure": Black's Law Dictionary.

The constitutions of Maryland, North Carolina, and Tennessee declare that: "Monopolies are contrary to the genius of a free government, and ought not to be allowed." In the Roman law persons who monopolized grain and other produce of the earth were called dardanarii, and were variously punished: Dig. 47, 11, 6. It was a crime at common law to buy up such large quantities of an article as to obtain a monopoly

of it for the purpose of selling at an unreasonable price. The tendency of modern English law is very decidedly to restrict the application of the law against engrossing, and it is very doubtful if it applies at all except to obtaining a monopoly of provisions: Bouvier's Law Dictionary. There can be no doubt but that coal is an article of prime necessity in this part of the country, and therefore legally capable of being engrossed. Doubtless engrossing is an offense at common law in this state.

It is provided in General Laws, caption 284, section 1: "Every act and omission which is an offense at common law, and for which no punishment is prescribed by this title, may be prosecuted and punished as an offense at common law." The same provision [261] is contained in Public Statutes, caption 247, section 1, General Statutes, caption 235, section 1, and Revised Statutes, caption 219, section 1.

In Public Statutes of 1844, by section 6 of the act establishing the Digest, it was provided: "When no provision is made either at common law or by the Revised Statutes, such statutes as were introduced before the Declaration of Independence and as have been continued in force shall be considered as part of the common law, and remain in force until the General Assembly provide therefor."

The provisions of section 59 of "An act to reform the penal laws," contained in the Digest of 1822, are identical with those in the Digest of 1798, section 55 of "An act to reform the penal laws," which reads as follows: "And be it further enacted, That any crime or offense, being such at the common law, and for which no punishment is prescribed by this act, shall and may be prosecuted and tried, adjudged and punished, by fine or imprisonment, or both, as an offense at the common law, anything in this act to the contrary notwithstanding."

The Digest of 1767 (pages 55 and 56) contains the following "Act, regulating sundry Proceedings in the several Courts in this Colony."

"Be it Enacted by the General Assembly, and by the Authority thereof it is Enacted That all the Courts in this Colony shall be held to, and governed by, the Statutes, Laws, and Ordinances of this Colony, and such Statutes of Parliament as are hereinafter mentioned, that is to say:

"All Statutes, that are against criminal offenders, so far as they are descriptive of the Crime, and where the Law of this Colony hath not described and enjoined the Punishment, then

that Part of the Statute that relates to the Punishment also; always saving and excepting such statutes as, from the Nature of the Offenses mentioned in them, are confined to Great Britain only.

"And be it further Enacted by the Authority aforesaid, That in all Actions, Causes, Matters and Things, whatsoever, where there is no particular Law of this Colony, or Act of Parliament introduced, for the Decision and Determination of [262] the same, then and in such Cases, the Laws of England shall be in force for the Decision and Determination of the same."

As was said by Brayton, J., in Martin v. Clarke (1866), 8 R. I. 389, 5 Am. Rep. 586, at page 403, referring to another offense: "Suppose, however, that champerty were not an offense at the common law, and were first made illegal by the statute of Westminster I, the answer to the question, if it be now an offense here, must still be the same. If there had been no legislation here upon the subject, the colonists here, upon their emigration, brought with them, to this country, the law of England as it then existed, as modified by statutes, so far as it was applicable to their condition and circumstances here, and this statute, as part of that law, became a part of the common law of this country."

Although the list of common-law offenses in this state may be said to include that of engrossing, our history does not disclose any prosecutions made thereunder; it may therefore be considered as dormant, but ready to be called into activity whenever the occasion may require. When it becomes necessary the law relative to engrossing in this state will be applied with due regard to the circumstances and conditions existing at the time of its enforcement. The danger to be apprehended from engrossing is monopoly.

A monopoly, as now understood, "embraces any combination the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public": 20 Ency. of Law, 846.

This subject was considered by the court in Oakdale Mfg. Co. v. Garst (1894), 18 R. I. 484, 49 Am. St. Rep. 784, 28 Atl. 973, 23 L. R. A. 639, wherein Stiness, J., speaking for the court, said, at page 487: "Undoubtedly there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consid-

eration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce [263] greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule."

It is a criminal offense for a person to obtain a monopoly of a prime necessity of life. It is no answer to say that the article may have been monopolized for a benevolent purpose. It is the stock excuse of monopolists that their work is beneficent and charitable. It is not safe to allow monopolies of prime necessities of life to exist for any purpose. They are "contrary to the genius of a free government."

In order to regulate and fix the price of an article it is absolutely necessary to have or to acquire the power so to do.

In the case of Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44 L. ed. 136, Mr. Justice Peckham makes use of the following expressions: "Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true, but within that limit they could fix prices as they chose. The most cogent evidence that they had this power is the fact everywhere apparent in the record that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact.

[264] "The defendants were by their combination, therefore, able to deprive the public in a large territory of the advan-

tages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee and by allowing the highest bidder at the secret 'auction pool' to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39 L. ed. 325, Chief Justice Fuller, in speaking for the court, said: 'Again, all the authorities agree that in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.' "

A charge of conspiracy that the defendants combined to exercise a certain power must proceed upon the assumption that they have or will have the power to be exercised. Therefore, a charge of conspiracy to exercise a certain power presupposes the acquisition of the power. The gravamen of the offense, however, consists in combining to acquire the power; whether it shall be exercised or not depends entirely upon the will of those who control it. The danger to be guarded against is possession of the power, and efforts to obtain it should be prevented. "Prosecutions for conspiracy are preventive rather than curative": State v. Bacon, 27 R. I. 252, 61 Atl. 653. Conspiracies to exercise power without possessing it must be futile, as if the courtiers of King Canute had conspired to regulate the ocean tide.

265 The charge in each indictment is not that the defendants conspired to create a monopoly in order to regulate and fix the price of coal. The charge is that the defendants combined to do something that can only be done through a monopoly. The act of fixing the price is only an attribute of a monopoly, an indicium by which it may be classified. It is a symptom, but it is not the disease itself. It may be argued

that because the defendants are charged with conspiring to do that which only monopolists can do, that therefore they are charged with conspiracy to create a monopoly itself. The very fact that it requires argument to complete the pleading shows wherein it is defective. Criminal pleading must be clear and definite.

"In indictments and informations every fact necessary to constitute the crime charged must be directly and positively alleged. Nothing can be charged by implication or intendment, nor is it sufficient to charge any material matter by way of argument": 22 Cyc. 293, C.

We are of the opinion that each count in both indictments is defective in this: it charges, by implication, intendment and inference, that the defendants conspired to create a monopoly in coal in the city of Providence. Having arrived at this conclusion, we answer the questions propounded to us, as follows:

The first, second, sixth, and seventh questions we answer in the affirmative. The third and fifth questions we answer in the negative. To the fourth question we answer: If the offense was set out with proper particularity in other respects, we should regard this objection as unimportant, as the duration of the illegal contract is not of the essence of the crime.

The eighth question raises the inquiry: Has a corporation the ability to commit this kind of crime?

The defendants, in support of their contention that it has not, argue as follows: "We submit that, on principle and authority, a corporation has not, from its very nature, the capacity to commit this offense. It is too plain to require argument that this intangible entity cannot actually do any act requiring any mental, moral or spiritual process, or any act, as it is more frequently put, requiring intent. In civil [260] cases the intent of the officer or agent is sometimes imputed to the corporation, it is true, but this doctrine is admittedly a pure legal fiction, based on grounds of public policy.

"In civil cases a party has been injured and is seeking compensation. Balancing the equities of the plaintiff and the stockholders of the defendant corporation, it has seemed more just that the person injured should be reimbursed than that an individual stockholder should be absolved from liability forced upon him by an officer of the corporation. But in criminal cases the theory is adequate punishment for an offense against the state. The punishment may be out of all proportion to the benefit gained by the commission of the crime, and never

has any logical relation to it. Oftentimes no advantage is gained by the corporation, so that to punish an innocent stockholder for an offense really committed by an officer of the corporation can have no basis in justice. Furthermore, all the benefit of the preventive objects of the punishment can be accomplished by punishing those who are in fact the wrongdoers."

The following argument in behalf of the affirmative of the question is presented by the attorney general:

"Conspiracy is a misdemeanor at common law, and not a felony. There is nothing peculiar connected with the element of intent involved in the crime of conspiracy which differs from the element of intent in other ordinary misdemeanors. If the contention of the defendants is held to be good, it would seem to necessarily follow that a corporation could not be held guilty of any of the ordinary crimes where the question of intent was involved. In the early history of corporations they were held to be without power of action except through their agents, and therefore they would not be guilty of a crime requiring a criminal intent. It is believed that this theory has long since been exploded both in England and America. At the present time there seems to be very little doubt that corporations may be guilty of most of the common crimes, and that criminal intent will be imputed to the corporation from acts done by its agents. It is still held in some jurisdictions that corporations cannot be guilty of a felony, or crimes where [267] personal violence is involved, but that is as far as any courts, it is believed, will now go in holding that they cannot be guilty of crime. The tendency of the present time is to hold corporations responsible, criminally as well as civilly, for all acts committed by their agents, having any relation to the business of the corporation.

"It has been repeatedly held that a corporation may be guilty of criminal libel, of maintaining the various kinds of nuisances, and of violations of the various obligations which it owes to the public. Some states even hold them capable of committing the crime of assault and battery and other similar crimes.

"It is now universally held that corporations may be liable for all kinds of torts, including conspiracy. It is further generally held that a corporation is liable in exemplary or punitive damages—damages which from their very nature are only allowed as punishment for an actual wrong committed, which the law presupposes that the defendant had the volition or

initiatory power to commit or not to commit. The intention of the officers and agents of the corporation is imputed to the corporation in these civil cases, but that is what is done in all other cases where a corporation is held criminally liable. Corporations are held amenable for acts of conspiracy in the enforcement of contracts in civil law. Why should there be a distinction in the law with regard to conspiracy between that which is criminal and that which is civil?"

In support of their argument, the defendants also quote 2 Morawetz on Corporations, second edition, section 732: "It is sometimes said that the act of an agent is, in law, the act of his principal; but it is well to bear in mind that this is a mere fiction. A principal is frequently liable for the acts of his agents, as if he had done the acts himself; the reason of the liability, however, is not always the same. Sometimes the principal is chargeable by reason of his previous consent, sometimes by reason of his subsequent adoption of the act of the agent, and sometimes by reason of a rule of positive law established upon the grounds of public policy, which is the ultimate source of all law. It is for the latter reason that a principal may often be [268] held civilly responsible for the torts of his agents, though in no manner at fault himself; and this is true even where the tort involves a malicious intention on the part of the wrongdoer.

"But public policy certainly does not demand that a person or association should be punished by the state, through criminal proceedings, on account of a wrong committed by another. This would be contrary to the natural sense of justice. Hence it is held that where the comission of a crime involves the intention of the offender, this intention cannot be imputed by means of a fiction; actual intention is required.

"It follows, therefore, that a corporation cannot be charged criminally with a crime involving malice, or the intention of the offender. Even though the corporators themselves should unanimously join, with malice aforethought, in committing a crime as a corporate act, yet the malice would be that of the several members of the company, and not actually one malicious intention of the whole company."

This doctrine, however, is contrary to that held in Buffalo Lubricating Oil Co. v. Standard Oil Co. of New York (1887), 106 N. Y. 669, 13 N. E. 936: "We entertain no doubt that an action against a corporation may be maintained to recover damages caused by conspiracy: Morton v. Metropolitan Life Ins. Co., 34 Hun, 366; affirmed, 103 N. Y. 645; Reed v. Home

Savings Bank, 130 Mass. 443; Krulevitz v. Eastern R. R. Co., 140 Mass. 573, 5 N. E. 500; Western News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786. If actions can be maintained against corporations for malicious prosecution, libel, assault and battery and other torts, we can perceive no reason for holding that actions may not be maintained against them for conspiracy. It is well settled by the authorities cited that the malice and wicked intent needful to sustain such actions may be imputed to corporations."

If corporations have the capacity to engage in actionable conspiracy they have the power to criminally conspire. We are of the opinion that the better reasoning supports the contention that corporations can conspire, and therefore answer the eighth question in the affirmative.

Having thus fully decided the questions certified to us in 269 the cases at bar, we send back the papers in each cause, with our decision certified thereon, to the superior court for the counties of Providence and Bristol, for further proceedings.

Unlawful Trusts and Monopolies are discussed in the note to Harding v. American Glucose Co., 74 Am. St. Rep. 235. Monopolies embrace any combination the tendency of which is to prevent competition in trade in its broad and general sense, and to control prices to the detriment of the public: Pocahontas C. Co. v. Powhatan etc. Co., 60 W. Va. 508, 116 Am. St. Rep. 901. Any combination of competing corporations, the necessary consequence of which is the controlling of prices or limiting production or suppressing competition in such a way as to create a monopoly, is contrary to public policy and void: Charleston Gas Co. v. Kanawha Gas Co., 58 W. Va. 22, 112 Am. St. Rep. 936. The true test of the validity of a contract or combination between corporations or other persons to fix the price and control the supply of a commodity is whether it affords only a fair and just protection to the parties, or whether it is so broad as to interfere with the interests of the public. If the former, it is valid; if the latter, it is void: Finck v. Schneider Granite Co., 187 Md. 244, 106 Am. St. Rep. 452. A combination in restraint of trade is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief: Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 118 Am. St. Rep. 399.

A Contract by Which the Owner of Coal Lands, coal mines and coal boats sells them and agrees not to engage "in the business of mining, marketing, or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers and their tributaries for the period of ten years," is not in violation of the public policy of Pennsylvania, notwithstanding the purchaser has similar contracts with a large number, but not all, of the coal operators and shippers in the Monongahela valley in Pennsylvania: Monongahela River etc. Co. v. Jutte, 210 Pa. 288, 105 Am. St. Rep. 812.

HICKEY v. BOOTH.

[29 R. I. 466, 70 Atl. 529.]

APPEAL AND ERROR—Excessive Damages—New Trial.—The court will not disturb the finding of the jury as to damages for an assault except they are so grossly excessive as to "shock the conscience of the court" or have been awarded emotionally from passion or prejudice aroused by the justice's charge to them. (p. 834.)

APPEAL AND ERROR—Punitive Damages for Perjury.—In an action for damages for an assault, where there was a direct conflict of evidence, it was error to lead the jury to believe that the manifest perjury committed by one of the parties to the action could be punished by them in their verdict; and while punitive damages might be awarded, the jury should have been instructed they should be for the assault and not for the perjury. (p. 834.)

APPEAL AND ERROR—New Trial—Statements of Presiding Justice.—In an action for damages for assault it was error for the presiding justice to charge the jury that they had not only the duty to decide between the parties to the action, but the extraordinary duty to see to it that no liars or perjurers prevail, and that they must not shirk that important duty, and further, that as perjury had been undoubtedly committed, some one must be punished for it. (p. 835.)

William R. Champlin, for the plaintiff.

Edward M. Sullivan, for the defendant.

[467] SWEETLAND, J. This is an action of trespass, for assault and battery.

At the trial before the superior court, and a jury, the plaintiff testified that in the summer of 1905, he was employed by the defendant as manager of a restaurant, conducted by the defendant, in the town of New Shoreham; that upon a certain day in August, 1905, in said restaurant, the defendant, intentionally, threw a large water-bottle at the plaintiff; that this water-bottle struck the plaintiff upon his back, over the kidneys, causing the plaintiff to fall down, and injuring him severely. In essential particulars the plaintiff was supported in his testimony as to the assault by the testimony of his brother and one other witness. In her testimony the defendant admitted that she was present at the place and time stated by the plaintiff and his witnesses, but denied in a most positive manner that she had assaulted or struck the plaintiff in any way. The testimony of the defendant was corroborated by that of her daughter.

The jury rendered a verdict for the plaintiff for one thousand dollars, the full sum of the ad damnum.

The defendant filed her motion for a new trial in the superior court on the grounds that the verdict was against the

law, and the evidence and the weight thereof, and was against the law, and that the damages awarded by the verdict were excessive.

Upon this motion the justice presiding in the superior court, on August 22, 1908, decided that "the amount of damages awarded is grossly excessive. The actual damage, if any, suffered by the plaintiff at the hands of the defendant, was slight, and taking a view of the testimony most favorable to the plaintiff, the court is of the opinion that three hundred and fifty dollars would be a liberal allowance to the plaintiff; accordingly, the petition of the defendant for a new trial will be granted unless the plaintiff, on or before September 1st next, in writing shall remit all of said verdict in excess of said sum of three hundred and fifty dollars."

To this decision of the superior court the defendant did not except.

[468] The plaintiff did not file his remittitur on or before September 1, 1908, in accordance with the decision of the superior court, but excepted to said decision and duly filed his bill of exceptions, which is now before this court.

In this court the plaintiff urges that said decision of the superior court granting a new trial should be set aside, that the verdict of the jury was not excessive.

Upon consideration of the testimony relating to the injury which the plaintiff claims that he suffered as a result of the alleged assault, the court is of the opinion that the damages awarded by the jury are larger than this court would assess if it was called upon to fix compensation for these injuries. Also, the justice who presided in the superior court, who saw the witnesses and had the benefit of that observation in forming his judgment, has declared that the amount of damages awarded is grossly excessive. In considering the amount of damages it should not be overlooked, however, that the testimony of the plaintiff and his witnesses, which the jury undoubtedly accepted as true, shows a considerable amount of personal injury, of loss of wages, of expenses for medical attendance, and of pain suffered by the plaintiff. Also, the jury, in the circumstances of this case, in addition to compensatory damages, were justified in awarding punitive or exemplary damages against the defendant. Furthermore, the question of the amount of damages was one within the province of the jury to determine, and the court will not disturb their finding in that regard unless the amount awarded is so large as to

"shock the conscience of the court," or unless the court is satisfied that the jury have been improperly influenced or have acted from passion, prejudice or partiality.

While the damages awarded appear to be somewhat large, the court cannot say, from an examination of the testimony alone, that they are so large as to shock the conscience of the court. From a consideration of the whole record, however, we are forced to the conclusion that the verdict of the jury in the matter of damages was not based upon a fair consideration of the testimony, but was the result of passion [460] and prejudice produced in the minds of the jury by the charge of the justice presiding at the trial.

The conflict between the testimony of the witnesses for the plaintiff and that of the witnesses for the defense, as to the alleged assault, warranted the conclusion that one set of witnesses or the other was willfully trying to deceive the court and jury. This might well excite the indignation of the court. It would be the duty of the justice presiding, if he believed that perjury had been committed before him, to set in motion criminal proceedings, that the guilty persons might be punished in a proper tribunal. But it would be error to lead the jury to believe that the perjury could be punished by them in the case then on trial.

The issue in the case was a simple one. If the jury found the defendant not guilty of the assault alleged, the verdict would be the same whether the jury believed that the plaintiff had committed perjury or was honestly mistaken. If the jury found the defendant guilty, their opinion as to the honesty of the defendant's testimony should have no effect upon the amount of the damages awarded. Punitive damages might properly be given in this case, but they would be awarded as punishment for the assault, not as punishment for perjury committed at the trial.

The justice presiding at the trial, after commenting at length upon what he terms "most bare-faced perjury going on in this courtroom," instructed the jury: "You have the duty of deciding between the parties litigant in this court. You have that duty, which you have in every case, and in addition to that in this case you have the extraordinary duty, which you owe to the state, to see to it that no liars, no perjurers, prevail in this court. That is an important duty which you owe; and you have no right to shirk it." From this instruction the jury must have believed it their duty to do more than decide the issues in the case.

Again, the justice presiding instructed the jury: "Some one has committed perjury; some one must be punished for it." The effect of this instruction must have been to inflame [470] the minds of the jury against the party whose testimony they did not believe. This instruction would be particularly vicious if the party whom the jury disbelieved chanced to be the defendant; for as to the plaintiff, the jury could not assess damages against him, even if they believed him guilty of perjury; but as to the defendant, the only manner in which the jury could punish her for false swearing would be by assessing damages against her in excess of proper damages for the wrong alleged in the declaration.

The justice presiding further instructed the jury: "You are to take the case absolutely free from any prejudice except such prejudice as you naturally would feel against anyone whom you believed to be a falsifier. That is a legitimate prejudice—but I mean no prejudice against the parties as such." The justice might properly have cautioned the jury that, if they found the defendant untruthful in her testimony regarding the assault, that should not be permitted to affect the assessment of damages; but it was error to lead the jury to believe that, if they found the defendant's testimony false, they might legitimately be influenced by a prejudice against her in the further consideration of the case.

The charge of the justice would naturally lead the jury to base their computation of damages upon passion and prejudice rather than upon an unbiased consideration of the elements which constitute the true measure of damages in the case. We are of the opinion that the effect of these erroneous instructions appears in the verdict which the justice himself has denominated as grossly excessive in amount.

Plaintiff's exceptions overruled. Case remitted to superior court for a new trial.

It is Only When a Verdict is so Excessively Large and out of line with reason and justice as to shock the conscience and satisfy an unbiased mind that it is not the result of fair and unprejudiced deliberation that it will be set aside as excessive and the result of prejudice, passion or bias: Longan v. Weltmer, 180 Mo. 322, 103 Am. St. Rep. 573; Mehr v. Williams, 95 Minn. 261, 111 Am. St. Rep. 462; Frankfort v. Coleman, 19 Ind. App. 368, 65 Am. St. Rep. 412.

The Doctrine of Exemplary Damages is the subject of a note to Spellman v. Richmond etc. R. R. Co., 28 Am. St. Rep. 870.

CLAVIN v. WILLIAM TINKHAM COMPANY.

[29 R. I. 599, 73 Atl. 392.]

MASTER AND SERVANT—Fellow-servant.—A loom fixer, while repairing a loom, utilizing the services of a weaver present and accidently setting the loom in motion, whereby the weaver is injured, is not a fellow-servant of the weaver, but the representative of the employer, and an instruction to the jury to that effect is correct. (p. 837.)

MASTER AND SERVANT—Fellow-servant.—It is the Duty of a Master who furnishes machinery for his servants to operate or work about to see to it that it is reasonably safe. He cannot devest himself of this duty by devolving it on others, and if he does, they will simply occupy his place, and he will remain as responsible for their negligence as if he were personally guilty of it himself. In cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure thereof he is accountable. (pp. 838, 840.)

APPEAL AND ERROR—Instruction to Jury—Contributory Negligence.—Where the judge instructs the jury that it is a question of fact for them whether under certain circumstances the plaintiff assumed a risk she should not have assumed, whether she put herself in a place of danger, and that if she did so without any excuse, she has to take the loss that falls on her, such instruction on the point of contributory negligence is proper, and the trial court properly refused an instruction that the plaintiff, having been guilty of contributory negligence, could not recover. (p. 841.)

John W. Hogan, for the plaintiff.

Tillinghast & Murdock, for the defendant.

600 BLODGETT, J. The case at bar is thus stated on the defendant's brief:

"This is an action of trespass on the case for negligence brought by Catherine Clavin against the William Tinkham Company, a corporation. The William Tinkham Company is engaged in the manufacture of worsted and woolen goods, having a mill at Harrisville. The plaintiff, a weaver, was on the nineteenth day of June, 1906, operating a loom in the defendant's mill. On that day certain minor repairs were being made by a loom fixer upon a loom in the weaving-room, where the plaintiff was working. The loom which was being repaired was the one adjacent to the plaintiff's loom, and was operated by one San Souci. While the work of repairing was in progress she took the seat at San Souci's loom, and while in this position was injured by a shuttle which flew out of San Souci's loom.

"A loom fixer was called upon to tighten the picking cam, which is fastened to a shaft running underneath the loom. To get at the picking cam it was necessary to lift the warp-beam out of its position and rest it on the framework of the loom. The loom fixer, having made the adjustment, was lowering the warp-beam into its position, with the assistance of San Souci, when he accidentally touched the shipper which engaged the friction clutch and set the loom in motion; the shed through which the shuttle passed being loosened by reason of the warp-beam not being in position, the shuttle flew from the loom and caused the injury to the plaintiff. As a result of this injury, the plaintiff lost an eye and claims to have suffered other injuries."

A demurrer to the plaintiff's declaration was heard before Mr. Justice Stearns, was overruled, and the defendant's exception was noted thereto.

This case was tried before Mr. Justice Stearns and a jury, in the superior court at Providence, on December 8, 9, and 10, 1908, and a verdict returned therein in favor of the plaintiff for the sum of four thousand two hundred dollars ($4,200). Within seven days after the rendition of said verdict the defendant [601] filed its notice of intention to prosecute a bill of exceptions, and said bill of exceptions was duly filed and notice thereof duly given to the plaintiff, and the case is now before this court on defendant's bill of exceptions.

The bill of exceptions alleges six grounds of exceptions, as follows:

1. To the decision of Justice Stearns, entered February 25, 1908, overruling the defendant's demurrer to the declaration filed in said cause as appears of record.

2. To the refusal of the trial justice to direct a verdict for the defendant, as appears on page 150 of the transcript of testimony in said case.

3. To the charge of the trial justice at the trial of said cause, that the loom fixer in fixing the loom in question was attending to a duty which the employer owed to the employé, and that he was a vice-principal, as appears in the judge's charge on page 158 of the said transcript.

4. To a certain ruling of said justice in refusing to charge the jury as requested by the defendant, as shown on star page 162 of said transcript, designated exception 1.

5. To a certain ruling of said justice in refusing to charge the jury as requested by the defendant, as appears on star page 162 of the said transcript, designated exception 2.

6. To the refusal of the said justice to charge the jury as requested by defendant as appears on star page 163 of said transcript.

The trial justice instructed the jury, without objection, that "there are several counts in the declaration, which is the statement of the plaintiff's case, and the only count on which you can find a verdict is the last count," thus eliminating all questions arising under any other counts in the declaration.

The charge of the trial justice on page 158, to which exception is taken, is as follows: "I charge you, gentlemen, that under the circumstances here that the duty, that the fixing of that loom, that the loom fixer was attending to a duty which the employer owed to the employé." The instruction was correct. It is in substance the converse of the contention of the defendant in his second ground of demurrer to the third count, "that it appears by said count that the negligence of the loom fixer, [602] if any, was the negligence of a fellow-servant," which contention the trial court properly overruled. The cause of the accident in question was the neglect of the loom fixer to remove the belt while the necessary adjustments were being made, so that an accidental moving of the shipper could not prematurely start the loom, or the neglect by the loom fixer to remove the shuttle, so that, if the loom were prematurely started, the shuttle would not fly from its place and cause damage.

In Crandall v. Stafford Mfg. Co., 24 R. I. 555, 54 Atl. 52, it was said by this court (p. 556): "The witness, John S. Grant, who erected the 'hanger' upon which the pulley-shaft was placed, was not, in the doing of that work, a fellow-servant with the plaintiff. The 'hanger' was part of an appliance in the mill; it was put up under the oversight of the superintendent, and was intended to be used in facilitating the doing of certain work which the defendant corporation was carrying on. The duty of properly constructing and fastening said appliance, therefore, was clearly one which the law devolved upon the defendant, as master, and it could not devest itself of this duty by devolving it upon another. As said by this court in Mulvey v. R. I. Locomotive Works, 14 R. I. 204, 'It is the duty of a master, who furnishes machinery for his servants to operate or work about, to see to it that it is reasonably safe. He cannot devest himself of this duty by devolving it on others, and if he does devolve it on others, they will simply occupy his place, and he will remain as re-

sponsible for their negligence as if he were personally guilty of it himself' ": See cases cited.

So in Jaques v. Great Falls Mfg. Co., 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824, which in many respects resembles the case at bar and was upon the following facts: "Clark, J. The motion for a nonsuit presents the question whether the jury could properly find a verdict for the plaintiff upon the evidence submitted: Paine v. Grand Trunk Ry., 58 N. H. 611. The evidence produced by the plaintiff—that the shuttle would not fly out of a loom unless the machinery was defective or out of repair, that the plaintiff had no knowledge of the machinery and was not allowed to meddle with it, and in case it did not operate properly was required to call on Burke, a loom fixer employed by the defendants [603] to look after the looms operated by the plaintiff and keep them in proper repair; that the shuttle flew out of one of her looms about 10 o'clock in the forenoon of the day of the injury, and she notified Burke, who examined it, made whatever repairs he thought necessary, and set it running; that at 11 o'clock the shuttle caught in the 'binder' or in the 'picker' and she again called on Burke, who again examined the loom, repaired it, and put it in operation; that shortly after, and before 12 o'clock, the shuttle flew out and struck her, putting out one of her eyes; and that she had watched the loom more closely than the others because its actions made her afraid of it — was evidence tending to show that the plaintiff, exercising reasonable care, was injured by the defendants' negligence in failing to provide suitable machinery for her use; and, in the absence of rebutting evidence, was sufficient to sustain a verdict for the plaintiff. The motion for a nonsuit was properly denied.

"The defendants excepted to the refusal to instruct the jury that Burke, the section hand and loom fixer, being engaged in the same common employment and under the same general control, was a fellow-servant of the plaintiff, and that the defendants were not liable for his negligence. As the servant assumes the ordinary risks of his employment, including the negligence of his fellow-servants, the master is not responsible to the servant for injuries happening from that cause. But the rule of law which exempts the master from responsibility for such injuries does not relieve him from the duty which he owes to the servant to provide suitable and safe machinery and appliances for the use of the servant in his employment: Fifield v. Northern R. R., 42 N. H. 225; Hanley v. Great Trunk

R. R. Co., 62 N. H. 274; Ford v. Fitchburg R. R., 110 Mass. 240, 14 Am. Rep. 598; Hough v. Texas & Pacific R. R. Co., 100 U. S. 213, 25 L. ed. 612. This duty may be, and in case the employer is a corporation must always be, discharged by agents and servants, and the agent or servant charged with its performance, whatever his rank of service may be, stands in the place of the employer, who thereby becomes responsible for the acts and chargeable with the negligence of such agent or servant.

604 "In many kinds of service the care and keeping of tools and machinery in a condition of safety require merely the attention and repairs occasioned by ordinary use and wear, and are properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the duty of the employer is performed by furnishing safe tools and machinery and the means of making needed repairs, and the duty of making the repairs may be intrusted to servants, and any neglect in the performance of this service is the negligence of a servant: McGee v. Boston Cordage Co., 139 Mass. 445, 1 N. E. 745. But in cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill, and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure to exercise proper care and skill the employer is accountable.

"The question who are fellow-servants within the rule exempting the employer from the consequences of the negligence of fellow-servants is not ordinarily determined by rank or grade of service, but by the character of the service performed or acts complained of. As a general rule, those doing the work of a servant are fellow-servants, whatever their grade of service; and a servant of whatever rank, charged with the performance of the master's duty toward his servants, is, as to the discharge of that duty, a vice-principal, for whose acts and neglects the master is responsible, because he has invested him with the responsibility of doing that which the master is bound to have carefully performed: Moynihan v. Hills Co., 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574; Daley v. Boston & A. R. R. Co., 147 Mass. 101, 16 N. E. 690; Booth v. Boston & A. R. R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 575; Davis v. Central Vermont R. R., 55 Vt. 84, 45 Am. Rep. 590; Tierney v. Min-

neapolis & St. L. Ry., 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; Cincinnati etc. R. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287; Eli v. Northern Pac. R. R., 1 N. D. 336, 26 Am. St. Rep. 621, 48 N. W. 222, 12 L. R. A. 97; Dayharsh v. Hannibal etc. R. R., 103 Mo. 570, 23 Am. St. Rep. 900, 15 S. W. 554.

"The test whether the plaintiff and Burke were fellow-servants was, not whether they were engaged in the common employment of manufacturing cotton cloth under the same general [605] control and paid by the same principal, but whether Burke represented the defendants in the responsibility or performance of any duty which they owed to the plaintiff. It was the duty of the defendants to furnish suitable machinery and keep it in suitable condition for the plaintiff's use. The duty of keeping the looms in proper repair required experience and the exercise of mechanical skill, and was especially intrusted to Burke; and so far as the discharge of that duty was concerned Burke represented the defendants, and any negligence on his part in the performance of that duty was the negligence of the defendants.

"It is immaterial that Burke exercised no control or authority over the plaintiff. The negligence of the defendants complained of was, not in ordering the plaintiff into a place of danger, but in failing to use ordinary care to prevent the exposure of the plaintiff to unusual hazard in her ordinary employment."

The fourth and fifth exceptions are overruled. The instructions called for were not applicable to the undisputed testimony in the case.

The sixth exception is to the refusal of the court to instruct the jury (p. 163): "That the plaintiff, having been guilty of contributory negligence in voluntarily placing himself (herself) in a place of danger, cannot recover." The charge was properly refused, the judge having properly instructed the jury (p. 154): "Now, then, that is a question of fact for you whether or not under these circumstances she assumed a risk there which she ought not to assume, whether she put herself in a place of danger. If she did, if she put herself there without any excuse for it, without any reason for it, why then, she has got to take the loss that falls on her, if that is the case. That is a question for you to pass on."

The defendant's exceptions are overruled, and the case is remitted to the superior court with direction to enter judgment on the verdict.

As to Who are Fellow-servants and Who Vice-principals, see the notes to Mast v. Kern, 75 Am. St. Rep. 584; Fox v. Sandford, 67 Am. Dec. 588.

The Liability of a Master to His Servant for Injuries resulting from defective machinery or appliances is the subject of a note to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289.

The Doctrine of Assumption of Risk and Contributory Negligence in the law of master and servant is discussed in the note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884.

CASES

IN THE

SUPREME COURT

OF

TEXAS.

CITY OF GREENVILLE v. PITTS.

[102 Tex. 1, 107 S. W. 50.]

ELECTRICITY—Defective Insulation—Licensees and Trespassers.—A policeman who, without invitation from the owner, goes upon the roof of a private building to detect unlawful gambling in an adjoining building, and there comes in contact with a defectively insulated wire maintained by the city as a part of its electric light system, has no cause of action against the city for his injuries. (pp. 844, 845.)

L. L. Bowman, city attorney, and Yates & Carpenter, for the plaintiff in error.

Bennett & Spearman and Jones & Connor, for the defendant in error.

[2] WILLIAMS, J. The defendant in error was a policeman in Greenville, and suspecting that persons were gambling in a room in the upper story of a building in the city, he, on several occasions at night, ascended to the roof of an adjoining one-story building in order that he might see into the suspected place through its windows. After he had done this once or twice and had seen gambling going on, he stated his action to the mayor and expressed the opinion that it would be best, before making arrests, to continue his watch, in order to identify a greater number of the persons thus violating the law, to which the mayor assented. He again went upon the roof at night, and in moving about he came in contact with and was burned by an electric wire which belonged to the city and was used in connection with its electric lighting plant in supplying light. This wire extended north and south with and near to a fire-wall between the

building on which plaintiff was and an adjoining one, and ran down the partition wall between the two at one end. The insulating material upon it had become defective to such an extent as to render contact with it dangerous. The city operated its plant at night, its wires not being charged with electricity in the daytime, except on a few rare occasions. No way had been provided by the owner of the building upon which plaintiff went for getting upon it, and plaintiff reached its roof by climbing upon a fence in its rear and then passing over the top of a low adjoining room. Access to the roof could also be had from the gallery of a near-by hotel across the walls and roof of an intervening house. It was shown that at times, during parades and like occasions, people had gone upon these roofs in the daytime, but [3] not at night. Plaintiff had no invitation or express permission from the owner of the building to go upon it.

We do not doubt that it was the duty of the city to the owners of the buildings, their servants, employés, and anyone else who may have had a legal right to go upon the roofs, to exercise proper care in maintaining the wire upon the partition wall to protect them against injury from contact with the wire: Giraudi v. Electric Imp. Co., 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596; Ennis v. Gray, 87 Hun, 355, 34 N. Y. Supp. 379; Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51, 16 L. R. A. 43; Illingsworth v. Boston Electric L. Co., 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552. But it owed no such duty to trespassers or bare licensees: Hector v. Boston Electric L. Co., 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554; 1 Thompson on Negligence, secs. 946, 947, and cases cited.

Plaintiff was invested with none of the legal rights which pertained to the ownership of the building or an interest therein. He went upon it for purposes of his own and not in the interest of the owner. If he was not a trespasser, he certainly was no more than a licensee under an implied license. If he be regarded as such a licensee, this would not clothe him with any legal right in the use of the building. It would merely relieve him of any imputation of being an unauthorized trespasser. Though his act be regarded as lawful, or even praiseworthy, he nevertheless was using the premises of another for purposes of his own, without any legal right in himself which entitled him to object to the condition in which the owners maintained them.

The city, it appears, maintained its wire partly upon the wall of buildings belonging to others and partly in the space above such wall. This was the affair of the city and the owners of the property. We must assume that the wire was there lawfully. As to the plaintiff, having no right with respect to such wall and such space, they are to be regarded as the premises, not only of the owner of the lot and the buildings, but of the city. Neither was under legal duty to keep them safe for the plaintiff. If the roof had fallen in with plaintiff, would anyone contend that the owner would be liable to him? In what does the attitude of the city differ? It was not keeping its wire in a public place, where all had the right to go, or might be expected to go, but on private premises, which we must presume it had acquired some right or permission so to use, and was under no duty, in keeping its property there, to one like plaintiff, who went there without invitation or inducement from anyone interested in such premises: Dobbins v. Missouri, K. & T. Ry. Co., 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62, 38 L. R. A. 573. Plaintiff's official character does not affect this question. The city, as owner of its light plant, occupied the position, so far as this case is concerned, of any other proprietor, and we know of no principle which makes it the duty of a proprietor to keep his premises safe for the use of such officers when they have occasions to go thereon in pursuit of violators of the law. Nor did the conversation with the mayor add anything to plaintiff's rights. The mayor did not instruct or invite the plaintiff to go upon the house, but merely agreed with him in the plan which he had himself conceived. Besides, the mayor was not the representative of the city as owner of the light plant; and, lastly, such an assent as this transaction might imply, if given by an owner himself, would be no more than a mere permission or license, authorizing the licensee to enter the premises in their existing condition and carrying no duty to alter them for his use.

We conclude that defendant in error has no right of action against the city, and the judgment of the district court and of the court of civil appeals will be reversed and judgment will be entered for plaintiff in error.

Reversed and rendered.

The Duties and Liabilities of Electric Companies in the management of their wires is the subject of a note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 515. As to their duty and liability toward licensees and trespassers, see the recent cases of Mayfield Water etc. Co. v. Webb's Admr., 129 Ky. 395, 130 Am. St. Rep. 469; Temple v.

McComb City etc. Power Co., 89 Miss. 1, 119 Am. St. Rep. 698; Guinn v. Delaware etc. Tel. Co., 72 N. J. L. 276, 111 Am. St. Rep. 668; Cumberland Tel. etc. Co. v. Martin, 116 Ky. 554, 105 Am. St. Rep. 229.

A City Engaged in the Enterprise of Manufacturing and selling electric light to its inhabitants is not engaged in a public, governmental duty, and is held to the same responsibility for injuries received on account of the negligent conduct of its officers as would a private individual running an opposition plant in the same municipality: Eaton v. City of Weiser, 12 Idaho, 544, 118 Am. St. Rep. 225. See, also, Hodgins v. Bay City, 156 Mich. 687, ante, p. 546.

SIMMANG v. PENNSYLVANIA FIRE INSURANCE COMPANY.

[102 Tex. 39, 112 S. W. 1044.]

COURTS—Jurisdiction Depending on Amount—Garnishment.—On writ of error the supreme court has jurisdiction over garnishment proceedings upon a judgment of the district court, although the amount garnished is less than five hundred dollars; the garnishment is not an original suit, but ancillary to the judgment, and could be sued out only in the court that rendered the judgment. (p. 847.)

EXEMPTION—Apparatus of Restaurant-keeper.—If it be conceded that the keeping of a restaurant is a "trade," still counters, safe, tableware, kitchen utensils, etc., are not "tools or apparatus," within the meaning of the exemption statute. (pp. 847, 848.)

Salliway & McAskill, for the plaintiff in error.

Webb & Goeth, for the defendants in error.

[40] BROWN, J. In the district court of Bexar county, forty-fifth district, Frank Simmang recovered a judgment against Otto Geise for about six hundred dollars. The Pennsylvania Fire Insurance Company owed Geise on a fire policy three hundred and forty-one dollars and twenty cents, which was not contested by the company. Simmang sued out in the district court of the forty-fifth district of Bexar county a writ of garnishment against the Pennsylvania Fire Insurance Company, calling upon it to answer what it was indebted to Otto Geise, and the company answered stating the amount due. Otto Geise filed a plea of intervention in which he claimed that the sum due him upon the policy of insurance was exempt from the writ of garnishment because the policy under which the debt accrued was upon property owned by said Geise which was exempt from forced sale. Upon a trial, judgment was rendered in favor of Simmang. Upon appeal

to the court of civil appeals that judgment was reversed and judgment rendered in favor of Geise. The honorable court of civil appeals makes this statement of the property insured: "Lunch counter, back counter, shelving, safe, stools, stove, fans, cash register, two ice-boxes, crockery, tableware, linen, knives, forks and kitchen utensils, together with similar articles constituting the tools and apparatus of his trade or profession as a keeper of a restaurant, and being entirely property used, designed and intended [41] for said business and necessary for the purpose of conducting the same, and this being the only property of this character owned by this intervener; and that the money in the hands of the garnishee was due him on its policy, insuring him against loss on the property described. The foregoing matters were pleaded by Geise and admitted to be true by Simmang."

Defendant in error filed a motion to dismiss the writ of error because the amount in controversy is within the jurisdiction of the county court and the proceeding might have been had in that court, therefore it is claimed that this court has no jurisdiction of this case. The garnishment proceeding is not an original suit, but ancillary to the judgment of the district court which was rendered in favor of Simmang against Geise, being a process for the enforcement of said judgment, therefore, the garnishment could not have been sued out from any other court than that in which the judgment was rendered: Kelly v. Gibbs, 84 Tex. 143, 19 S. W. 380, 563; Kreisle v. Campbell, 89 Tex. 104, 33 S. W. 852; Townsend v. Fleming (Tex. Civ. App.), 64 S. W. 1006.

It is claimed that under article 2395, subdivision 5 of the Revised Statutes, the property insured and for the destruction of which the money was due from the Pennsylvania Fire Insurance Company was exempt from forced sale for the debts of Geise; therefore the proceeds of such property in the shape of insurance money is exempt from the process of garnishment for the payment of his debts. The article referred to reads as follows:

"Art. 2395. The following property shall be reserved to every family, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided:

"5. All tools, apparatus and books belonging to any trade or profession."

Granting that the keeping of a restaurant is a trade within the meaning of the law, the question arises, Were the things

insured "apparatus" as the term is used in the statute? In Heidenheimer v. Blumenkron, 56 Tex. 308, a mortgage had been given upon articles such as were insured in this case, by the keeper of a hotel, and, suit being instituted to foreclose the mortgage, the defendant claimed that the articles embraced in the mortgage were exempt from forced sale under the terms of the statute above quoted. The court held that such articles, when not used by the family of a hotel-keeper, were not exempt from forced sale, therefore, were subject to sale under the mortgage.

Dodge v. Knight (Tex.), 16 S. W. 626, involved the same question as that at issue here. Dodge and Martin were keepers of a restaurant and were indebted to Knight and Dickson, who sued out a writ of attachment against Dodge and Martin and caused the same to be levied upon the furniture, fixtures, etc., of the restaurant, being such articles as are involved in this proceeding. Afterward, Dodge sued for damages upon the ground that the property levied upon was exempt under the statute from forced sale, but this court approved the opinion of the commission of appeals which held that it was not embraced within the terms of the statute.

[42] In Frank v. Bean, 3 App. Civ. Cas. 258, the court of appeals held that the furniture, dishes, etc., used by the keeper of a restaurant in carrying on the business, were not exempt under the statute as quoted above. That court said: "Such property does not come within the meaning of 'tools' or 'apparatus,' as used in the statute of exemptions, and cannot be claimed as exempt under that clause of the statute. The common signification of said words does not embrace furniture used in hotels and restaurants."

We conclude that the property which was destroyed by fire and for which the insurance money was due from the Pennsylvania Fire Insurance Company was not exempt from forced sale, and that the court of civil appeals erred in reversing and rendering the judgment in this case. It is therefore ordered that the judgment of the court of civil appeals be reversed and that judgment of the district court be affirmed.

Reversed and judgment of district court affirmed.

The Exemption of Tools and Implements is the subject of a note to Reeves v. Bascue, 123 Am. St. Rep. 129.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY v. MATZDORF.

[102 Tex. 42, 112 S. W. 1036.]

CARRIER—Safe Premises—Duty to Friends of Passenger.—A carrier does not owe the affirmative duty of keeping its station in a safe condition to mere friends or acquaintances of a passenger who go there to see him depart on a journey. (pp. 850, 851.)

Baker, Botts, Parker & Garwood, Newton & Ward and Teagarden & Teagarden, for the plaintiff in error.

John Schorn, for the defendant in error.

[43] WILLIAMS, J. The judgment in this case was recovered against the plaintiff in error by defendant in error, plaintiff below, on account of a fall which she received in entering the waiting-room for passengers kept by the railroad company at San Antonio. The fall was caused by a piece of wire projecting from a door-mat which penetrated plaintiff's shoe as she stepped upon it. Plaintiff was not a passenger and had [44] not gone to the station upon any business with the company or with any passenger. One Mrs. Simpson, intending to take passage, for a temporary absence, went to the station accompanied by her husband and children. Mrs. Nicholls and plaintiff went with them, plaintiff going upon the invitation of Mrs. Nicholls to accompany her, and to bid Mrs. Simpson good-bye.

Upon these facts the question is whether or not the plaintiff has a cause of action arising from the failure of the defendant to keep the waiting-room and its approaches in safe condition, which is the only theory upon which the judgment is defended. If she is to be regarded as there upon an implied invitation from the defendant, the question should be answered affirmatively; if she was no more than a mere licensee, it should be resolved in the negative: City of Greenville v. Pitts, 102 Tex. 1, ante, p. 843, 107 S. W. 50, 14 L. R. A., N. S., 979.

Those who keep premises for the carrying on of business with the public impliedly invite people to come and transact business with them, and from this invitation arises the duty to keep the premises in suitable condition for use by those accepting it. Common carriers of passengers in this way extend invitations to persons desiring transportation as passengers and owe to them the resulting duty. The attendance and assistance of others is often necessary or convenient to

passengers, and the invitation to them includes the right to have others with them to assist them in attending to the details incident to departure or arrival. Hence such persons are entitled, in right of the passenger, to the use of the carrier's premises. The domestic relation and the ties of kinship and the usages incident thereto make it so customary as to be looked upon as a matter of course for persons sustaining such relations to attend the arrivals and departures of each other upon and from journeys. The existence of such relations, therefore, may often properly be regarded as sufficient to include within the invitation to the traveler those who so naturally are to be expected to attend his going or to await his coming. In the authorities stating the rule, the invitation is said to include those who go to "welcome the coming, speed the going guest." This suggests the existence of the relation of host, or entertainer, and guest, and is based upon social custom, which exacts the extension of certain courtesies and attentions by one to the other of those sustaining such a relation. Business relations may exist between passengers and others which will entitle both to be at the station and upon the premises of the carrier. We believe that these classes will be found to embrace all who have been held, by actual decisions, to be included by implication in that invitation which is extended by the carrier to the traveler himself. It is sometimes said generally that friends who go to stations to see passengers off or to await their arrival are in the invited class, but it will be found, in examining the facts of cases, that such expressions refer to those who sustain some special relation to the passenger, such as attendant, assistant, member of his family, host, or the like.

In the case of Montgomery & E. Ry. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72, the rule is stated thus: "All the property of a railroad company, including its depots and adjacent yards and grounds, is its [45] private property, on which no one is invited or can claim the right to enter save those who have business with the railroad. Under this classification, however, we must include attending friends and protectors, who accompany friends to the train to aid them in getting on, in procuring tickets, and in checking baggage, and kindred services. The same license is accorded to protecting friends, when the traveler is to leave the train. To persons filling these classes, the railroad corporation owe special obligations of duty, different from those due to the general public. While the former come by invitation, express or im-

plied, the latter are mere pleasure-seekers, or are prompted by curiosity. For the use and comfort of the former class, railway companies are bound to keep in safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers or those who have purchased tickets with a view to take passage on their cars would naturally or ordinarily be likely to go."

We are not disposed to draw narrowly the line defining those entitled to the benefit of the principle, but that line must be drawn somewhere, and we find no authority for the proposition that the invitation extends to those who have no business with the carrier or passenger and sustain no relation to the latter but that of friendship or acquaintanceship. If it includes one merely because he is a friend or acquaintance, it includes all friends and acquaintances, not of one passenger only, but of all. Not only that, but it is held that the invitation to those included in it is not simply to the station-houses, waiting-rooms, or platforms, but to the trains and any other places where the discharge of the duty of the attendant to the passenger makes it proper for the former to go. The consequences of such an extension of the doctrine may easily be seen. That which is really a mere incident of the relation of the carrier to the passenger would become the principal thing, and, instead of facilitating, would seriously impede the discharge of the duties of that relation.

In not a few of the cases in which the doctrine has been referred to, the real ground on which the carrier was sought to be held liable was that of active negligent conduct of its employés toward persons at stations or upon trains. It is scarcely necessary to say that we have before us no such case, or that our decision would not affect a right of recovery of that kind. Persons who go to such places upon occasions like that which took plaintiff to defendant's waiting-room are not there unlawfully or wrongfully, and their right, as licensees, to complain of active negligence by which they are injured is unquestioned. The question here is whether or not the carrier owes them the affirmative duty of keeping its premises safe for their use as persons invited by it to go there, and we must hold that it does not owe that duty.

Reversed and rendered.

The Duty of a Railroad Company to Keep Its Station Safe for persons assisting or accompanying passengers is considered in the note

to Little Rock etc. Co. v. Lawton, 29 Am. St. Rep. 54; and in the subsequent cases of Klugherz v. Chicago etc. Ry. Co., 90 Minn. 17, 101 Am. St. Rep. 384; Southern Ry. Co. v. Patterson, 148 Ala. 77, 121 Am. St. Rep. 30. As to the duty of a railroad company to maintain its station and premises in safe condition for persons taking or leaving trains, see Mangum v. North Carolina R. R. Co., 145 N. C. 152, 122 Am. St. Rep. 437; Abbot v. Oregon R. R. Co., 46 Or. 549, 114 Am. St. Rep. 885; Pineus v. Atlantic Coast Line R. R. Co., 140 N. C. 450, 111 Am. St. Rep. 856.

AETNA LIFE INSURANCE COMPANY v. WIMBERLY.

[102 Tex. 46, 112 S. W. 1038.]

LIFE INSURANCE—Payment of Premium—Days of Grace.—Where a premium falls due on October 1st, which is Sunday, the "thirty days of grace" allowed by the policy commence to run at midnight of that day and expire at midnight of October 31st. (pp. 853, 854.)

TIME—Sunday.—Days of Grace are not Enlarged by the fact that the obligation matures on Sunday. (p. 854.)

W. J. Moroney, for the plaintiff in error.

J. M. Ralston and Moore & Moore, for the defendant in error.

47 BROWN, J. On the first day of October, 1904, the plaintiff in error issued to Garee A. Wimberly a life insurance policy in the sum of one thousand dollars, payable at his death to his wife, Lillie M. Wimberly. The policy provided that the premiums should be paid annually in advance on the first day of October at or before 5 o'clock, and the first premium was paid upon the issuance of the policy. The policy contained this provision: "Policies cease in accordance with their terms if the premiums are not paid on or before the day stipulated therein for such payment, except that a grace of thirty days is allowed for the payment of any premium after the first, provided that with the payment of such premium interest is also paid thereon for the days of grace taken." The first day of October, 1905, was Sunday, and the premium which fell due on that day was never paid by the deceased, who died on November 1st, of that year. The plaintiff in error contends that the thirty days of grace expired with the thirty-first day of October, while counsel for defendant in error contends that the thirty days of grace began at the ex-

piration of the second day of October and embraced all of the first day of November.

If there had been no provision for days of grace in the policy the assured would have had the right to pay the premium on the second day of October, Monday. This proposition of law is not disputed by the plaintiff in error. It is claimed by counsel for the defendant in error that because the day of payment fell upon Sunday and the assured had the right to pay the premium on Monday, that made Monday the day of maturity just as if it had been named in the policy and that the thirty days of grace ran from that day. If the plaintiff in error's contention is correct, it determines this case, and it will be unnecessary for us to pursue the investigation of the other questions presented.

The first day of October in the year 1905 being Sunday, if the days of grace had not been allowed by the contract, the assured would have had the right to pay the premium on the following Monday, because the law does not require payment to be made on Sunday. It is contended by the defendant in error, and so held by the honorable court of civil appeals, that this constituted Monday the day for the payment of the premium, and that the thirty days which the contract allowed for the payment of that premium commenced to run at the close of Monday instead of at the close of Sunday; therefore, the first day of November was within the thirty days' limit for the payment of the premium. We are of opinion that the fact that the law granted to the assured the right to pay on Monday did not have the effect to add a day to the thirty days allowed by the contract. The contract prescribes that the premium shall be due on October 1st, but the policy would not be forfeited if paid within thirty days thereafter. The construction placed upon the contract by the court of civil appeals would give to the assured thirty-one days from the first day of October instead of thirty as expressed in the contract: Wooley v. Clements, 11 Ala. 220. In the case cited suit was upon a note to which the law gave three days of grace. The note fell due on Sunday and was protested on Wednesday. It was contended as in this case that the days of grace began to run at midnight of Monday, and that the note was not protestable [48] until Thursday, but the court held that the days of grace were not enlarged by the fact that the note matured on Sunday.

The rule for computation of time under a state of facts like those set out in this case is well settled to be that the day on

which an act is to be performed is to be excluded in determining the time when some other thing is to be done thereafter, and that the last day of the time given for the performance of the latter act is to be included in the computation: Hill v. Kerr, 78 Tex. 213, 14 S. W. 566; Lubbock v. Cook, 49 Tex. 96.

Applying this rule to the facts of this case the thirty days' grace allowed by the policy of insurance began to run at midnight of Sunday, October 1st, and terminated at midnight of the thirty-first day of that month, which gave thirty full days from the day on which the payment was expressed to be made and fulfilled every provision of the contract between the parties. It follows that since Wimberly did not pay the premium at all and died after the expiration of the time allowed within which to make the payment, the policy was forfeited before his death and there was no right of recovery as against the insurance company.

It is unnecessary to discuss the other questions which are raised, and it is hereby ordered that the judgments of the court of civil appeals and district court be reversed and that judgment be here rendered that the defendant in error take nothing by the suit and that the insurance company go hence without day and recover of the defendant in error all costs of this proceeding.

Reversed and rendered.

The Computation of Time Where Sunday is Involved is considered in the note to State v. Michel, 78 Am. St. Rep. 377.

EASTHAM v. HUNTER.

[102 Tex. 145, 114 S. W. 97.]

VENDOR AND VENDEE—Amount of Consideration as Showing Bona Fides.—While one who pays a grossly inadequate consideration may not be regarded as a bona fide purchaser, and while inadequacy of consideration is a circumstance that may be looked to on the issue whether a deed was intended to convey the land or a mere chance of title, still one is not deprived of his status as a bona fide purchaser by the mere fact that he pays less than the market value. (p. 856.)

VENDOR AND VENDEE—Deed Executed Under Power of Attorney.—Long lapse of time intervening between the execution of a deed under power of attorney and an action by the principal to recover the land may be considered on the question whether he knew of and acquiesced in the sale. (p. 857.)

Dean, Humphrey & Powell, for the plaintiffs in error.

Hill, Williams & Elkins, for the defendants in error.

[146] GAINES, C. J. This case has previously been before this court upon writs of error in two different instances. In the first, judgment for plaintiffs was reversed and the cause remanded (Hunter v. Eastham, 95 Tex. 648), and in the second, a judgment for the defendant was reversed and again remanded (Eastham v. Hunter, 98 Tex. 561).

Suit was brought in an action of trespass to try title by Beverly Hunter and others to recover the land in controversy. The facts briefly stated, in regard to the title, are as follows: Beverly Hunter was the common source of title, and it is admitted that it was the community property of Beverly and Caroline Hunter, and that plaintiffs and Robert Hunter are heirs at law of Beverly and Caroline Hunter.

The facts of the case, briefly stated, are that November 26, 1879, Beverly Hunter being about to remove to Kansas, executed a power of attorney to his son, Robert Hunter, to sell the land. On the fifth day of January, 1880, Robert Hunter made a conveyance of the land to one W. R. Pace, for a recited consideration of one hundred and twelve dollars and fifty cents cash to him paid. Caroline Hunter died about 1880 in the state of Kansas, and Beverly Hunter died on or about 1899 in the same state. On December 1, 1880, W. R. Pace conveyed the land to one B. Eastham, which conveyance is found in the case reported in 95 Tex. 651. In order to show that the title of the land did not pass by the conveyances in question, plaintiffs attempted to prove that the consideration mentioned in the deed from Robert Hunter, attorney in fact, to W. R. Pace was not in fact paid in money, but was in part a debt due from Robert Hunter, or Beverly Hunter, or both, to Pace. They also attempted to show that the deed from Pace to Eastham was a quitclaim deed which conveyed only a chance of title and not the land, and also that Eastham when he accepted said conveyance knew the fact that Pace had not paid the consideration for the deed mentioned therein. The court in its main charge instructed the jury as follows: "If you find from a preponderance of the evidence that said Pace did not pay said Robert Hunter the consideration recited in said deed in cash, but applied the same or any part thereof to the payment of debt due to said Pace either by Robert Hunter or Beverly Hunter or both, then you [147] are instructed that the deed from said Robert Hunter to said Pace did not pass the legal title to said Pace, but the legal

title to said land remained in said Beverly and Caroline Hunter, and you will find for plaintiffs the land in controversy unless you shall believe by a preponderance of the evidence that said B. Eastham, under whom defendants claim title, bought the land in controversy in good faith, and not the chance of title to said land from said Pace, for a valuable consideration, and that at such time said Eastham had no notice or knowledge that the consideration paid to said Robert Hunter was in fact the discharge of a pre-existing debt either of Robert Hunter or Beverly Hunter or both; if you find such was the fact, and that the consideration paid by said Eastham to said Pace at the time was a fair price for said land at the time, then you are instructed that the said Eastham was an innocent purchaser in good faith for value of said land in controversy, and if you so find, you will find for the defendants." In previous part the court also gave this instruction: "By fair price is not meant an adequate consideration or the full value of the property, but the reasonable market value of the property at the time of sale."

It is apparent from this that if the jury believed that Eastham did not pay the full market value of the land, he could not claim title as an innocent purchaser. We think this was error. In Nichols-Steuart v. Crosby, 87 Tex. 443, 29 S. W. 380, it is held by this court that a party who pays a grossly inadequate consideration for land cannot claim to be the bona fide purchaser, for the reason that a grossly inadequate consideration should not be considered a valuable consideration; but we have never held that a party cannot be a bona fide purchaser who has paid simply less than the market value of the land. Now, it may be that, in determining the question whether the deed from Pace to Eastham was intended to convey the land or a mere chance of title to the land, the fact that an inadequate consideration was paid may be looked to as a circumstance to throw light upon that question, but we do not think that further than this the court should go upon this matter. The charge was therefore erroneous and misleading, and may have led to the finding of the jury in this case. For this error the judgment must be reversed and the cause remanded. We are of opinion that it was not only proper for the trial judge, but also his duty to have instructed the jury, in determining the question of whether Eastham bought the land, or a mere chance of title, to consider the amount paid for it, whether it was the reasonable value of the land or not; but we do not think that the court should have

gone further, and made the determination of the question depend upon whether he paid the full market value or not. We also think, upon the question of whether Beverly Hunter knew of the sale made by Robert Hunter as his attorney in fact and acquiesced in it so as to make it a valid sale, the long lapse of time which intervened from the execution of the sale by Robert Hunter until this suit was brought should also be considered by the jury.

The evidence in this case on the two important questions is [148] meager and quite unsatisfactory, and we think both questions should be left to the jury under proper instructions.

Judgment is reversed and the cause remanded.

To Constitute a Grantee a Purchaser for Value, it has been affirmed that the consideration must be not only good, but valuable in the sense that a fair equivalent is given for the property: Ten Eyck v. Witbeck, 135 N. Y. 40, 31 Am. St. Rep. 809. But in Strong v. Whybark, 204 Mo. 341, 120 Am. St. Rep. 710, it is said that it is not necessary that the consideration for a deed be adequate in value; although such consideration is small or even nominal, in the absence of fraud, it is enough to support the deed against a prior unrecorded conveyance. That a consideration of one dollar will not support an option to sell valuable property, see Murphy, Thompson & Co. v. Reed, 125 Ky. 585, 128 Am. St. Rep. 259; Rude v. Levy, 43 Colo. 482, 127 Am. St. Rep. 123.

TEXAS AND NEW ORLEANS RAILROAD COMPANY v. PARSONS.

[102 Tex. 157, 113 S. W. 914.]

RAILROADS—Liability for Deputy Sheriff in Their Employ.—The fact that a person who ejects trespassers from the property of a railroad is a deputy sheriff does not prove that his acts are official, nor does the fact that he is employed by the railroad company to watch its property prove that his acts are those of an employé; the question must be determined by all the facts and circumstances of the case. (p. 860.)

RAILROADS—Liability for Deputy Sheriff in Their Employ.—Where a deputy is appointed by the sheriff at the request of a railway company to preserve order and protect property on its premises, and is paid for his services by the company, it is liable for his act where, in expelling tramps from an empty car and putting them off the premises without arresting them, he shoots at a third person whom he takes for one of the tramps attempting to attack him, and unintentionally wounds one of them. (p. 861.)

Baker, Botts, Parker & Garwood and Lane, Jackson, Kelley & Wolters, for the plaintiff in error.

Lovejoy & Parker, for the defendant in error.

159 BROWN, J. The Texas and New Orleans Railroad Company owned and operated in 1903 a railroad from Houston to a place called Echo, in Orange county, at which latter place were located a depot, shops and yards. The yards extended about two miles in length and in width sufficient to embrace five separate tracks, all being inclosed by a fence on each side the length of the yards. Within the inclosure were all improvements and buildings which were located at Echo, including a hotel at which the railroad employés boarded. The railroad company had a large number of hands employed in the shops and otherwise about its yards. At times there were many cars standing upon the tracks inside of the yards loaded and unloaded. A large number of transient persons, tramps, etc., collected about the place and frequently built fires outside and near to the fences. On several occasions they interfered with the railroad men in their work, and it was not infrequently the case that depredations were committed upon the property, cars were broken into, etc. These conditions became so bad that the yardmaster reported to his superior officer, who applied to R. M. Johnson, then sheriff of Orange county, to appoint two deputies to be located in said place, Echo, to serve in protecting the property and premises of the said railroad company from trespassers and from depredations and to enforce the law against all persons who might violate it. Johnson at first declined to make the appointment, on the ground that he could not afford to pay the deputies for their services. The railroad company agreed that it would pay the monthly salaries of each deputy so appointed, and upon this agreement Charles A. Futch and one Prejean were appointed and stationed as deputy sheriffs at said place. The only instruction that Johnson gave to the deputies was to enforce the law, and there is no evidence that any officer of the railroad company gave to said deputies any instructions. It seems to have been assumed by the deputies that they were to act as watchmen over the railroad property, and they so acted. One of them was on watch in the day and kept the yards under supervision, going from point to point protecting the property from trespassers; the other was on guard or watch during the night, and likewise made the rounds as often as was necessary among the cars that might be standing upon the tracks to protect the property against depredations and the inclosure against trespassers. It was the duty of the said watchmen, if they saw persons trespassing upon the yard of the company, to put them out of the inclosure, which they did

whenever such trespassers appeared. The two appointees of the sheriff continued their services from the times of their appointment up to December 18, 1905, something more than two years, during which time their wages or salaries were paid by the month by the railroad company.

On the eighteenth day of December, 1905, Parsons, with a number of other persons, entered a box-car on the Texas and New Orleans Railroad at Beaumont and remained in it until the car reached Echo, about 2 o'clock the next morning. An employé of the railroad company came to the car and saw that there were persons inside, and when he opened the door and told them to get out they refused to do so, [160] whereupon he shut the door and moved the car down to a point near the hotel where Futch was, and, by direction of the yardmaster, telephoned to Futch to come over, there were some hobos in a car. Futch went over to the car and when the railroad employé opened the car door Futch had his pistol in his hand and ordered the men in the car to get out, which they did. He then told them that he did not intend to arrest them, and had not arrested them for riding in the car, but he intended to put them off of the company's property, and ordered them to walk down the track toward the end of the yard. He told them if they did not move along that he would shoot just to see them jump, or some such language. After they had gone about three hundred yards down the track they met another man going in the opposite direction, who asked Futch for a match and also asked him when a train would go west. Just what occurred is somewhat in doubt as the witnesses differ about the facts; but taking Futch's statement, he took the man who approached him to be one of the party that he was marching down to the end of the yard and ordered him to stop, not to come to him, but to go to his crowd. The man had nothing in his hands, made no threats, but Futch thought he was trying to get hold of him and fired at him, the ball striking Parsons in the leg, inflicting a wound that made amputation of the limb necessary.

Futch testified that he did not receive any orders from the railroad officials, and the yardmaster testified that he never gave him any orders. It was also proved that the railroad officials at one time tried to get Johnson, the sheriff, to remove Futch because the latter would not obey orders of the railroad officers.

The first question which presents itself is, In what character did Charles A. Futch act at the time the injury was inflicted

on Parsons? The fact that Futch was a deputy sheriff does not prove that his acts were official, neither would the fact that he was likewise a watchman employed by the railroad company prove that his acts were those of a servant; that question must be determined by all the circumstances and facts placed in evidence: Dickson v. Waldron, 135 Ind. 507, 41 Am. St. Rep. 440, 35 N. E. 1, 24 L. R. A. 483.

The lawless condition of things at Echo and the exposure of the property of the railroad company to depredations by the tramps who assembled there prompted the railroad company to apply to the sheriff of Orange county for the appointment of two deputies, the purpose of the company being to secure protection for the private property of the corporation. The sheriff had no authority to appoint or to detail deputies to act as guards and watchmen over the property of the railroad: St. Louis etc. Ry. Co. v. Hackett, 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881. In that case the court said: "An officer of the law cannot engage as such officer to guard the property of a private individual or corporation not in the custody of the law." We do not mean to say that an officer may not watch property to prevent threatened injury. It follows that whatever authority Futch had to guard and watch over the property of the railroad company and to expel from its premises trespassers thereon must have been derived from the company and not from the sheriff. Futch testified that he had authority [161] to expel persons who were trespassing upon the property of the company, and that he had exercised that authority during his stay there, and it appears from the testimony that he had been so engaged continuously for about two years time. During the time that Futch was so engaged the railroad company had paid his monthly wages without objection. It does not appear that there was any business to be transacted by Futch at that time and place except that which pertained to the property of the railroad company, except that on a few occasions one of the deputies may have served a subpoena or some process from the court. From the continued performance of this service for the railroad company for two years, which he could not have done as deputy sheriff, and the payment for the services by the railroad company, the conclusion is natural that Futch was employed by the railroad company to serve it as a guard and watchman over its property, and that while so engaged he was acting as its agent and servant.

Notwithstanding Futch was both deputy sheriff and watchman for the railroad company, it does not follow that the railroad company would be responsible for his acts done in his official character. It therefore becomes necessary to inquire in what capacity Futch was acting at the time the shot was fired. When Futch was called to remove the men from the car he might lawfully have arrested them for violation of the statute against unlawfully riding in such cars: Laws 1895, c. 113, p. 178. Futch testified that when he ordered the men to get out of the car he told them that he did not intend to arrest them, and did not arrest them, for any violation of the law, but that he intended to put them off the company's property, which he could not have done as deputy sheriff, but was authorized to do for the corporation. It therefore appears that at that time he was acting as the agent and servant of the railroad company: Brill v. Eddy, 115 Mo. 596, 22 S. W. 488. In the case last cited a policeman who was authorized to make arrests for violations of ordinances of the city took hold of a boy who was riding a train in violation of such ordinances and pulled him from the car. The policeman had the authority to arrest the boy for the offense, but he did not intend to arrest him, only intended to take him off the car and put him out of the yard. The policeman was also an employé of the railroad company and charged with the duty of keeping boys off the yard and away from the company's property. It was contended that, he being a policeman, the railroad company was not responsible for his act, and the court said, in substance, that if it appeared from the evidence that he was acting officially and was arresting the boy, then the company would not be responsible, but if it appeared from the policeman's evidence and also from other circumstances that he did not intend to make any arrest, but simply to remove the boy from the car and from the railroad company's premises, the court held that his act was not official, but that of a servant of the company. We think the evidence in this case shows that at the time Futch marched the men, including the plaintiff, down the railroad track to put them off the company's property, he was acting in the capacity of watchman [162] and agent of the company, and if he fired the shot which caused the injury while in the performance of, or in furtherance of, that duty, then the railroad company must be held liable for the consequences.

It is contended that Futch departed from the service of the railroad company and became involved in a difficulty with a

third person, and that he did not fire the shot in the discharge of any duty to the railroad company. The following charge was asked by the railroad company and was refused: "Gentlemen of the jury, you are instructed that if you find from the evidence that, on the occasion of plaintiff's injury, the defendant Charles A. Futch had required the plaintiff and his associates to leave the premises and yard of the defendant railway company, and while they were in the act of departing therefrom, another person, unknown to plaintiff and his associates, approached the defendant Futch, and that a personal controversy thereupon ensued between such person and the said defendant Futch, and that as result of such controversy the defendant Futch discharged his pistol, and thereby inflicted injury upon the plaintiff, but that such injury of the plaintiff was not intentional, nor for the purpose of coercing him or his said companions to leave the said yard and premises of defendant railroad company, then, and in such event, the plaintiff is not entitled to recover, and if you so believe, you will return your verdict in favor of the defendant railroad company." If the charge had been given, the jury must have found for the railroad company, although they believed Futch was negligent or reckless in firing his pistol. Futch had plaintiff under his control, and he owed it to him and his associates not to injure them through negligent or reckless use of his gun. Under the requested charge the jury must have found for defendant railroad company, although they believed Futch acted recklessly in firing his pistol and the evidence would justify that conclusion. The charge was properly refused.

The facts stated by Futch show that at the time he fired the shot he did it for the purpose of compelling the man at whom he fired to return to the parties that he had under control and whom he was putting off the yards. Futch believed that the unknown man was one of the party that he had started to put off the yard, and so believing he had ordered him to rejoin the company in order that all might be put off the grounds, and upon his refusal to do so he fired at him. Futch's evidence does not show that he had at any time abandoned the purpose he had when he started with the men from the car to take them down the track to the end of it and across the bridge. To do this he sought to keep them together. The fact that he was mistaken as to the unknown man's relation to the others does not affect his relation to the railroad company.

We are of opinion that the evidence is sufficient to sustain the judgment of the court whereby the railroad company was held liable to Parsons for the injuries inflicted upon him by Futch. We therefore affirm the judgments of the district court and court of civil appeals.

A Special Police Officer appointed on the application of the proprietor of a place of amusement is not, according to Healey v. Lothrop, 178 Mass. 151, 86 Am. St. Rep. 471, the servant of the proprietor; and if he commits an assault, the only remedy against the proprietor is on his bond. But in Dickson v. Waldron, 135 Ind. 507, 41 Am. St. Rep. 440, a theater manager was held liable for the act of his employé in wrongfully attacking a patron of the theater, although the employé is a special policeman. As to the liability of a railway company for the act of a special policeman in shooting a trespasser, see Deck v. Baltimore etc. R. R. Co., 100 Md. 168, 108 Am. St. Rep. 399; and as to its liability for his acts in wrongfully arresting and prosecuting a citizen, see McKain v. Baltimore etc. R. R. Co., 65 W. Va. 233, 131 Am. St. Rep. 964.

MILLICAN v. McNEILL.

[102 Tex. 189, 114 S. W. 106.]

ADMINISTRATOR'S DEED—Effect as Conveying His Own Title.—An administrator's deed, ineffectual because the sale was ordered at a time when the court could not lawfully sit, conveys his life estate in the property, and hence the possession of his grantees is rightful and the remaindermen have no right of action for possession until the termination of the life estate. (p. 865.)

ADMINISTRATOR'S DEED—Refund by Heirs on Avoiding Sale.—Where an administrator's deed is ineffectual to convey the title of the heirs, but his accounts show that the proceeds of the sale were applied to the satisfaction of charges against the estate, the heirs, before recovering the property from the purchasers, must refund the amount with interest from the time it was applied to the payment of the charges. (p. 866.)

W. W. Moores, for the plaintiffs in error.

W. T. Carlton, Eli Oxford and M. L. Jackson, for the defendants in error.

191 WILLIAMS, J. The defendants in error, as heirs of John M. Stephen, brought this suit to recover of the plaintiffs in error an undivided one-sixth interest in a lot in the town of Stephensville, admitting in their petition that the defendants were the owners of the other five-sixths.

The chief defense was that of limitation, and the question as to its sufficiency depends upon the following facts: John

M. Stephen, who owned the lot in controversy, died in 1862, leaving two children, one of whom was the wife of W. W. McNeill. McNeill became the administrator of Stephen's estate and was acting as such as late as 1877. His wife died in 1864 and he inherited from her a life estate in one-third of her half of the real estate which had descended to her from her father, and thus became entitled to a life estate in one-sixth of the lot. In 1871 he procured an order for the sale of the lot, which is admitted to be void because it was made at a time when the court could not lawfully sit. He sold the lot to J. W. Moore, and executed to him a deed reciting his authority to act as administrator, the order of sale and the sale, and by [192] which, as administrator of the estate, he bargained, sold and conveyed the lot to Moore, to have and to hold to him and his heirs in fee simple forever. The deed closed with this covenant: "And I, the said W. W. McNeill, administrator as aforesaid, do covenant with and to the said Moore, his heirs and legal representatives, to warrant and forever defend this title to the aforesaid lot, against the claim or claims of any and all persons lawfully claiming or to claim the same or any part thereof, to the extent that I am bound to do according to law as such administrator and no further." The defendants claim under this deed, and have held such possession as to bar the claim of the heirs unless it is true that their cause of action for the recovery of the one-sixth of the land first accrued upon the termination of the life estate therein of McNeill by his death, which occurred less than five years before the institution of the action. The contention of the defendants' counsel is that nothing passed by the administrator's deed to Moore, and that those holding the lot were naked trespassers against whom plaintiffs, as owners of undivided interests therein, could have at any time maintained an action for the recovery of the possession of the whole, which contention is based upon the doctrine of the cases of McConnico v. Thompson, 19 Tex. Civ. App. 539, 47 S. W. 537, and Elcan v. Childress, 40 Tex. Civ. App. 193, 89 S. W. 84.

The counsel for plaintiffs contend that McNeill's deed passed to Moore his life estate, and entitled the latter and his vendees to possession until that estate ended upon McNeill's death, and that plaintiffs' cause of action for the recovery of the remainder only arose upon the happening of that event. The district court and the court of civil appeals sustained the latter contention, and we are of the opinion that this is correct.

We do not base our opinion upon the covenant of warranty in the administrator's deed, finding it unnecessary to go to the extent of holding that such warranty bound McNeill personally, although there is authority for the proposition: Aven v. Beckon, 11 Ga. 1; note to Allen v. Sayward, 17 Am. Dec. 224 et seq. That question would become important if those holding under the deed were claiming a title acquired by McNeill after its execution. The principle controlling this case is that which estops the maker of a deed purporting to convey an estate of a particular kind from afterward asserting that such an estate did not pass. McNeill owned the life estate when he made the deed in question, and had full power to convey it then. His deed undertakes to convey the lot itself and full title to it as the property of the estate, without mention or reservation of any claim of his own. Although he assumes to convey as administrator, he assumes as well that the title is in the estate, and he should not be heard afterward to assert that any part of it was in himself. It does not appear that he ever did so claim. While there may be some diversity of opinion on the question, the weight of authority is said to be in favor of the view which we express, and this court has heretofore adopted that view: Corzine's Heirs v. Williams, 85 Tex. 499, 22 S. W. 399; Frisby v. Withers, 61 Tex. 134; 16 Cyc. 712; Brown v. Edson, 23 Vt. 435; Phillips v. Hornsby, 70 Ala. 414; Johnson v. [193] Brauch, 9 S. D. 116, 62 Am. St. Rep. 857, 68 N. W. 173. Many of the reported cases are complicated by questions as to the operation of covenants of warranty upon after-acquired titles, which do not arise here: Allen v. Sayward, 5 Me. 227, 17 Am. Dec. 221.

The limitation put by McNeill upon his covenant of warranty does not attempt to restrict the language whereby he undertook to convey full title to the lot, and does not modify the effect of that language upon the estate then held in his own right. His deed said to the grantee that the property belonged to the estate, and it would be a fraud to permit him afterward to say that it belonged to him, and this is a just reason, aside from the technical learning upon the subject, for holding him bound. It follows that those who thus became invested with the title to his estate for life were rightfully in possession of the land as joint owners until that estate terminated, and that the heirs of Stephen, whose title to the remainder did not pass by the administrator's sale, had

no right of action to recover from them their interest burdened with the life estate so long as the latter existed.

Another objection to the judgment is that the heirs were not required to refund the purchase money paid for the property which went to discharge debts by which their title was encumbered. This equity was pleaded by the defendants, and the principle invoked is well settled by the decisions of this court. Only one need be cited: Halsey v. Jones, 86 Tex. 488, 25 S. W. 696. The court of civil appeals did not apply the principle because it thought the fact relied on was not shown by the evidence. The record shows that in 1877 the administrator made an exhibit to the probate court showing the receipt of moneys including one hundred and fifty dollars as the purchase money of the lot in question, and showing further that after allowing all credits to which the estate was entitled, there remained a large balance due to him. This was approved by the court. From this it plainly appears that after the estate was credited with this purchase money it still owed the administrator. The approval of the exhibit establishes this result, and necessitates the conclusion that the money was applied to the payment of legal charges against the estate. The proof upon the subject is in the same condition as was that in Halsey v. Jones, 86 Tex. 488, 25 S. W. 696. There, the final report of the administrator showed a claim in his favor which was established by the order of the probate court, in payment of which the land in controversy was turned over to him by the order. It was held that the title did not pass, but that the action of the court showed that a debt of the estate was discharged and that the heirs, before recovering the property, must pay that debt with interest. The proceedings here show with quite as much certainty that the purchase money of this land was applied to charges allowed and established by the court. The purchase money was received by the administrator at the date of the sale, but we are of the opinion that interest upon it is chargeable to the heirs only from the time at which it was applied to the payment of charges against the estate. The record does not show any date at which this was done earlier than that at which the [194] exhibit was filed. Interest will therefore be calculated from that date. On the authority of the case referred to the judgment will be reformed so as to allow the plaintiffs below to recover the interest sued for, conditioned upon the paying to the defendants within six months from the date of this judgment the sum of twenty-five dollars

($25), which is one-sixth of the purchase price of the lot ($150), with interest thereon at six per cent from May 24, 1877. The costs of appeal and writ of error will be adjudged against defendants in error.

Reformed and affirmed.

The Question Whether an Administrator is estopped to assert an individual interest in the property after it has been sold under an order of court is discussed in Lindsay v. Cooper, 94 Ala. 170, 33 Am. St. Rep. 105; Johnson v. Brauch, 9 S. D. 116, 62 Am. St. Rep. 857; Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679.

The Estoppel of Heirs to Avoid a Sale made under order of court after they have enjoyed the proceeds thereof is discussed in Mote v. Kleen, 83 Neb. 585, 131 Am. St. Rep. 654; Manternach v. Studt, 240 Ill. 464, 130 Am. St. Rep. 282; Lindsay v. Cooper, 94 Ala. 170, 33 Am. St. Rep. 105.

WILKIN v. OWENS.

[102 Tex. 197, 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425.]

ADMINISTRATOR'S SALE—Ineffectual Description of Land.—Where an administrator's application for a sale describes the land "As all those lots yet unsold, being situated in the county of Hale and state of Texas, and better known as the north half of the town of Plainview, patented to E. L. Lowe, by virtue of the pre-emption laws of the state of Texas"; and the report of the sale describes the property as "Also 7⅝ acres out of the N. E. quarter of E. Lowe pre-emption"; and the order approving the sale contains no description whatever, the sale is ineffectual for failure to describe the land. (p. 869.)

ADMINISTRATOR'S SALE—Estoppel of Heirs to Reclaim Land.—Where a part of the estate of a decedent has been sold at an ineffectual sale, the heirs are not estopped to recover it by the fact that they have received the remainder of the property without protest, nor are they required to pay back the purchase money before recovering the land. (p. 869.)

ADMINISTRATOR'S SALE.—In Order to Assert an Equity of Subrogation in property that has been sold at an administrator's sale, the facts must be pleaded. (p. 869.)

TRESPASS TO TRY TITLE—Facts that may be Shown in Defense.—In an action of trespass to try title, the defendant without a plea may show any fact that will defeat the plaintiff's right to recover. (p. 869.)

ADMINISTRATOR'S SALE—Recovery of Land by Heir—Modification in Supreme Court.—If the property of a decedent is sold by his administrator, and his heir sues for its recovery and judgment is given in his favor, the supreme court may modify the judgment so as to place the recovery on condition that the plaintiff pay the defendant the amount of the bid for the land at the attempted sale and interest thereon to date. (p. 870.)

L. C. Penry, H. C. Randolph and J. C. Randolph, for the plaintiff in error.

Prendergast & Williamson, for the defendants in error.

[198] GAINES, C. J. The court of civil appeals in its first opinion in this case reversed the judgment of the district court and rendered judgment in favor of appellant, but upon motion for rehearing they affirmed the judgment of the court below. The suit was brought by appellant against appellees to recover seven and two-fifths acres of land adjoining the town of Plainview in Hale county, Texas, in an action of trespass to try title. The land was the property of one Lowe, to whom it was granted upon pre-emption certificate. Lowe died leaving two children, Mattie N. and Janie A., the ages being respectively [199] ten and five years. One C. H. Gilbert became the administrator of the estate and applied for an order of sale, describing the property to be sold "as all those lots yet unsold, being situated in the county of Hale and state of Texas, and better known as the north half of the town of Plainview, patented to E. L. Lowe, by virtue of the pre-emption laws of the state of Texas." In the report of sale by the administrator the property is described as follows: "Also 7⅖ acres out of the N. E. quarter of E. Lowe pre-emption." The order approving the sale, dated November 7, 1890, contains no description of the land whatever. The court of civil appeals in their first opinion held that the description of the land was insufficient and that the sale did not pass the title; but in their opinion on motion for rehearing they say: "The administrator filed his final account on February 18, 1893, which report appears never to have been acted upon, and on January 15, 1894, was removed as administrator of the estate on account of his continued absence from the state. No other administrator has ever been appointed, but said Lowe's daughters have taken charge of and disposed of the estate as though the same had been duly closed. In thus accepting what remained of the estate of their father the heirs undoubtedly received the benefits of the proceeds of the sale of the land in controversy. If they did not receive a part of the proceeds as such they at least received property of the estate which otherwise would have been liable for the payment of debts against the estate, and in either event are in no position to seek a recovery of the land. It is not necessary for us to decide whether the conduct of the heirs in passively approving the administration and accepting what remains of the estate amounts to an absolute es-

toppel to recover the land unlawfully sold, or merely imposes upon them the duty of tendering a repayment of the purchase money, since at no time did the plaintiff, who claims by mesne conveyances under them, offer to restore the purchase money."

We concur with the court in holding that the sale was invalid by reason of failure to describe the land, but we cannot assent to the proposition that the grantees of the heirs of Lowe are estopped to assert any claim to it. We see no element of estoppel in the facts of the case. To hold that the heirs are estopped by reason of the fact that they received the remainder of the property without entering any protest we think is untenable, because we cannot see that the fact that the heirs received and disposed of that which was unsold should deprive them of an assertion of a right to that which was illegally sold, nor do we agree with the court in that the property could not be recovered without paying back the purchase money. It is held distinctly in the case of Fuller v. O'Neil, 69 Tex. 349, 5 Am. St. Rep. 59, 6 S. W. 181, that in order to assert an equity of subrogation in property that had been illegally sold the facts must be pleaded. We think this is a correct ruling, and was approved by this court in the case of Crow v. Fidler, 3 Tex. Civ. App. 576, 23 S. W. 17, and in Matthews v. Moses, 21 Tex. Civ. App. 494, 52 S. W. 113, in which applications were made to this court for writs of error and refused: See, also, Black v. Gardner, 63 S. W. 918.

200 The case of Williams v. Wilson, 76 Tex. 69, 13 S. W. 69, is seemingly in conflict with the decision last cited, but in that case the land had been leased for a period of ninety-nine years, which was held by the court to be equivalent to a sale, and therefore void under the law and prohibited by the statute, during the lifetime of the grantee, which authorized the granting of a certificate. In that case the heirs sued directly to set aside the lease, and it was held they could not recover without paying back the purchase money which had been paid for the lease. Since in an action of trespass to try title a defendant without a plea may show any fact that will defeat the plaintiff's right to recover, since in making out their case they showed the lease and the purchase money that was paid for it, they were held not entitled to recover without tendering the consideration shown to have been paid their ancestor for the land. We think that case clearly distinguishable from this, in which the attempt is to subrogate the par-

ties claiming under the purchase to a lien upon the lands for the purchase money on the ground that it had been used in paying the debts of the estate and the heirs had derived the benefit thereof.

We conclude that the plaintiff was entitled to recover the land, and therefore reverse the judgments of the court of civil appeals and district court and here render judgment for plaintiff in error.

ON MOTION FOR REHEARING.

Opinion Delivered January 27, 1909.

Upon a consideration of the motion for rehearing in this case we have reached the conclusion that we were wrong in reversing and rendering the judgment instead of remanding the cause for a new trial. We think the circumstances of the case are such as to demand that the appellee should have an opportunity to amend his pleading so as to claim the money paid the administrator for the land as a condition to its recovery. Accordingly, the judgment is reversed and the cause remanded for a new trial.

ON MOTION FOR REHEARING.

Opinion Filed March 31, 1909.

These are motions for a rehearing, No. 2000, by defendants in error, which urges that the previous decision of this court is radically wrong; No. 2025 is by plaintiff in error, in which it is prayed that the judgment of this court should be rendered for the appellant for the land—conditioned upon his paying to defendants in error the money originally paid the administrator for the land, with legal interest thereon. We are of opinion that No. 2000 should be overruled; and it is accordingly so ordered. No good reason suggests itself to our minds why the prayer of No. 2025 should not be granted. It accomplishes the object for which we had remanded the cause. It is therefore ordered that the motion in this respect be [201] granted and that judgment be here rendered that the plaintiff in error do have and recover of the defendants in error the land in controversy, on condition that he pay defendants in error the amount bid for said land at the attempted sale and interest thereon to this date.

Reversed and rendered.

The Estoppel of Heirs to Avoid a Sale, made under order of court, after they have enjoyed the proceeds thereof, is discussed in Mote v. Kleen, 83 Neb. 585, 131 Am. St. Rep. 654; Manternach v. Studt, 240 Ill. 464, 130 Am. St. Rep. 282; Lindsay v. Cooper, 94 Ala. 170, 33 Am. St. Rep. 105; Wilkins v. Owens, 102 Tex. 197, ante, p. 867.

ROTH v. TRAVELERS' PROTECTIVE ASSOCIATION OF AMERICA.

[102 Tex. 241, 115 S. W. 31.]

BENEFIT INSURANCE—Payment of Dues.—The Mailing of a Check by a member of a beneficial association to the secretary is not a payment of his dues until received by that officer. (p. 872.)

BENEFIT INSURANCE.—When a Word in a Benefit Certificate is susceptible of two constructions, it must be given the one most favorable to the beneficiary. (p. 873.)

BENEFIT INSURANCE—Meaning of the Word "Killed."—If a member of a benefit association falls on the ice while delinquent in his dues, and dies from the effects thereof some weeks later after he has paid his dues and been reinstated, he is not "killed" at the time of the fall, and hence during delinquency, within a provision in the certificate "nor shall his beneficiaries receive anything should he be killed during such period of delinquency." (p. 875.)

BENEFIT INSURANCE—Construction of Policy.—A provision in a benefit certificate "That the Travelers' Protective Association of America shall not be liable in case of injury, disability or death happening to the member while intoxicated or in consequence of his having been under the influence of any narcotic or intoxicant, or disability when caused, wholly or in part, by any bodily or mental infirmity or disease, duelling, fighting, wrestling, war or riot," does not apply in any case of death, but of disability only. (p. 876.)

EVIDENCE—Declarations by Injured Person.—Statements by a person after returning from a pond are admissible to show that he was suffering, but not to show that he fell on the ice and struck his head. (p. 876.)

WITNESS—Leading Questions.—An Interrogatory as to the Condition of a person who was injured by falling on the ice, followed by the further inquiry, "Did he seem sick or stupid?" is objectionable as leading. (p. 877.)

WITNESS—Opinion as to Condition of Injured Person.—Answers to questions calling for the opinion of a witness as to the mental or physical condition of a person after he is injured by falling on the ice are properly stricken out. (pp. 877, 878.)

Capps, Cantey, Hanger & Short and Theodore Mack, for the plaintiff in error.

Coke, Miller & Coke, for the defendant in error.

244 BROWN, J. The defendant in error, which is hereafter styled the association, is a corporation organized under the laws of the state of Missouri and doing business in Texas. The object of forming the association was, among other things, "to provide a benefit fund for members of the association in case of accident or death." The membership consisted of white males who possessed certain qualifications. The funds by which the benefits were to be paid were collected in annual dues of eleven dollars, payable one-half in

advance on January 1st of each year, and the other half on July 1st. Article 9, section 2, of the constitution provides as follows: "Five thousand dollars shall be paid to the beneficiaries named in the certificate of any deceased member in case of death by accident." Jennie Roth, the plaintiff in error and beneficiary in the certificate, was the wife of W. H. Roth, who became a member of the association on the sixteenth day of January, 1895. On the first day of January, 1905, Roth owed five dollars and fifty cents dues to the association, which he failed to pay on that day. At Henryetta, Indian Territory, on the fifteenth day of January, 1905, Roth mailed a check for the amount of his dues to the secretary of the association at Dallas, but it did not reach the secretary until the morning of the 16th. After Roth had mailed his check, and on that day, he, with a friend, went to a pond near Henryetta, which was covered with ice, for the purpose of skating. While they were skating, Roth got a fall on the ice, and it is claimed by the plaintiff in error that he struck his head against the ice in the fall which caused his death as hereafter stated. This is a sharply contested issue. After the fall, Roth got up from the ice and continued his skating for about half an hour, then, with his friend, walked to the town of Henryetta. A short time after this occurred Roth became unwell and made various complaints. He died on the fifth day of March, 1905. For the purposes of this opinion we will assume that Roth died from the accident, as was found by the jury. At the trial before a jury a verdict was given in favor of Mrs. Roth and a judgment was entered accordingly. Upon appeal to the court of civil appeals of the sixth district that judgment was reversed and the cause remanded. The application for a writ of error was granted because the decision of the court of civil appeals practically settles the case.

[245] The court of civil appeals correctly held that the mailing of the check by Roth to the secretary of the association was not a payment of the dues until the check was received by that officer. Roth was not in good standing when he fell on the ice, but was by the payment reinstated on the 16th of January, the next day after he fell, and continued to be a member of the association in good standing until he died.

Section 2 of article 9 of the constitution of the association provides that five thousand dollars shall be paid to the beneficiaries named in the certificate of any deceased member "in case of death by accident." Assuming that Roth died from

the effects of the fall on the ice, Mrs. Roth is entitled to recover in this case unless her claim is defeated by section 1 of article 6 of the constitution, which we here copy:

"The annual dues of this association shall be $11, which shall be apportioned as follows: $1.50 to the Post, $1.50 to the State Division; and where there is no Post, $3 to the State Division; $6 to the benefit or indemnity fund; and $2 to the general expense fund. The above dues shall be due from, and paid by every member annually in advance, or in semi-annual installments, of $5.50 each in advance, on January 1st and July 1st without notice. Any member may pay said dues before they become due as aforesaid, but any member failing to pay said dues in advance on the day on which they become due, as aforesaid, to the secretary of the State Division of which he is a member, shall by such failure cease to be a member of this association, and he and his beneficiary shall cease to be entitled to any benefits under his benefit certificate. Should he, within thirty days after such default pay such dues, he may be reinstated, and receive a new card of membership, but he shall receive no insurance benefits of any kind under his benefit certificate that may have accrued between the date of said default and the date of his reinstatement; and, if injured during the thirty or less days of his delinquency, the delinquent member shall receive no indemnity therefor, nor shall his beneficiaries receive anything should he be killed during such period of delinquency; but after thirty days after such default, he can only again become a member of this Association by making formal application in the manner provided for new members."

This case turns upon the construction of the word "killed," as used in the last quoted section. In seeking the meaning of that word we must bear in mind that if it is susceptible of two constructions, it must be given the interpretation most favorable to the beneficiary: 1 Bacon on Benefit Societies, sec. 179; Goddard v. East Texas Fire Ins. Co., 67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906. We must also look to any other provision of the constitution which will aid in arriving at the meaning of the language under consideration.

The verb "kill" means "to destroy life, animal or vegetable" (Webster's Dictionary). The word "killed," in the section of the constitution above quoted, applied to the facts of this case, refers to the state or condition of Roth, that is, death had resulted from the accident during his delinquency. Under article 6 of the constitution Mrs. Roth cannot recover

if her husband died before he was reinstated. Under the ninth article she can recover if her husband died [246] from the accident. Construing the two in harmony, she can recover if his death by accident occurred at any time while he was in good standing.

The distinction between the words "injured" and "killed" is very clearly made in the clause of the constitution quoted. If it was intended to bar the beneficiary in case death ensued from the injury received during the period of delinquency, it could have been done by saying, "the delinquent member nor his beneficiary shall receive any benefit," but the right of the beneficiary is clearly made dependent upon the result of the injury. The two words cannot mean the same thing.

It is not claimed that Roth's death occurred before his reinstatement to membership in the order, but the defense is rested upon the proposition that the word "killed," as used in that connection, referred to the accident or the cause of the death; that is, when Roth fell upon the ice he was "killed" within the meaning of that word as used in article 6 of the constitution, although he lived six weeks thereafter. In support of the claim that this is the meaning of the word, the honorable court of civil appeals cites the following two cases from the supreme court of Mississippi: Martin v. Copiah County, 71 Miss. 407, 15 South. 73; Newton County v. Doolittle, 72 Miss. 929, 18 South. 451. In each of the cases cited a wound had been inflicted upon a person in one county who died in a different county. The suit was to recover a reward which was allowed by statute for the arrest of "anyone who had killed another and is fleeing or attempting to flee before an arrest, to be paid by the county in which the homicide occurred." The question in each case was whether the county where the wound was inflicted was liable for the reward, or another county in which the death occurred, and in each case the supreme court of Mississippi held that the county in which the wound was inflicted was liable for the reward. In the first case cited above the court used this language: "The question now presented is, whether, for the reward, the person killing may be said to have killed another when the mortal blow is struck of which the person soon dies, although death does not occur until after the arrest of the fugitive who gave the mortal wound. The manifest purpose of the act giving a reward is to incite to the arrest of fleeing homicides and secure them for trial; and an interpretation of the statute which requires that the victim of a mortal

wound shall be actually dead before arrest, to entitle to the reward is too literal, and would exclude cases which fall clearly within the spirit and purpose of the law." The court, in seeking the intention of the legislature, properly looked to the purpose for which the law was enacted, and accordingly held that the man who inflicted a mortal wound from which death followed, within the meaning of the law, killed the deceased in that county; therefore, the county in which the wound was inflicted ought to pay the reward. There seems to be another sound reason for that construction—that is, that the county in which lawlessness occurred should be responsible for the expense of arrest and trial of the party who committed the crime. In those cases the word "killed" was interpreted to refer to the act which caused the death, the blow or shot constituted the criminal act, the [247] result fixed the degree of the crime and punishment; but in the sixth article of the constitution of the association the word "killed" definitely refers to the result of the accident—that is, if the member should die while a delinquent the beneficiary could not recover. We are of opinion that the court of civil appeals erred in holding that the word "killed," as used in that article, referred to the accident from which the death ensued, and in holding that Mrs. Roth was not entitled to recover because the accident which caused the death happened while Roth was a delinquent.

The trial judge submitted this cause to the jury on the theory that the plaintiff was entitled to recover only in case she established the following facts: (1) That her husband was at the time of his death a member in good standing of the Travelers' Protective Association of America, and (2) that his death was caused by his falling accidentally upon ice and striking his head thereon, and that the accident alone caused his death. The defendant in error challenges the correctness of the charges given by the court, contending that the right of the plaintiff depended upon whether Roth was a member in good standing at the time the accident occurred. We do not find it necessary to discuss this question here, for the reason that it is fully disposed of in our opinion upon the main issue. There was no material error committed by the court against the defendant in the charges complained of.

The court was requested to instruct the jury to return a verdict for the defendant. The evidence was sufficient to raise the issues upon which plaintiff's right to recover depends; therefore, the charge was properly refused.

By the seventh assignment of error defendant in error complains of the refusal of the court to give the following charge requested by it: "Gentlemen of the jury, if you believe from the evidence that the blood clot in Roth's ventricle was caused wholly or in part by any bodily infirmity or disease, then the defendant is not liable, and you should return a verdict for defendant." The court distinctly charged the jury that the death of Roth must have been caused alone by the accident of falling and striking his head upon the ice, which was more favorable to defendant than the facts justified. In view of another trial we will say that this language, "That the Travelers' Protective Association of America shall not be liable in case of injury, disability or death happening to the member while intoxicated or in consequence of his having been under the influence of any narcotic or intoxicant, or disability when caused, wholly or in part, by any bodily or mental infirmity or disease, duelling, fighting, wrestling, war or riot," does not apply to a case of death, but of disability only: there is no ambiguity in the terms used in the rule indorsed on the certificate.

The defendant in error has presented many objections to the evidence admitted by the court, of which we will discuss only such as will arise on another trial.

The plaintiff took the deposition of J. W. Sullens, who met White and Roth on the streets of Henryetta as the latter were returning from the pond where they had been skating. In answer to an interrogatory [248] the witness detailed statements made by White and Roth with reference to the latter's fall on the ice, all of which we hold to be inadmissible, because it was hearsay, except that which states the action of Roth in placing his hand to his head, which might be admitted with the accompanying statement, "it hurt my head and made it ache," being limited to proof of the fact that his head ached at the time he was speaking, but not to be considered as evidence to establish the fact of the fall or of striking his head on the ice.

Mrs. H. C. Embree kept a boarding-house and Roth boarded with her. Plaintiff took her deposition, to which there were many objections by defendant. The following question was propounded to her: "4-c-Q. State how his [Roth's] appearance was after the time that he is said to have fallen on the ice, whether he was right mentally and physically. Did he seem to be sick or stupid, or was there any difference in his appearance and in his conduct after the time he is said to

have fallen on the ice and previous to that time?" to which the witness answered: "Mr. Roth was not right. He did not step any more like he had, his steps were slow, and he lost his cheerfulness. There was all the difference in the world in his manner after he had had the fall. He was stupid and was never well any more in my house." Objection was made to a part of the interrogatory because it was leading, that is, the following: "Did he seem to be sick or stupid?" We are of the opinion that the objection was well taken and that this portion of the interrogatory was leading and suggested the answer to the witness.

The following portions of the answer copied above should have been stricken out, first: "Mr. Roth was not right. He did not step any more like he had." This was the opinion of the witness; she did not state any symptom observed by her. Also the following: "There was all the difference in the world in his manner after he had had the fall," and, "he was stupid and never well any more in my house." The statement that he was stupid should have been stricken out because it was in answer to a leading question, and the remainder was matter of opinion. Question 5-b-Q propounded by the plaintiff to Mrs. Embree reads: "State how his appearance was during the entire time, from the time he was hurt until the time of his death, and how his conduct then compared with his condition before said fall. State if he made any complaints up until the time of his death, and if so, what such complaints were. State what his general appearance was"; to which she answered: "Mr. Roth was on a gradual decline after he got the fall on the ice, and I don't think he improved any after he fell on the ice up to the time of his death. Mr. Roth was not the hearty man and did not enjoy his meals as he had heretofore. He was not so talkative as he had been. Mr. Roth complained each day which he was with me, and said that he was feeling badly, and told me that his head hurt him. After he was taken to his bed I visited him several times and I noticed a marked difference in his appearance. The first I saw him after he had taken to his bed he was partially paralyzed. He seemed to be on a gradual decline after he got the fall." The defendant objected to and moved to [249] strike out the following portion of the answer: "Mr. Roth was on a gradual decline after he got the fall on the ice and I don't think he improved any after he fell on the ice up to the time of his death." The answer was the opinion of the witness, not

facts; it should have been excluded. The following portion of the answer was admissible: "He was not so talkative as he had been. Mr. Roth complained each day while he was with me and said he was feeling badly and told me that his head hurt him."

The defendant propounded to the witness Mrs. Embree the following question: "Is it not a fact that, as far as you observed, Mr. Roth's mental condition after the date of his alleged fall, until about February 1st, was the same as it had theretofore been? And is it not a fact that you never noticed any material change in his mental or physical condition until in February, after his return from a trip on the road, and a short time before he became partially paralyzed?" to which she answered: "Mr. Roth didn't talk as much as he had and did not seem as cheerful. There was a change in his physical condition from the time he was hurt. I think that he began to go down from the time he got the fall. I can't remember date, and I can't say about the trips he made." Objection was made to the following portion of the answer: "There was a change in his physical condition from the time he was hurt. I think that he began to go down from the time he got the fall." This was an opinion of the witness and should have been excluded. Plaintiff propounded the following question to the witness, R. J. Dickson: "Please state what was the apparent condition of said Roth's health when you saw him at Weleetka, on January 24, 1905, if you have answered that you saw him on that date? Did he seem to be in good health or in ill health? Did you have any conversation with him at that time? If you did, did he make any complaint about his health or concerning his health?" to which the witness answered: "I could not discover from his appearance on this occasion that he was in ill health, but he complained of severe pains in his head; but on a subsequent visit to Weleetka, about ten days later, at my office, his face was somewhat drawn to one side, and he was unable to articulate or talk coherently. This attack lasted about half an hour, during which time I administered to his needs with a stimulant. He remained in my office about two hours on the morning of this occasion, from about 8 o'clock to about 10 o'clock, going from my office to the Weleetka Cotton Oil Company's office, where he solicited for the sale of some coal, and from there he returned to Henryetta on the noon train; this was on Friday." The defendant moved to exclude all that part of the answer following the

words, "But on a subsequent visit to Weleetka," because it was not responsive to the question. The motion should have been sustained. The question gave no notice to defendant of an intention to use as evidence what occurred at a time different to that named.

It is ordered that this cause be remanded to the district court.

Reversed and remanded.

Having Indemnity for Its Object, a Policy of Insurance is to be construed liberally to that end, and for this reason conditions and provisos are construed strictly against the insurer: Jennings v. Brotherhood Accident Co., 44 Colo. 68, 130 Am. St. Rep. 109; Bader v. New Amsterdam Casualty Co., 102 Minn. 186, 120 Am. St. Rep. 613; Welch v. British-American Assur. Co., 148 Cal. 223, 113 Am. St. Rep. 223; Pacific Mutual Life Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862; Aetna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 112 Am. St. Rep. 232. In construing policies, all doubts are resolved in favor of the insured: Jones v. Casualty Co., 140 N. C. 262, 111 Am. St. Rep. 843. An exception of uncertain import must be construed most strongly against the insurer: Furry's Admr. v. General Accident Ins. Co., 80 Vt. 526, 130 Am. St. Rep. 1012.

The Failure of the Insured to Make Payment of Premiums according to the conditions of his policy ipso facto forfeits all his rights thereunder, according to Pacific Mutual Life Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862, so that if the policy is subsequently reinstated with the consent of the insurer, it becomes a new contract as if then for the first time issued.

HAYWORTH v. WILLIAMS.

[102 Tex. 308, 116 S. W. 43.]

ADVERSE POSSESSION Between Parties to Illegal Marriage. Where a marriage is illegal, a claim by the woman as wife to land through a deed by which title was conveyed to the man will not ripen into title in her by adverse possession. (p. 882.)

PROBATE HOMESTEAD — Children Entitled to Claim — Illegitimates.—A statute providing for the setting apart of a homestead for the "benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased," is for the benefit of legitimate children only, and cannot be invoked by an illegitimate widowed daughter remaining with the family. (p. 883.)

VOID MARRIAGE—Property Rights of Woman.—Where land is conveyed to a man illegally married, but the woman has contributed to the purchase by producing a portion of the money by her labor or by working together with him for the common purpose, she is entitled to a share in the property in proportion to what she has contributed. (p. 884.)

Stuart & Bell, for the appellant.

Green & Blanton and Potter & Culp, for the appellee.

[310] BROWN, J. Certified question from the court of civil appeals of the second district, as follows:

"The above-styled cause is now pending before us on a motion for rehearing. The opinion rendered by us on the original hearing will accompany this certificate, and is made a part of it. The members of this court are agreed upon the ground of reversal upon which the cause was originally reversed, but are not agreed as to the legal sufficiency of the evidence to support appellee Margreth's plea of limitation against the deceased, Thomas Jefferson, or even to authorize the submission of such issue should the evidence be the same on another trial.

"We therefore certify to your honors for decision whether or not (a) the evidence contained in the record, which appears to be undisputed, raises the issue of title by limitations of ten years in favor of appellee Margreth Williams as against the deceased Thomas Jefferson, or (b) if not identical with the above, is the evidence legally sufficient to support a finding in her favor on such issue?

"The opinion referred to will also disclose that we held it to be error in the trial court to exclude evidence tendered by appellee Nettie Maloy, tending to show that she was an unmarried daughter living with the family of the deceased at the time of his death, upon which she based [311] her claim to the property in controversy as a homestead as a surviving constituent of her father's family. It is insisted on this motion that since Mrs. Maloy, she being a widow, is the illegitimate daughter of Thomas Jefferson and appellee Margreth, and therefore not entitled to inherit from her father, she is also not within the statute (Sayles' Texas Civil Statutes, article 2046) making it the duty of the probate court "to set apart, for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, the exempt property of the estate." While we understand it to be settled, as contended by appellant in this motion, that where the only surviving constituent of a deceased's family is an unmarried daughter, her rights as such surviving constituent are subordinate to the right of the heirs to a partition of the homestead (White v. Small, 22 Tex. Civ. App. 318, 54 S. W. 915, writ refused), and while it appears that the deceased Thomas Jefferson left surviving him no minor

children to claim the homestead, we nevertheless yet believe we were correct in our holding, since the question before us was not one involving the rights of the heirs to a partition, but rather, whether or not the appellant, temporary administrator of the estate, would be entitled to recover the homestead as against the rights of a surviving unmarried daughter living with deceased's family at the time of his death. In view of the novelty of the question and of the reversal of the case, we deem it advisable to certify to your honors whether or not we erred in this holding.

"It is also earnestly insisted that we erred in holding that, on another trial, if the evidence showed that the property was acquired by money accumulated and earned by the joint efforts of the appellee Margreth and the deceased Thomas, she would be entitled to one-half of the property. It is insisted, though erroneously, we think, that we are in conflict with the decision of the court of civil appeals for the first district in the case of Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246, wherein a writ was refused by your honors, and that that decision is decisive of appellees' rights in the land in controversy. In the Lawson case, as we understand it, Mrs. Lawson's rights were accorded to her upon the express finding that she had innocently entered into the marriage relation with her husband, believing the same to be lawful, and therefore the question of what her property rights would have been had she been cognizant of their illicit relations was not before the court. The contention of appellant in effect is that our holding in this respect is tantamount to an enforcement by the courts of an illegal contract between deceased and appellee Margreth by recognizing her property rights in the property acquired during their joint lives. But we thought, and still think, that this wholesome principle of law is not violated by such holding, inasmuch as her rights under our holding are predicated upon the equitable grounds that her individual funds or earnings entered into the acquisition, and not that her rights are in any sense those of a lawful wife. In other words, that the case would be no different if she were a man, and had contributed funds toward the acquisition of the property taken in the name of another. To accord her such rights appears to us to be in keeping with the dictates of common honesty, and in nowise to involve the enforcement of an illegal contract. The case of Chapman
312 v. Chapman, 16 Tex. Civ. App. 382, 41 S. W. 533, cited

as authority for the holding in Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246, recognized such a rule, and adjusted the property rights of the man and woman with reference to it. But in view of the insistence of counsel, and of the novelty of the question, we also certify to your honors whether or not we erred in this last holding."

The court of civil appeals has submitted three questions, which, for convenience, we formulate as follows:

First question: Did the evidence in the record raise the issue of ten years limitation in favor of Margreth Williams against Thomas Jefferson?

Briefly, the evidence bearing upon this question is as follows: In 1859 Thomas Jefferson, being then a married man and living in the state of Pennsylvania, entered into a marriage, in form, with Margreth Williams, who, at the time, knew that Jefferson was a married man, he having a living wife. Subsequently Jefferson and Margreth Williams removed from Pennsylvania to the city of New Orleans, Louisiana, where they remained until 1880, when Jefferson, with Margreth and their children, removed to Cooke county, Texas, and he bought the land in controversy in this suit. The land was deeded to Jefferson for a recited cash consideration, paid at the time. In a short time after the purchase Jefferson, with Margreth and their illegitimate children, moved upon the land, where he remained with them but a few months and then returned to New Orleans. Margreth Williams, with her children, remained upon the land, cultivating same and improving it by building fences, etc., during which time she claimed the land as her own, and claimed to be the wife of Thomas Jefferson. She says that she claimed the land because she was the wife of Thomas Jefferson. Margreth Williams and her children resided upon the land until this suit was brought on the ninth day of September, 1905. Thomas Jefferson returned to the place at intervals, sometimes would be gone for a number of years at a time. On the occasions of his visits he would remain with them but a very short time, when he would return to New Orleans. Thomas Jefferson brought a suit against Margreth Williams for divorce, claiming that she was his wife, but subsequently dismissed that suit. He instituted this suit for the purpose of recovering the land, and during the pendency of it he died. Appellant was appointed temporary administrator and made a party to the suit.

In order for the statute of limitation of ten years to be effective in favor of Margreth Williams it was necessary that she should have claimed the title to the land adversely to Thomas Jefferson, in whom the title was. Her claim to the land as his wife through the deed by which title was conveyed to him was not such adverse possession as would confer a right upon her. We therefore answer that the evidence was not sufficient to raise the issue of limitation in favor of Margreth Williams.

Second question: Was Mrs. Maloy entitled to have the homestead set apart to her as an unmarried daughter of Thomas Jefferson, remaining with his family at his death?

Mrs. Maloy was an illegitimate child of Thomas Jefferson and [313] Margreth Williams; she was a widow, living with her mother at the time of Thomas Jefferson's death.

Article 16, section 52, of the constitution does not secure to the unmarried daughter of the deceased a right to occupy the homestead after her father's death. Mrs. Maloy's right, if she has any, depends upon the construction of the following article of the Revised Statutes: "Art. 2046. At the first term of the court after an inventory, appraisement and list of claims have been returned, it shall be the duty of the court, by an order entered upon the minutes, to set apart for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, all such property of the estate as may be exempt from execution or forced sale by the constitution and laws of the state, with the exception of any exemption of one year's supply of provisions."

The question propounded depends upon the meaning of the words, "unmarried daughters," as used in the statute. It will be observed that the article last copied mentions the widow and minor children and unmarried daughters remaining with the family as the persons for whose use the homestead may be set aside. It is evident that "widow," as used in that article, refers to the surviving lawful wife of the deceased, and would not embrace Margreth Williams. The "minor children and unmarried daughters" might be the children of the surviving widow, or of a former wife, but they must be the legitimate children of the deceased. The common law governs in regard to the relation of bastards to their fathers, and does not recognize any right in the bastard to any interest in the father's estate.

ST. PAUL'S SANITARIUM v. FREEMAN.

[102 Tex. 376, 117 S. W. 425.]

WILLS—Life Estate and Contingent Remainder.—Where by one clause of his will the testator bequeaths F. all his property, and in the following clause declares that if F. "shall die without issue, then it is my will and desire that all of my said property willed as aforesaid be given" to a specified charity, F. is not entitled to the property in fee simple, but if he dies at any time without issue the limitation over to the charity takes effect. (pp. 887, 888.)

Wm. P. Ellison, for the plaintiff in error.

Geo. A. Titterington, for the defendant in error.

376 GAINES, C. J. On the eighth day of November, 1901, Julian Reverchon made his will, in the second and third clauses of which he provided as follows:

377 "Second. I give and bequeath to Robert M. Freeman, of Dallas County, Texas, all my property, real and personal and mixed, that I may own and be possessed of at the time of my death."

"Third. It is my will and desire that in the event the said Robert M. Freeman shall die without issue then it is my will and desire that all of my said property willed as aforesaid be given to Saint Vincent de Paul Institution or order, for the benefit of the sick Sisters of that Order in Dallas County, Texas."

In the fourth clause he nominated Freeman as his executor without bond. Reverchon having died and his will having been admitted to probate, Freeman, never being married, brought this action to have the will construed and to determine the question whether he is entitled to a fee simple in the devised property, or whether the estate he holds therein is subject to be defeated by his death without issue. The trial court held that Freeman was entitled to the property in fee simple and gave judgment accordingly. The court of civil appeals affirmed the judgment of the trial court.

In Jarman on Wills it is laid down: "Hence it has become an established rule that where the bequest is simply to A. and in case of his death, or if he die, to B, A, surviving the testator, takes absolutely": 2 Jarman on Wills, p. 690. The reasons for this rule are variously stated. One is that death is a certain event, and that if death at any time be meant, there is no contingency about it, and therefore, in order to make the death contingent, it is construed to be a death before that of the testator. Another reason ascribed for the

rule is that the law favors the vesting of estates, and hence if the construction be that the death meant is a death before that of the testator, the estate vests upon the survivorship of the legatee over that of the testator. But in every case the law looks diligently to the context of the will, and if there be any words in the will that indicate, though slightly, that it was not the intention of the testator to vest the estate, they will be given that effect.

In the present case the second clause of the will gives to the defendant in error all the testator's property that he may own at the time of his death. This, however, is qualified by the third clause, which prescribes that it is his will and desire that in the event the said Robert M. Freeman shall die without issue, then that all of his property willed as aforesaid be given to Saint Vincent de Paul Institution or order, for the benefit of the sick sisters of that order in Dallas county, Texas. Now, dying without issue is no certain event. Freeman may die without issue or he may not. It follows that the first ground for holding that in case of a will that gives to the first taker a fee simple title to land, with a gift over to a third party in case of the death of the first taker, has no applicability to the present case. Nor do we see that the second ground is applicable to the present question. There is no language in the will which indicates that the testator had in mind the probability that Freeman would not outlive him. On the contrary, the fact that Freeman is nominated as the sole executor of the will strongly evinces that it was contemplated that Freeman would probably survive him.

We recognize the fact that upon this question there is a decided [378] conflict of authority. It seems to us that this conflict is settled in England by the case of O'Mahoney v. Burdett, L. R. 7 H. L. 388, in which it is held that "a bequest to A, and if he shall die unmarried or without children to B, is an absolute gift to A, defeasible by an executory gift over in the event of A dying at any time unmarried or without children." In the American courts the cases which hold the contrary doctrine are quite numerous. On the other hand, there is a very respectable array of American authority which holds in accordance with O'Mahoney v. Burdett, L. R. 7 H. L. 388. In Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. Rep. 291, 28 L. ed. 816, Mr. Justice Gray says: "It is equally clear that upon her death under age and without issue, then living, her estate in fee was defeated by the executory devise over. When indeed a devise is made to one person

in fee, and "in case of his death" to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime: 2 Jarman on Wills, c. 48; Briggs v. Shaw, 9 Allen, 516; Lord Cairns in O'Mahoney v. Burdett, L. R. 7 H. L. 388. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator: O'Mahoney v. Burdett, L. R. 7 H. L. 388; 2 Jarman on Wills, c. 49." And the decision of the case was in accordance with the principles so announced. This decision has been cited and followed in Summers v. Smith, 127 Ill. 645, 21 N. E. 191, in Smith v. Kimbell, 153 Ill. 368, 38 N. E. 1029, in Matter of New York etc. Ry. Co., 105 N. Y. 89, 59 Am. Rep. 478, 11 N. E. 492, and in Shadden v. Hembree, 17 Or. 14, 18 Pac. 572.

To the same effect is Parish's Heirs v. Ferris, 6 Ohio St. 563; Moore v. Moore, 12 B. Mon. 651; Daniel v. Thomson, 14 B. Mon. 662, to which others might be added.

It follows that in our opinion the death without lawful issue referred to in the clause of the will means the death of Freeman at any time and not his death before that of the testator. Accordingly, the judgments of the trial court and that of the court of civil appeals are reversed, and judgment is here rendered that should Freeman die at any time without issue, the limitation over to the St. Vincent de Paul Institution shall take effect.

The First Taker in a Will is Presumed to be the Favorite of the testator, and the tendency is to adopt such a construction as will give an estate of inheritance to the first donee: Platt v. Brannan, 34 Colo. 125, 114 Am. St. Rep. 147; Allen v. Hirlinger, 219 Pa. 56, 123 Am. St. Rep. 617. But of course a devise in fee may be restricted by subsequent words in a will and change an estate for life: Hill v. Gianelli, 221 Ill. 286, 112 Am. St. Rep. 182. Where a will devises real estate to a person for life, with remainder over to his issue, and provides that if he should leave no issue, the remainder over shall go to the testator's grandchildren living at the time of the devisee's death, this limits his interest to his life: Steele v. Korn, 137 Wis. 51, 129 Am. St. Rep. 1051. But see King v. Frick, 135 Pa. 575, 20 Am. St. Rep. 889. A devise of all property by the testator to his son, with a provision that what remains at the latter's death shall go to other specified persons, does not cut down the son's interest to an estate for life pure and simple, nor a life estate with a power of disposal: Galligan v. McDonald, 200 Mass. 299, 128 Am. St. Rep. 421, and see the cases cited in the cross-reference note thereto.

KALTEYER v. MITCHELL.

[102 Tex. 390, 117 S. W. 792.]

ALTERATION OF INSTRUMENT—Presumption and Burden of Proof.—Where the plaintiff relies upon a deed of trust which appears on its face to have been altered, he has the burden of showing that the alteration was made before the instrument was signed. (p. 891.)

NEW TRIAL—Misconduct of Jury.—The Court does not Abuse Its Discretion in refusing a new trial on the ground of misconduct of the jury in agreeing that a majority vote shall control their verdict, where the testimony of the jurors in regard to such agreement and its influence is not convincing. (p. 891.)

R. B. Minor and Aug. E. Altgelt, for the plaintiffs in error.

Henry Verner and Joseph Ryan, for the defendants in error.

[391] GAINES, C. J. This action was instituted August 25, 1904, by plaintiffs in error upon a promissory note for eight hundred dollars given by Wallace Mitchell and Mattie Mitchell to George A. Schoenert, purporting to be for a part of the purchase money of a certain lot, payable December 23, 1897. The plaintiffs also pleaded that on the twenty-third day of December, 1901, the said Wallace Mitchell and Mattie Mitchell, in order to secure said lien, executed to George C. Altgelt a deed in trust upon the said property empowering him, in default of the payment of said note on or before the 23d of December, 1903 (to which time the payment had been extended in said instrument), to sell the property for the payment of the amount. The defendants answered, among other things, the statute of limitations of four years to the note; and that the words in said deed of trust "the payment of which said [392] note has been extended for two years from December 23, 1901, all interest to that date having been paid and the rate of interest reduced to seven per cent" were not in the deed of trust when it was signed by them, nor were they afterward inserted by their knowledge or consent; but after the signing and delivery of said instrument were inserted by another person for the purpose of making it appear that the note secured thereby was not barred by the statute of limitations. This answer was sworn to by Wallace Mitchell and Mattie Mitchell.

The case was submitted to the jury upon special issues. The first issue submitted to the jury was as follows: "Were the following interlineations—'the payment of which note had been extended for two years from December 23, 1901, all

interest to that date having been paid and the rate of interest reduced to seven per cent'—written into the deed of trust which had been introduced in evidence before the same was signed and acknowledged? Answer they were, or they were not." Upon this issue the court gave the following instruction: "You are instructed that the burden of proof is upon plaintiffs to establish by a preponderance of the testimony, that the pen interlineations in the deed of trust introduced in evidence were made before the said deed of trust was signed and acknowledged by the defendants." It was for the giving of this charge that we granted the writ of error; but are now of the opinion that the charge was correct. In Wells v. Moore, 15 Tex. 521, and in Muckleroy v. Bethany, 27 Tex. 551, it was held that upon a similar issue the burden was upon the defendants. But in the former case the issue was whether the penalty of a bond "eight thousand dollars" had been inserted before or after the bond was signed. We have examined the transcript of the case and find nothing to show that the alleged insertion was apparent upon the face of the instrument. The same may be said of Muckleroy v. Bethany, 27 Tex. 551. In that case the question was whether a seal had been added to the names of the makers of the note. We find nothing in the transcript to show that the alleged alteration appeared upon the face of the paper. So we may dismiss these two cases from further consideration, there being nothing in either transcript to show that the alleged alteration was apparent. On the other hand, it is expressly held in Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 296, and in De Wees v. Bluntzer, 70 Tex. 406, 7 S. W. 820, that a party who offers an instrument which appears upon its face to have been altered is bound to account for the alteration: See, also, Park v. Glover's Heirs, 23 Tex. 469, and Howell v. Hanrick, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611. We cannot hold that the burden of showing that the alteration was made after the instrument was signed by the parties was upon the defendants without overruling these later decisions. There is a conflict of authority upon the question, but the weight of it, as we think, is in accordance with the later decisions of this court.

We incline to think that the plea of homestead against which was sustained the exception as complained of in the first assignment of error was not good, as is intimated by the court of civil appeals in its opinion; but if the note was barred by limitation, as it clearly was, and if the inserted

words found in the deed of trust were written after [393] the signing of that instrument, without the knowledge or consent of the defendants, then the note remained barred, and we fail to see that the failure of the trial court to strike out the allegations as to the homestead could have operated to the prejudice of the plaintiffs upon that issue.

In regard to the question of the misconduct of the jury: One of the jurors, upon whose testimony it was proposed to get a new trial for misconduct of the jury, swore that it was agreed to take a vote, and that as a majority should vote, so should be their verdict, that upon taking a ballot a majority voted for the defendants and that by reason of such ballot a verdict was rendered for the defendants. Another juror (there were but two examined) testified that when the jury retired they agreed to take a ballot, but declined to say that they agreed to be governed by the ballot; that the ballot was taken and that they afterward passed upon the special issues, but he again declined to say that any juror's vote was influenced by the ballot taken. The statute provides that "if the misconduct proven, or the testimony received, or the communication made, be material, a new trial may, in the discretion of the court, be granted": Laws 1905, p. 21. We cannot say that the action of the court in refusing a new trial shows such an absence of discretion as to authorize us to hold that it was error.

The other assignments of error in the case, though not discussed in this opinion, we think were correctly overruled by the court of civil appeals.

Finding no error in the judgment, it is affirmed.

Presumptions and Burden of Proof in Case of the Alteration of a written instrument are discussed in the note to Burgess v. Blake, 86 Am. St. Rep. 128–134.

EVANTS v. FUQUA.

[102 Tex. 430, 118 S. W. 132.]

REAL ESTATE BROKER—Contract in Excess of Authority—Commission.—Where an agent to sell land exceeds his authority by inserting in the contract of sale a stipulation that the vendor shall forfeit fifty dollars for each day's failure to make a deed after a specified date, the principal is not bound by the contract, and the broker cannot recover commissions. (pp. 893, 894.)

R. W. Hall, George W. Barcus and Reeder, Graham & Williams, for the plaintiffs in error.

Turner & Boyce and John P. Slaton, for the defendant in error Ferguson.

Madden & Truelove and W. D. Wilson, for the defendant in error Fuqua.

430 GAINES, C. J. This is an action by Evants and James P. Hagler to recover of defendants, Ferguson & Fuqua, $72,000 for procuring a purchaser of seventy-two thousand acres of land alleged to belong to defendants. The plaintiffs alleged that they were employed and authorized by Ferguson to sell seventy-two thousand acres of land owned by him and his codefendant Fuqua at a price of $3.50 per acre net to the vendor, and that they were to have for their compensation all in excess of that sum for procuring the purchaser; and that in pursuance of the power conferred 431 upon them by the contract, they procured a purchaser of the land at $4.50 per acre for the land and entered into a contract with him therefor. To the petition the defendants, among other defenses, pleaded a general denial.

Upon conclusion of the evidence the court instructed a verdict for the defendants.

The plaintiffs proved a contract in writing authorizing them to make the sale at $3.50 per acre for the entire tract or tracts of land, and proved by parol that they were authorized to sell on a credit over $40,000 to $100,000, the balance to be paid in notes running for ten years and to bear six per cent interest. When the terms of the sale were agreed upon with the proposed purchaser they were put in writing and signed by the parties, Evants and Hagler signing for the proposed vendor, and John S. Hagler signing for himself. That contract contained the following stipulations: "It is further agreed by the said Jno. E. Ferguson et al. that in the event the said John S. Hagler makes and deposits with

the First National Bank, heretofore referred to, the said sum of $10,000 as a part of the purchase money of said seventy-two acres of land in said Bailey county, Texas, and in the event the said Jno. E. Ferguson et al. do not by themselves or through their agents or attorneys in fact, execute and deliver to the said John S. Hagler a good and sufficient title and deed of conveyance to said land, duly and properly signed and acknowledged, for him and in his behalf, through the said bank, within or before the expiration of the said sixty days hereinbefore mentioned, then the said John S. Hagler is hereby empowered, and we hereby agree that he may take down, take from, receive and withdraw from said bank the said sum of $10,000 so deposited by him with said bank as a part of the purchase money on said land, together with all vendor's lien notes that he may have executed therefor and deposited with said bank, and the same shall be considered of no further force and effect against him, and we hereby release him from all further obligations for the purchase money for said land or damages from the nonperformance of said contract of purchase; and we furthermore agree with the said John S. Hagler to forfeit and pay to him, his heirs, executors, administrators or assigns, the sum of $50 per day for each and every day after the expiration of the sixty days hereinbefore mentioned, as liquidated damages for the nonperformance of said contract of sale on the part of the said Jno. E. Ferguson et al. and the failure on our part to make, execute and deliver to him a deed of conveyance in writing and a good and sufficient title to all of the land hereinbefore referred to. And we, the said Jno. E. Ferguson et al., do hereby give and guarantee unto the said Jno. S. Hagler, his heirs, executors, administrators or assigns, a lien upon the seventy-two thousand acres, just before referred to, as a security for the payment on our part to the said Jno. S. Hagler of all liquidated damages agreed to be paid to him, and provided for in this contract, should we fail to carry out and perform this contract for any reason whatsoever." There is no claim that Evants and Hagler were empowered by the agency contract to make such a stipulation as the above; indeed, one of the agents testified [432] that they had no authority for that action. But it is insisted that the proposed purchaser was not bound to insist upon that stipulation; that he might waive it and hold the proposed vendors to such of the terms of the agreement as they were authorized to make. But we do not concur in this view. The purpose

of the contract between Evants and Hagler, as agents of Ferguson, and Jno. S. Hagler, as purchaser of the land, was to evince their acceptance of the proposition made by the vendors, and when he accepted in part and wrote into the contract the onerous stipulation set out above, it was not the contract of the vendors. They were not bound by the contract. It amounted to no more than a counter-proposal which they could accept or reject, as they saw fit. It was a departure from the contract they authorized their agents to make and they were not bound by it.

It is insisted that Hagler had the right to release Ferguson from the stipulation. This may be so, if he had gone about it in the right way—that is, by releasing the contract as executed and executing a new one with this stipulation left out. But this he did not do. The agents set out the contract in their petition and pray to recover compensation for making it. It is the foundation for their action. It was Ferguson's right to say to him, if you desire to accept the contract of my agents, do so according to the terms they are entitled to make, but do not insert in it any terms which they are not authorized to grant.

Because the plaintiffs were not authorized to make the contract which is declared upon in this case, we hold that they cannot recover compensation for making it.

Having examined the other assignments of errors and finding none the determination of which should have changed the result of the suit, the judgment of the court of civil appeals is affirmed.

A Broker is not Entitled to Commissions where he negotiates a contract at variance with the one which he is authorized to make: Cadigan v. Crabtree, 179 Mass. 474, 88 Am. St. Rep. 397; except where the principal approves and ratifies the transaction: Gelatt v. Ridge, 117 Mo. 553, 38 Am. St. Rep. 683.

HAGLER v. FERGUSON.

[102 Tex. 432, 118 S. W. 433.]

SPECIFIC PERFORMANCE—Contract in Excess of Broker's Authority.—Where an agent to sell land exceeds his authority by stipulating that his principal shall pay fifty dollars for every day he fails to make a deed after a specified date, the contract is invalid, and the vendee is not entitled to specific performance although he waives the unauthorized stipulation. (p. 895.)

Reeder, Graham & Williams, for the plaintiff in error.

Turner & Boyce, Madden & Truelove, A. B. Martin and W. D. Wilson, for the defendant in error.

433 GAINES, C. J. This is a companion case to that of Evants & Hagler v. Ferguson et al., this day decided by us, (102 Tex. 430, ante, p. 892, 118 S. W. 132). That case was a suit for commissions for a sale of seventy-two thousand acres of land alleged to have been made for plaintiffs by the defendants. This is a suit by John S. Hagler, the alleged purchaser at that sale, to enforce a specific performance of the terms of that sale. After the evidence was introduced the trial judge instructed a verdict for the defendant, which was accordingly returned and made the basis of a judgment for that party.

The two cases were tried in different counties and not before the same judge. It seems to us that the facts in the two cases were substantially the same. This suit is to enforce the contract which was made in the former case; and since we have held that, because that contract was unauthorized by the principal, in the former case the agents could not recover, we think it follows that it will not support a finding of a contract for the sale of the land. It is true that the alleged purchaser, John S. Hagler, may be willing to forego the stipulation that Ferguson was to pay him fifty dollars a day for every day that he fails after a certain time to execute a deed for the land, but the answer to the suggestion is that he did not so contract. The contract by an agent for the sale of land must be such as either party can enforce strictly in accordance with its terms. How could Ferguson have enforced this contract against Hagler without complying with the stipulation that if he failed after sixty days from the date of the contract to make a conveyance of the land, he should become liable to pay fifty dollars a day for each day he was so in default, and that sum should be a lien upon the land proposed to be sold: Michael v. Hoffstead (Neb.), 98 N. W. 1078. In the case cited the husband author-

ized his wife to sell his land at fifty dollars per acre if she could not get more. She entered into an agreement to sell the land and stipulated that if her husband failed to convey, he should pay five hundred dollars liquidated damages. This last stipulation was held to avoid the contract for the reason that she was not authorized to make it, and a recovery was denied. For the same reason we think a recovery should be denied in this case.

There are other assignments of error which we have considered, but we find none of them which, if sustained, would affect the question of the right of recovery.

For the reasons given the judgment of the court of civil appeals and of the district court are affirmed.

Persons Dealing with an Agent are bound to ascertain the scope of his authority; if they do not, they ordinarily deal with him at their peril: Blum v. Whipple, 194 Mass. 253, 120 Am. St. Rep. 553; Moore v. Skyles, 33 Mont. 135, 114 Am. St. Rep. 801; Seattle Shoe Co. v. Packard, 43 Wash. 527, 117 Am. St. Rep. 1064. As expressed in Swindell v. Latham, 145 N. C. 144, 122 Am. St. Rep. 430, persons dealing with an agent having limited powers must generally inquire as to the extent of his authority. But a principal is bound by the apparent, not the actual or express, authority, which he has delegated to his agent, where third persons have in good faith relied thereon: Antrim Iron Works v. Anderson, 140 Mich. 702, 112 Am. St. Rep. 434; General Cartage etc. Co. v. Cox, 74 Ohio St. 284, 113 Am. St. Rep. 959; Harrison Nat. Bank v. Austin, 65 Neb. 632, 101 Am. St. Rep. 639.

SPEER & GOODNIGHT v. SYKES.

[102 Tex. 451, 119 S. W. 86.]

HOMESTEAD—Whether Lost by Divorce.—Where a Wife Obtains Judgment granting her a divorce and the custody of the children, and decreeing to her title to one-half of the property (claimed as community and as a homestead), with the use and possession thereof during the minority of the children, and also obtains a money judgment for personal injuries inflicted on her by the husband; and she is put in possession accordingly and he is put out of possession, taking the children with him; and subsequently the land is sold under the judgment for damages, she purchasing and then selling the tract to third persons, whereupon the husband with the children (he having had their custody and having supported them since the divorce) moves back upon the land (all this occurring within less than one year after the decree of divorce), he may assert his homestead right. (pp. 898, 899.)

Barnwell & Eberhart, for the plaintiffs in error.

Hart & Hart, for the defendant in error.

[452] BROWN, J. J. D. Sykes and Sallie Sykes were husband and wife, having [453] minor children. In 1903 they lived upon and owned the land in controversy, being one hundred and sixty acres in Upshur county, which they claimed as their homestead and which was their community property. On the third day of April, 1903, Sallie Sykes filed in the district court of Upshur county a suit against her husband, J. D. Sykes, for divorce and for the custody of the children. She also claimed one-half of the land upon which they resided and the possession and use of the whole for the support of the children. She also sought to recover from her husband damages for an assault made upon her during their marriage. Upon a trial before the judge, judgment was entered granting to the plaintiff a divorce and the custody of their children, decreeing to her title to one-half of the land and the right to the possession, use and control of the entire tract during the minority of the children. The court also gave judgment in her favor for the sum of five hundred dollars on account of the personal injury inflicted upon her by her husband during their marriage. It appeared in the judgment that this sum was for and on account of the assault made during the marriage. J. D. Sykes was living with his children upon the land when the judgment was rendered, and, soon thereafter, a writ of possession was issued out of the district court by virtue of which the sheriff put J. D. Sykes out of possession and placed his wife in possession of the entire tract of land. J. D. Sykes took the children with him when he left the place and settled upon another tract of land a short distance from his home, where he remained, keeping house and his children living with him, until he removed again upon this property. The next day after the sheriff gave possession of the land to Mrs. Sykes an execution was issued on the judgment of the district court for $500 damages, and for $40.95 costs of the suit. The sheriff levied the execution upon the interest of J. D. Sykes in the one hundred and sixty acres of land and sold it in regular manner, at which sale Mrs. Sykes became the purchaser for $300. Within a few months after she purchased the land Mrs. Sykes sold the entire tract to the plaintiffs in error for $1,000. When she sold the land to the plaintiffs in error, J. D. Sykes, with his children, moved back upon the land, claiming one-half of it as his homestead. It appears that J. D. Sykes had kept and supported the children during all the time from the date of the divorce down to the time when this suit was commenced, and has at all

times had them with him as a part of his family. It does not appear that Mrs. Sykes ever made any effort to get possession of the children.

The plaintiffs in error instituted this suit against J. D. Sykes for the possession of the entire tract of land. Sykes disclaimed as to one-half and claimed the other undivided half as his homestead. The case was tried before the court without a jury and judgment rendered in favor of the plaintiffs in error. From this judgment Sykes appealed and the court of civil appeals reversed the judgment of the district court, holding that a half interest in the land was the homestead of Sykes during all the time, and that it was not the subject of sale under the execution issued upon the judgment of divorce, and therefore the sale was void, and that [454] the plaintiffs in error got no title to the land. Application was made to this court for writ of error upon the ground that the judgment of the court of civil appeals practically settled the case.

The land in controversy being the homestead of J. D. Sykes and his wife at the time of the institution of the divorce suit and at the time the decree was entered, the homestead character of the land was not destroyed unless the judgment of the court had that effect. The fact that the court awarded the custody of the minor children to the wife did not deprive Sykes of his paternal interest in them, nor did it discharge him from his legal and moral obligation to care for and support them. They were still his offspring and a part of his family: Hall v. Field, 81 Tex. 553, 17 S. W. 82; Zapp v. Strohmeyer, 75 Tex. 638, 13 S. W. 9.

In Hall v. Field, 81 Tex. 553, 17 S. W. 82, the object of the proceeding was to secure the use of the father's homestead to the minor children after his death, he having been divorced from their mother. The decree of divorce gave the custody of the minor children to the mother and they actually lived with her, yet the supreme court held that the divorced husband continued to be the head of a family and was entitled to a homestead under the constitution. Although the children did not live with him, they constituted a part of his family. It could not be that the children were entitled to the homestead unless the father was the head of a family at his death. The facts in this case are more favorable to Sykes' claim of homestead than in Hall v. Field, 81 Tex. 553, 17 S. W. 82. The facts which favorably distinguished this case from Hall v. Field are in this case the children actually lived

with the father and constituted a part of his family, while in that case the children lived with the mother. Mrs. Sykes did not claim the benefit of the decree which awarded to her the custody of the children, while in the case of Hall v. Field the mother did avail herself of a similar order, took control of the children, and kept them with her. The case cited has not been questioned and clearly settles the law to be that although a man be divorced from his wife and his children live separately and apart from him, his status as the head of a family is not lost, therefore his right to a homestead remains.

There is one fact in this case which did not exist in the Hall case; that is, the district court decreed to the wife one-half of the land in her own right as a part of the community property and decreed to her the use of the whole tract during the minority of the children. At the commencement and termination of the divorce suit Sykes was actually living upon the land, and, having been put off of it by the process of the court, he did not lose his homestead right in the land by any act of his own. The decree did not purport to devest his homestead right, but suspended his right of possession during the time the wife should use it to support the minor children. The homestead right of Sykes still existed. The use of the land for the support of the children, was never claimed by Mrs. Sykes; she not only abandoned the children, but abandoned the home and sold the entire property, thereby terminating her right within [455] less than a year after the decree was entered, and, the land then being owned jointly between her vendee and Sykes, he had the right to resume the occupancy of his half as his homestead. These facts show conclusively that the homestead right which was vested in Sykes at the time the decree was entered has never been legally devested. At the time the divorce was granted he was the head of a family and the homestead was exempt from sale. At the time the execution was levied he was the head of a family; therefore, the homestead was still exempt from forced sale. There had been no change either in the status of Sykes or in his homestead right; the levy and sale of the land were absolutely void and conveyed no title to the purchaser.

Since we agree with the court of civil appeals in their conclusion upon the facts of this case, it becomes our duty to render judgment. It is therefore ordered that the judgment of the court of civil appeals remanding the case be set aside, and that judgment be rendered in favor of J. D. Sykes for an undivided one-half interest in the land as it is described in

plaintiffs' petition, and that Sykes recover all costs of all courts against the plaintiffs in error. It is further ordered that this cause be remanded to the district court of Upshur county, with instructions that the land be equally partitioned between the plaintiffs in error and the said J. D. Sykes.

Rulings of court of civil appeals affirmed and judgment rendered.

A Divorce Against a Husband Usually Terminates His Homestead right in property on which he and his wife resided until they acquired a homestead therein: Kern v. Field, 68 Minn. 317, 64 Am. St. Rep. 479. See further, Lynn v. Sentel, 183 Ill. 382, 75 Am. St. Rep. 110; Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771; Bahn v. Starcke, 89 Tex. 203, 59 Am. St. Rep. 40. As to whether a homestead is lost by separation or loss of family, see Davis v. Feltman Co., 112 Ky. 293, 99 Am. St. Rep. 289; Montgomery v. Dane, 81 Ark. 154, 118 Am. St. Rep. 37.

BUCHANAN v. BURNETT.

[102 Tex. 492, 119 S. W. 1141.]

VENDOR AND VENDEE—Representation or Opinion as to Title.—A statement by a vendor to vendees who are ignorant of land titles that he has and can make a good title to the land, while embodying a conclusion, is in effect a representation that the facts which would constitute a good title exist. (p. 902.)

VENDOR AND VENDEE—Reliance on False Representations. A vendee who relies upon false representations by the vendor as to his title, and would not have made the purchase if the representations had not been made, is entitled to rescind the sale. It is not necessary that he should have relied solely upon the false representations. (p. 902.)

VENDOR AND VENDEE—Reliance on False Representations. The fact that a vendor believes his title good when he so represents it does not affect the vendee's right to rescind if he relies on the representations and they prove false. (p. 902.)

VENDOR AND VENDEE—Defects in Title—Duty to Investigate.—Where a vendor misrepresents his title, the vendee is not bound to investigate the truth of his statements and to inform himself of the defects in title from the abstract in his possession. (p. 902.)

VENDOR AND VENDEE—Rescission for False Representations.—A vendee who purchases in reliance upon false representations of the vendor as to the title, without notice of their falsity, is entitled to be restored to his former state upon his surrendering or offering to surrender what he has received. (p. 903.)

George E. Smith, for the plaintiff in error.

Goodson & Goodson, for the defendants in error.

494 BROWN, J. Burnett and wife instituted this suit in the district court of Comanche county against Buchanan to set aside a sale of land made to them by the latter, situated in the said county, upon the ground that Buchanan, in making the sale, fraudulently and falsely represented to the plaintiffs that he had a good title and could make a good title to the land to them, which representations the plaintiffs relied upon. It is charged that the said representations were false and that Buchanan had no title to the land. That relying upon the representations Burnett and wife received a deed from Buchanan for the land and paid him in cash sixteen hundred dollars about August 11, 1905. The petition also sought to fix a lien upon another tract of land which it was alleged had been purchased and paid for by Buchanan with the money received by him from Burnett and wife. There are no questions made upon the pleadings and it is unnecessary to state them more specifically. The essential facts in this case can be stated briefly as follows: Buchanan claimed to own one hundred and sixty acres of land situated in Comanche county, a part of the Humphrey survey, and proposed to sell it to Burnett and wife. Burnett was ignorant of land titles and asked Buchanan if he had a good title and could make him a good title, to which Buchanan replied, in substance, that he had a good title and could make him a good title to the land. Buchanan furnished to Burnett an abstract of title which showed the defect in his title. Burnett and a friend looked over the abstract, but Burnett testified that he knew nothing about such matters; that he was hardly able to read the abstract, and, in fact, could not read all of it; that he relied upon the representations of Buchanan that he had a good title to the land in making the purchase. The deed was made and the purchase money paid in cash. Burnett went into possession about August, 1905, and on the sixth day of March, 1906, the true owner instituted suit in the district court against Burnett and wife to recover the land. Burnett tendered the possession of the land to Buchanan and offered to reconvey it to him, which Buchanan refused. He alleged that he was too poor to remove to another place during that year, as it was too late to plant a crop and he could not live without making a crop, for which reason he had remained in the possession of the land with the consent of the true owner. There is no contention on the part of Buchanan that he had a good title to the land. It seems that the title was unquestionably bad. The district court gave judgment in favor of

Burnett [495] and wife for sixteen hundred dollars, and fixing a lien on one hundred and sixty acres of land purchased with the money received therefor. No question is made in this court as to the correctness of that portion of the judgment.

It is urged by the plaintiff in error that the evidence in this case shows only that the plaintiff in error expressed his opinion of the reliability of his title; therefore it constituted no cause for rescission of the sale. Although the statement made by Buchanan to Burnett embodied a conclusion drawn from the facts relative to the title, it was in effect a representation that the facts which would constitute a good title to the land existed. It was not an opinion as to the legal effect of known facts and muniments of title, for which the seller would not be responsible. The ignorance of Burnett on the subject of land titles adds force to the conclusion that the representations made by Buchanan had the effect of a statement that all the facts existed which would constitute a good title to the land.

The plaintiff in error requested the trial court to give to the jury a charge to the effect that in order for Burnett to avail himself of the misrepresentations of title, he must not only have been ignorant of the existence of the defect, but must have relied "solely" upon that representation in making the purchase. The trial court refused to give the requested charge, and the court of civil appeals correctly held that it was sufficient if Burnett relied upon the false representations made by Buchanan and would not have made the purchase if the representations had not been made. There is no error in this holding.

The fact that Buchanan believed that he had a good title to the land when he sold it and when he made the deed to Burnett was unimportant if in fact Burnett believed the representations to be true and relied upon them, making the purchase upon the faith of the statements made by Buchanan: Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

It is also urged that Burnett had in his possession an abstract of title which showed the defect in Buchanan's title, and that it was his duty to inform himself of the title as he had the means of so doing. Burnett was under no duty to his vendor to investigate the truth or falsity of statements and representations made to him in connection with the title: Labbee v. Corbett, 69 Tex. 503, 6 S. W. 503. In the case cited the court lays down the rule in the following quotation from another authority: "When once it is established that there

has been any fraudulent misrepresentation, ... by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by further inquiry. He has a right to retort upon his objector: 'You, at least, who have stated what is untrue for the purpose of drawing me into a contract, cannot accuse me of want of caution, because I relied implicitly upon your fairness and honesty.' "

Burnett having purchased the land and paid the consideration therefor relying upon the representations of Buchanan as to the title, and having no notice of their falsity, was entitled to be restored to his former state upon surrendering or offering to surrender what he had received from Buchanan in the transaction: Price v. Blount, 41 Tex. 472; Green v. Chandler, 25 Tex. 148; Demaret [496] v. Bennett, 29 Tex. 262. He promptly offered to rescind the trade and to surrender the possession of the premises, all of which Buchanan refused. The judgment of the court annulling the sale and restoring the purchase money was correct.

It is therefore ordered that the judgments of the district court and court of civil appeals be in all things affirmed.

Misrepresentation of Material Facts regarding the quality and title to land, made by the vendor and relied upon by the vendee as true, is sufficient ground for rescission of the sale: Cressler v. Rees, 27 Neb. 515, 20 Am. St. Rep. 691. The intent of the person making a misrepresentation for the purpose of inducing a purchase of property is wholly immaterial. It is sufficient to sustain the right of rescission that the statement was made, so as to mislead the party to whom it was made, and that it induced the purchase by him. He cannot be held to his contract on the ground that the person making the misrepresentation believed it to be true. And means on the part of a purchaser of discovering that a representation was false do not destroy his right to rescind: Wilson v. Carpenter, 91 Va. 183, 50 Am. St. Rep. 824. That a false representation as to the title of real estate will sustain an action by one injured through a reliance thereon, notwithstanding the title appears upon the public records, see Hunt v. Barker, 22 R. I. 18, 84 Am. St. Rep. 812; Kehl v. Abram, 210 Ill. 218, 102 Am. St. Rep. 158.

CASES

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

EPES v. SAUNDERS.

[109 Va. 99, 63 S. E. 428.]

VENDOR AND PURCHASER—Presumption of Sale by the Acre.—Where an agreement is for the payment of a gross sum for a tract of land, upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre and not a sale in gross, unless the contract plainly indicates the contrary; and this presumption can only be overcome by clear and cogent proof. (pp. 904, 905.)

VENDOR AND PURCHASER—Description—"More or Less."—The employment of the words "more or less," or "containing by estimation so many acres, more or less," will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency beyond what may be reasonably attributed to small errors from variations of instruments or otherwise, unless there is evidence to show that a contract of hazard was intended. (p. 906.)

William H. Mann, for the appellant.

McGuire, Riley & Bryan and W. E. Homes, for the appellees.

100 BUCHANAN, J. The principal question to be determined in this case is whether or not the tract of land sold and conveyed by the appellees to the appellant was a sale by the acre or a sale in gross.

It is well settled in this state that where persons enter into an agreement for the payment of a gross sum for a tract of land, upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre and not a sale in gross, unless the contract plainly indicates that it is a sale in gross, and this

presumption can only be overcome by clear and cogent proof: Blessing's Admrs. v. Beattie, 1 Rob. 287; Watson v. Hoy, 28 Gratt. 698; Benson v. Humphreys, 75 Va. 196; Boeschen's Exrx. v. Jurgens' Exrx., 92 Va. 756, 24 S. E. 390; Berry's Exrx. v. Fishburn, 104 Va. 459, 51 S. E. 827.

In December, 1905, the appellant wrote to Mrs. Saunders, one of the appellees, to know if she would sell her tract of land situated near the town of Blackstone, and if so, her price and the number of acres in the tract. Her reply to that letter was as follows: "I will sell my place near Blackstone, either in part or as a whole, said to contain seventy-five acres. Am willing to sell on terms you mention in your letter. Have been offered $2,500.00 for it. I am ignorant of prices of land in your locality, but if it was near this town (Chase City) it would bring $75 to $100 per acre."

Upon the receipt of that letter, the appellant prepared an option contract running for three months, in which he offered $2,500 for the land, which was described as containing seventy-five acres, more or less, and sent it to Mrs. Saunders. After inserting in that paper $2,750 instead of $2,500 as the purchase [101] price, and the words "said to contain" instead of "containing" just preceding the words "seventy-five acres, more or less," she copied, signed the copy and sent it to the appellant.

In March following, he wrote to her that he would take the property, and requested her to have a deed prepared. After some correspondence as to the mode of securing the deferred purchase money in order to avoid giving a deed of trust to secure its payment, he agreed to pay, and did pay, the whole of the purchase price of the land in cash, and received a deed therefor, prepared, signed and acknowledged by the appellees, in which the land is described as "containing seventy-five acres, more or less."

In April following, the appellant had the land surveyed and found, as he alleges in his bill, and as appears from a plat of the survey filed with it, that the tract, after deducting one-half an acre previously sold off of it by Mrs. Saunders, and six and six-tenths acres condemned for railroad purposes, only contained fifty-two and nine-tenths acres.

The appellant immediately wrote to Mrs. Saunders of the deficiency, stating that she had represented to him that the tract contained seventy-five acres. Mrs. Saunders denied in her reply that she had made any such representation, and stated that she had sold the land by the boundary and not by

the acre. In a few months afterward this suit was brought by the appellant to recover compensation for the alleged deficiency.

When Mrs. Saunders, in her reply to the appellant's letter asking if she would sell the land, and if so, her price and the number of acres in the tract, stated that the tract was "said to contain" seventy-five acres, she either thought it contained that number of acres or she intended to mislead the appellant as to the quantity. She states in her deposition that by the use of the words "said to contain" she meant "supposed to contain." The presumption is that she did not intend to mislead the appellant into thinking there was seventy-five acres of [102] land in the tract, and no one can read the record without reaching the conclusion that she honestly supposed, though she had no actual knowledge of the acreage, that the tract did contain that quantity of land. And it is equally clear, we think, from the record, that the appellant thought the same when the contract was made. Mrs. Saunders' statement "said to contain" did not amount to a positive affirmation of quantity, but it was a representation as to quantity upon which the appellant had the right to rely: Caldwell v. Craig, 21 Gratt. 132.

In the case cited, which is much relied on by counsel for appellees, the agreement of sale described the land as "supposed to contain one thousand acres, more or less." In discussing the language of that agreement, Judge Staples, who delivered the opinion of the court, on pages 140, 141, says: "No doubt he [the vendor] 'supposed' the tract to contain the number of acres mentioned, and the defendant [the vendee] honestly believed the same; and each was influenced, doubtless, by this estimate in fixing the price to be paid. And if this were all, the transaction would present a clear case of mutual mistake requiring the intervention of a court of equity in behalf of the injured party. For it is well settled that the employment of the words 'more or less,' or 'containing by estimation so many acres, more or less,' will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency beyond what may be reasonably attributed to small errors from variations of instruments or otherwise, unless indeed there be evidence to show that a contract of hazard was intended. In the absence of such evidence, it is to be presumed that the parties contract with reference to quantity. It is an important element in every agreement and prima facie must be intended to have

influenced the price. It is, however, a mere presumption, which may be met and overthrown by proof that the parties agreed to be governed at all events by the estimated quantity."

[103] In that case, the parol proof, which consisted chiefly of the admissions of the vendee, that the sale was by the boundary or in gross and not by the acre, satisfied the jury, and in the opinion of the court was sufficient to justify them in finding that the parties entered into a contract of hazard.

In this case, the only oral testimony upon this question is that of Mrs. Saunders and the appellant. She testifies that it was intended to be and was a sale by the boundary or in gross, and the appellant deposes that it was a sale by the acre. They are equally positive in their statements, and, so far as the record shows, are equally credible, so that no aid can be derived from their testimony upon this question. It must therefore be determined from the written evidence in the cause, and the facts and circumstances surrounding the parties when the sale was made.

The force and effect of the writings bearing upon this question have been considered. Without discussing in detail the other evidence, it is sufficient to say that, after a careful examination and consideration of all the evidence in the case, both written and oral, it does not clearly and cogently appear that the sale was in gross and not by the acre, and that the circuit court erred in so holding.

It is insisted that the record does not show that there is any deficiency in the land, and that the action of the court in dismissing the bill should be sustained on that ground.

It is alleged in the bill that there is a deficiency of twenty-two and one-tenth acres, as ascertained by survey which is filed with the bill as an exhibit. There is a general but no specific denial of this allegation in the answer of the appellees. They state in it that they know nothing of the accuracy and correctness of the survey referred to in the bill and are not bound or affected by it. The appellant proves that the engineers who made the survey are reputable and competent surveyors. The appellees took no proof to show that the tract of land contained seventy-five acres, [104] or that the survey showing the deficiency was not correct. That there was less land in the tract sold than seventy-five acres does not seem to have been really controverted in the circuit court. There the only question in dispute was, whether the sale was by the acre or in gross.

The record shows, we think, prima facie at least, that there is a deficiency in the land as claimed in the bill.

In order, however, that no injustice may be done, this court will reverse the decree complained of and remand the cause to the circuit court, with directions that if the appellees desire it the court shall order another survey of the tract to be made and ascertain the deficiency, if any, and for such further proceedings as may be proper, not in conflict with the views expressed in this opinion.

When Land is Sold as Containing so Many Acres, "More or Less," and the quantity falls short or overruns a little on actual survey and estimation, no compensation is to be given to either party in the absence of proof of fraud: Frenche v. Chancellor of New Jersey, 51 N. J. Eq. 624, 40 Am. St. Rep. 548.

The Words "More or Less" and "About," Used in a Conveyance in connection with quantity or as qualifying distances, are words of precaution and safety intended to cover some unimportant inaccuracy, and they do not weaken or destroy such indications of distance and quantity, when no other guides are furnished: Oakes v. De Lancey, 133 N. Y. 227, 28 Am. St. Rep. 628.

Under a Promise to Convey the "SW. SW. 6-35-8" in a specified county of the state at a certain price per acre, the unit upon which the price is made is the acre, not the forty: Curtis Land etc. Co. v. Interior Land Co., 137 Wis. 341, 129 Am. St. Rep. 1068.

WALTON, WITTEN & GRAHAM v. MILLER.

[109 Va. 210, 63 S. E. 458.]

NEGLIGENCE — Joint Tort-feasors — Joint Defendants.— Where a railroad company employed contractors to duplicate their roadbed and the plaintiff's intestate employed on a freight train was killed by the train running into a mass of debris caused by the contractors' blasting operations, the company and the contractors were properly joined as defendants. (pp. 910, 911.)

NEGLIGENCE — Joint Tort-feasors — Joint Defendants.— When the negligence of two or more persons concurs in producing a single indivisible injury, they are jointly and severally liable, although there was no common duty, common design, or concert of action. (p. 911.)

NEGLIGENCE—Sudden Peril—Error of Judgment in Mode of Avoidance.—One who is placed in a position of sudden peril by the negligence of another, without contributory negligence on his part, cannot be held responsible for error of judgment with respect to effecting his escape therefrom. (p. 912.)

RAILROADS—Duties of Independent Contractors—Blasting Operations.—The law imposes upon contractors who are widening the

roadbed of a railroad company the twofold duty of exercising ordinary care not to obstruct the track, and, if they do, to use like care to give warning of the obstruction in time to enable others, by the exercise of reasonable care, to protect themselves from danger. (p. 913.)

RAILROADS—Dangerous Obstruction—Duty of Signalmen.—It is the duty of a flagman in case of danger to display his flag at a point where the engineman on an approaching train can see it if he is looking; and if, while so displaying it, the driver sounds two short blasts of the whistle, which is the proper and usual responsive signal, the flagman may assume that such blasts are in response to his flagging, and may then discontinue, and this would bar a recovery in an action for injury caused in consequence, even though the driver did not see the flag and consequently did not intend his whistle as an answer to its challenge; but if the flagman knows, or ought to know by the exercise of ordinary care, that the blasts are not in response to his flag but to other signals, he is not justified in discontinuing flagging. (p. 913.)

RAILROADS—Proper Flagging—What is.—Proper flagging consists in waving a flag across the track on the right side of the approaching train (the engineman's seat being on that side of the cab), in such manner as to attract attention, and at such distance from the point of danger as to enable the engineman to stop his train in time to avoid it. (p. 914.)

APPEAL AND ERROR—Instruction—Severance of Liability of Railroad Owner and Contractor.—The facts that by a written contract between the owner of a railroad and well-known and reputable contractors, the latter were independent contractors, and their work under the contract lawful and not inherently dangerous, do not exonerate the owner from liability where injury is caused on his roadbed by the negligence of the contractors thereon and error lies for an instruction to the contrary. (p. 914.)

MASTER AND SERVANT—Railroad—Independent Contractor.—A railroad company cannot escape liability for the neglect of duties imposed upon it by law, in the interest of the safety of its servants and the public by delegation to an independent contractor or otherwise. (p. 915.)

RAILROADS—Safety of Track—Duty of Owner.—A railroad company cannot devest itself of the duty of keeping its track in good and safe condition, free from obstructions, by the interposition of an independent contractor. (p. 916.)

APPEAL AND ERROR—Joint Tort-feasors—Prosecution of Action Against One—Contribution.—Joint tort-feasors are jointly and severally liable, but no right of contribution exists among them, or remedy over by one against the other. Consequently, if proceeded against jointly, the plaintiff may dismiss or discontinue his action as to one defendant without affecting his rights against the other, who is not entitled to relief by writ of error. (p. 916.)

Harrison & Long, for Walton, Witten & Graham.

Lee & Howard and Whitehead & Whitehead, for Miller's administratrix.

S. Griffin, for Norfolk and Western Railway Company.

212 WHITTLE, J. Though these cases are before us on different writs of error, they arose out of the same accident,

were made the subject of one action, and were jointly submitted on appeal.

The object of the suit is to recover damages from the plaintiffs in error, Walton, Witten and Graham, and also from the defendant in error, the Norfolk and Western Railway Company, for the death of the plaintiff's intestate, William J. Miller, which is ascribed to the negligence of both defendants.

The jury found a verdict for the plaintiff against Walton, Witten and Graham, and assessed her damages at seven thousand five hundred dollars, but returned a verdict for the Norfolk and Western Railway Company; and judgment was rendered accordingly.

The first assignment of error by Walton, Witten and Graham is founded upon the court's action in overruling the demurrer to the declaration. On that assignment it is contended that the first and second counts of the declaration violate the rule of pleading which requires that the declaration in a joint action against tort-feasors must charge a joint tort; and, moreover, that inasmuch as the third and fourth counts allege a joint tort there is a misjoinder of counts. It is furthermore insisted that Walton, Witten and Graham did not owe plaintiff's intestate [213] the same duty that was owing to him as an employé from the Norfolk and Western Railway Company, and for that reason the defendants are not suable jointly.

The gravamen of the first and second counts, indeed of all the counts stated in varying form, is that the railway company owned, maintained and operated a line of road, extending, in part, between the cities of Roanoke and Lynchburg, in the state of Virginia; that with the view of widening its roadbed, for the purpose of double-tracking, the company employed Walton, Witten and Graham, a firm of railroad contractors, to excavate and remove large quantities of earth and rock along its right of way, for the distance of one mile in a westerly direction from Montvale, a station on the railroad; that, in the conduct of the work, heavy blasts were frequently made by the contractors, with dynamite and other high explosives, the effect of which was to cast large quantities of earth and rock upon the adjacent track; that it was the duty of the contractors to exercise reasonable care and diligence to warn employés of the railway company, engaged in operating and running engines and trains of cars over its track in the vicinity of the work, of such blasts, by the proper use of flags or torpedoes, or other reasonably practicable and adequate methods. A like duty is also imputed to the railway company, and it is alleged

that, in consequence of the careless and negligent failure of the contractors and of the railway company to give such reasonable and timely notice, a freight train upon which plaintiff's intestate was employed as a locomotive engineer collided with earth and rock thrown upon the track by one of these blasts, and plaintiff's intestate was killed.

It will be observed that the negligence attributed to both defendants is alleged to have produced a single indivisible injury; and where such is the case the rule is that they are, in contemplation of law, joint tort-feasors, though acting independently of each other.

214 The principle is thus stated in 1 Shearman and Redfield on Negligence, section 31: "If the injuries caused by the concurrent acts of two persons are plainly separable, so that the damage caused by each can be distinguished, each would be liable only for the damage which he caused; but if this is not the case, all persons who contribute to the injury by their negligence are liable jointly and severally for the whole damage."

Again, at section 122, it is said: "If several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform or for performing it negligently. Persons who co-operate in an act directly causing injury are jointly and severally liable for its consequences, if they acted in concert, or united in causing a single injury, even though acting independently of each other."

Judge Cooley, in his work on Torts, states the doctrine as follows: "In respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities. The authorities are, perhaps, not agreed beyond this, that where two or more owe to another a common duty and by a common neglect of that duty such other person is injured, then there is a joint tort with joint liability. The weight of authority will, we think, support the more general proposition, that when the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert of action": 1 Cooley on Torts, 3d ed., p. 246. To the same effect see 15 Ency. of Pl. & Pr. 557, 558; McKay v. Southern Bell Tel. Co., 111 Ala. 337, 56 Am. St. Rep. 59, 19 South. 695, 31 L. R. A. 589; Osage City v. Larkin, 40 Kan. 206, 10 Am. St. Rep. 186, 19 Pac. 658, 2 L. R. A. 56; Elec. Ry. Co. v. Shelton, 89 Tenn. 423, 24 Am. St. Rep. 614, 14 S. W. 863; Gulf etc. Ry. Co. v.

McWhirter, 77 Tex. 356, 19 Am. St. Rep. 755, 14 S. W. 26; [215] Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 181, 182, 10 N. W. 32; Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558; Flaherty v. Minneapolis etc. Ry. Co., 39 Minn. 328, 12 Am. St. Rep. 654, 40 N. W. 160, 1 L. R. A. 680.

All the counts contain the common allegation that the negligence and lack of ordinary care on the part of Walton, Witten and Graham, and the negligence and lack of ordinary care on the part of the Norfolk and Western Railway Company, were the efficient and proximate cause of Miller's death; and that, under the authorities, renders both liable as joint tort-feasors, "although there was no common duty, common design, or concert of action" between them.

The second error assigned by Walton, Witten and Graham relates to giving and refusing instructions.

Thus the court refused an instruction which told the jury that Miller was under as high a duty to protect himself as the defendants were to protect him, and if they believed from the evidence that he could, by the exercise of reasonable care, have saved himself by getting off the engine before the collision occurred, and failed to do so, they must find for the defendants, although they may have believed that the defendants were negligent in giving him no notice of the obstruction. But the court, in lieu thereof, gave an instruction embodying the principle, that if the jury believed from the evidence that Miller was placed in a position of sudden peril by the negligence of the defendants, without contributory negligence on his part, he could not be held responsible for error of judgment with respect to effecting his escape, occasioned by such sudden peril, which instruction also contained the converse of that proposition.

The modification of the instruction, as originally offered, is objected to on the theory that there was no evidence to support it. But, as we shall see presently, the evidence was ample for that purpose.

[216] The ground of exception to the next instruction is that it imposed upon the contractors the twofold duty of exercising ordinary care not to obstruct the track, and, in the event they did obstruct it, to use like care to warn plaintiff's intestate of such obstruction in time to enable him, by the exercise of reasonable care, to protect himself from danger, and that the failure to discharge either duty would constitute actionable negligence. Certainly the law devolved both duties upon the contractor. Really the second is corollary to the first.

The next instruction told the jury that if they believed from the evidence that the flagman displayed his flag at a point where Miller could have seen it, if he had been on the lookout, in time to have prevented the collision, and while so displaying the flag Miller sounded two short blasts of the whistle, which was the proper and usual signal in answering the flag, and was so understood by the flagman, he had the right to assume that Miller saw the flag and answered the signal, and to discontinue flagging; and that this would bar a recovery, although Miller did not see the flag or intend to answer it. To which instruction the court added: "But if the flagman knew, or, by the exercise of ordinary care, ought to have known, that the blasts were not in response to his flag, but to signals from the conductor, he was not justified in discontinuing flagging."

It appeared that two short blasts of the whistle was an answer to certain signals from the conductor as well as an answer to the flagging signal. In point of fact, the blasts in question were in response to the former and not to the latter, and the evidence of the plaintiff shows the relevancy and propriety of the court's addendum to the instruction.

The third assignment of error is to the refusal of the court to set aside the verdict against Walton, Witten and Graham as contrary to the law and the evidence. In dealing with that assignment, we shall content ourselves to give in brief outline 217 the case made for the plaintiff, as upon a demurrer to the evidence.

It appears that for the distance of four miles west to the point of accident, the railroad traverses the eastern slope of the Blue Ridge Mountain on a heavy descending grade; that at the time of the accident a freight train of the railroad company, consisting of thirty-odd loaded coal-cars drawn by two engines, was going east, at the rate of eight or ten miles an hour. The train was running under slow orders in approaching the part of the track near which the contractors were at work. These orders forbade a rate of speed in excess of twelve or fifteen miles an hour, and imposed upon the engineman the duty of keeping a sharp lookout for obstructions on the track and for flagging by the contractors, and to have his train under full control to stop promptly on signal. Plaintiff's intestate, as engineman on the front engine, had control of the air-brakes, and Ellett was in charge of the rear engine.

Proper flagging consists in waiving a flag across the track on the right side of the approaching train (the engineman's seat being on that side of the cab), in such manner as to attract attention, and at such distance from the point of danger as to enable the engineman to stop his train in time to avoid it.

Preparatory to setting off a blast, it was customary for the contractors to timber the contiguous track with cross-ties to prevent damage to the rails from falling rock. Usually, before this timbering was commenced, which in itself obstructed the track, flagmen were sent east and west to protect trains; the ordinary place for flagging east-bound trains being west of Brugh's crossing, which is three thousand feet west of the scene of the accident. On that particular occasion, however, the flagman, a negro employed on the work, assisted in timbering the track, and was afterward ordered out with his flag. He set off on the right-hand side of the track going west, on a run; and had proceeded about fifteen hundred feet with the flag rolled up when the train [218] ran down upon him. Thereupon, he rushed across the track in front of the engine and up the bank on the opposite side, with his flag partly furled, as the front engine passed him. He was not seen by Miller, but was discovered by Ellett after he had crossed the track. Ellett instantly blew "downbrakes," and Miller at once responded and did all in his power to stop the train. When he ran into the obstruction, sparks were flying from the locked wheels, the reverse lever was pulled entirely back against the pin, and the throttle was wide open, and the speed of the train had been reduced to three and a half or four miles an hour. The rear engine ran into the tender of the front engine and Miller was killed by the impact.

It also appeared that the train in question could hardly have been stopped with safety and certainty in less than a half a mile, or two thousand six hundred and forty feet.

It is needless to say that the verdict of a jury, with such evidence to sustain it, sanctioned by the trial court, cannot be disturbed on appeal.

It only remains to notice briefly the exception to a line of instructions given by the court at the instance of the Norfolk and Western Railway Company, to the effect that, under the written contract between it and Walton, Witten and Graham, the latter were independent contractors, and that if they were well-known railroad contractors of good reputation and standing, and the work to be done was lawful and not inherently dangerous, and was constructed by the firm under the con-

tract, then the Norfolk and Western Railway Company would not be liable, though the death of the plaintiff's intestate was caused by the negligent failure of the contractors to give proper notice of the blast and of the obstruction occasioned thereby.

The railway company undertakes to justify that ruling on the authority of Norfolk etc. Ry. Co. v. Stevens' Admr., 97 Va. 631, 34 S. E. 525, 45 L. R. A. 367. In the latter case it was held not to be an essentially hazardous undertaking to substitute [219] a new railroad bridge for an old one without the interruption of traffic; that it was the general custom of railroads to let such contracts to independent contractors; and, if the company used due care in the selection of a reliable contractor, it would not be liable for the negligence of such independent contractor in the faulty construction of the bridge.

It is sufficient to observe that the Stevens case rests upon its own particular facts, which are essentially different from the facts in this case, and was not intended to impair the established principle that a railroad company cannot escape liability for the neglect of duties imposed upon it by law, in the interest of the safety of its servants and the public, by delegation to an independent contractor or otherwise. It is the settled doctrine in this state that such duties are nonassignable.

In this instance the work of the contractors was not upon the main line, but they were engaged in grading a roadbed for a double track, parallel to but disconnected from the original track over which the company was operating its trains. If it were competent for a railroad company, under such circumstances, to delegate to a contractor the duty of supervising and maintaining part of its track, it could relieve itself of all liability simply by deputizing its nonassignable functions to an independent contractor.

In Virginia Central Ry. Co. v. Sanger, 15 Gratt. 230, this court said: "It would seem to me to follow, further, that when a railroad company, while using its track for the carriage of passengers, engaged in a work to be done on its road, and in the immediate proximity of its track, negligence in the performance of which would, in the estimate and opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, it would be just as competent for them, in the case of an accident to a passenger caused by an obstruction arising from negligence in the performance of such work, to show merely that they had placed the work in the hands of a contractor, and [220] that the obstruction was caused by the carelessness of one

of his employés, as it would be for them, in the case of an accident to a passenger arising from want of care or skill in the management or conduct of the train, to show that such management and conduct had been let out to a contractor, and that the accident was due exclusively to the carelessness of one of his employés. In neither case, I apprehend, could such a deputation by the company of its powers and duties to another shield it against the complaint of an injured passenger."

That case was followed in Carrico v. West Virginia Central etc. Ry. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, where it was held that a railroad company could not devest itself of the duty of keeping its track in good and safe condition, free from obstructions, by the interposition of an independent contractor: See Richmond etc. Street Ry. Co. v. Moore's Admr., 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; Southern Ry. Co. v. Newton's Admr., 108 Va. 114, 60 S. E. 625; Borrow S. S. Co. v. Kane, 88 Fed. 197, 31 C. C. A. 452; Barkman v. Pennsylvania Ry. Co. (C. C.), 89 Fed. 453; Taylor etc. Ry. Co. v. Warner, 88 Tex. 642, 32 S. W. 868.

Our conclusion upon this branch of the case, therefore, is that though the lower court erred in giving these instructions, which practically absolved the railway company from liability for its own negligence with respect to obstructions on its track, for which error the judgment in its favor must be reversed, it is not an error of which Walton, Witten and Graham can complain; the rule being, that joint tort-feasors are jointly and severally liable, but that no right of contribution exists among them, or remedy over by one against the other. Consequently, if proceeded against jointly, the plaintiff may dismiss or discontinue his action as to one defendant, without affecting his rights against the other: Staunton Mutual Telephone Co. v. Buchanan, 108 Va. 810, 62 S. E. 928.

For these reasons the judgment in favor of Miller's administratrix against Walton, Witten and Graham is affirmed; but [221] the judgment on behalf of the Norfolk and Western Railway Company is reversed, the verdict of the jury as to that defendant set aside, and the cause remanded for further proceedings.

In first case affirmed. In second case reversed.

Where One is Employed by a Railroad Company as an Independent Contractor to do work in the construction of its roadbed, in all matters incident to the use of its tracks permitted by such company, the contractor and his workmen represent the will of the company, and its

responsibility remains: Vickers v. Kanawha etc. R. R. Co., 64 W. Va. 474, 131 Am. St. Rep. 929.

The Duty of an Employer to Furnish His Employés a Safe Place to Work cannot be delegated to an independent contractor: Bernheimer Bros. v. Bager, 108 Md. 551, 129 Am. St. Rep. 458.

The Negligence of Independent Contractors and Their Liability Therefor are discussed further in the note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 382.

A Railroad Company Owes the Duty to Its Employés Operating Its Trains to use reasonable care to provide a safe track and to maintain it free from obstructions: Rogers v. Cleveland etc. Ry. Co., 211 Ill. 126, 103 Am. St. Rep. 185; Fuller v. Tremont Lumber Co., 114 La. 266, 108 Am. St. Rep. 348.

BOARD OF TRADE COMPANY v. CRALLE.

[109 Va. 246, 63 S. E. 995.]

MASTER AND SERVANT—Range and Limit of Liability.—The rule that a master is liable for the acts of his servant in the line of his duty and within the scope of his employment does not apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligence an injury is occasioned. (p. 920.)

MASTER AND SERVANT—Range of Liability.—The Master is Liable for the negligence of a person employed by his servant in the prosecution of the master's business, or of a person who assists his servant at his request, provided the servant had express or implied authority to procure assistance, and the negligent act complained of was done within the scope of the employment. (p. 920.)

MASTER AND SERVANT — Unauthorized Employment of Stranger by Servant—Irresponsibility of Master.—A passenger by an elevator who, finding no one in charge of it, asked the hall boy where the elevator operator was, and was told of his temporary absence, and the hall boy asked a lad who was near by to take the passenger up, and he did so, and by improperly starting the elevator caused injuries to the passenger, takes passage in such elevator at his own risk, and the owner cannot be held responsible either for the act of the temporary operator or the hall boy in appointing him. (pp. 920, 921.)

NEGLIGENCE—Proximate Cause.—To Warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. (p. 922.)

NEGLIGENCE—Proximate Cause—Natural Consequence—Definition.—A natural consequence is one which has followed from the original act complained of in the usual, ordinary and experienced course of events; a result, therefore, which might reasonably have been anticipated or expected. (p. 922.)

NEGLIGENCE—Proximate Cause—Natural Consequence—Illustration.—Leaving an elevator door open while the boy in charge is

temporarily absent getting oil or changing his uniform is not the proximate cause of an injury to a passenger who travels in it with a stranger operating and is injured thereby, nor is it a natural and probable consequence of leaving the door open under such circumstances that a stranger would undertake to operate it, and either from ignorance or want of care injure one who might then come into the building to be carried by the elevator, and the owner cannot be charged with the obligation to foresee that such consequences would ensue from the boy in charge temporarily leaving his post. (pp. 922, 923.)

Cabell & Cabell and Hughes & Little, for the plaintiff in error.

R. H. Bagby, R. C. Marshall and Thorp & Bowden, for the defendant in error.

247 BUCHANAN, J. This is an action to recover damages for personal injuries suffered by the defendant in error whilst on a passenger elevator of the plaintiff in error. There was a verdict and judgment against the defendant in the trial court, and to that judgment this writ of error was awarded upon its petition.

The evidence, so far as it is material to the questions involved in this court, shows that the defendant company was the owner of a seven-story office building in the city of Norfolk, in which it operated two passenger elevators. On the seventh floor of the building are the rooms of the Board of Trade and Business Men's Association of the city of Norfolk, of which the plaintiff was a member. On a Sunday morning in May, 1907, the plaintiff, between 8 and 9 o'clock, entered the hall or lobby of the defendant's building for the purpose of going up to the rooms of the Board of Trade. On entering, he found one of the elevators at that floor with the door open but no elevator boy in sight. At the bottom of the elevator well, under the other elevator, was an employé of the defendant, named Zachary, engaged in oiling its machinery. He was the "hall boy" of the building, but it was a part of his duty to assist the elevator boys in oiling the elevator machinery every Sunday 248 morning. The plaintiff, not seeing an elevator boy, inquired of Zachary where he was. In reply (both of the elevator boys being in the building, one getting oil on that floor, and the other on the fourth floor changing his clothes, as Zachary testified) he told a boy standing in the lobby to take the plaintiff up in the elevator. This the boy did, and as the plaintiff was stepping out of it at his point of destination, the boy started the elevator down at a very rapid speed, carrying the plaintiff with it, and causing the injuries complained of.

The boy was not an employé of the defendant, but had come into the building to borrow a chair to take across the street to a barber-shop where he worked.

The plaintiff testified that he did not know that the boy was not connected with the elevator, but presumed that he was a regular elevator boy; that he did not know them as they were frequently changed.

Zachary testified that he instructed the boy how to manage the elevator when he asked him to take the plaintiff up, but the plaintiff denies that he heard it. The evidence is also conflicting as to whether the elevator boys always wore uniforms when on duty. The plaintiff, who was frequently carried on the elevator, says that the boy in question did not have on a uniform, and that the elevator boys did not always wear them.

It further appeared that no one was authorized to employ elevator boys except the machinist and engineer in charge of the building, and that the elevator boys were the only persons who had any right to run the elevators, though Zachary testified that he did occasionally, for a few moments at a time, operate them when the elevator boys were not in place. There was evidence tending to show that one of the elevator boys had been in the service of the defendant as such for about a year, and the other for seven or eight months.

The declaration charged several acts of negligence on the part of the defendant, but the material question involved here [249] is whether or not the defendant is responsible for the act of the boy operating the elevator at the time the plaintiff was injured, as its employé or otherwise. This question was raised by the plaintiff's instruction No. 1, which was given, and by the instruction copied in bill of exceptions No. 2, asked for by the defendant and refused by the court. Those instructions are as follows:

"1. If the jury shall believe from the evidence that the plaintiff found the door of said defendant's elevator in said premises open between the hours of 7 A. M. and 2 A. M. on the day of the accident, he had the right to take passage upon said elevator to be transferred to the seventh floor of said premises, and, if he did so, it became and was the duty of the defendant to provide a competent operator to run said elevator. And if the jury shall believe from the evidence that the plaintiff did find said elevator open between the hours aforesaid and did take passage thereon as aforesaid, and that the defendant negligently allowed a boy who was not a competent operator and not in defendant's employment, to take charge of said

elevator and operate the same, and the plaintiff was injured as charged in the declaration by reason of the unskilful operation of said elevator by said boy, then they shall find for the plaintiff, unless they shall further believe from the evidence that the plaintiff at the time he so became a passenger upon said elevator knew, or by the exercise of ordinary care ought to have known, that said boy was incompetent, or not in the employment of said defendant for the purpose of operating elevators."

DEFENDANT'S INSTRUCTION.

"Even if the jury believe from the evidence that the plaintiff was injured while a passenger upon the elevator of the defendant, and that such injury was caused by the negligence of the person operating it, if they also believe that such person 250 was directed to operate it by Oscar Zachary, without the knowledge or means of knowledge, or consent, or authority of the defendant, they will find for the defendant."

While it is well settled that a master is liable for the acts or omissions of his employés which result in injuries to third persons, when the act or omission of the employé was within the scope of his employment and in the line of his duty while engaged in such employment, it is equally well settled that neither the principle upon which that rule is based ("qui facit per alium facit per se"), nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligence the injury was occasioned: See Muse v. Stern, 82 Va. 33, 3 Am. St. Rep. 77; Ricci v. Mueller, 41 Mich. 214, 2 N. W. 23; McKinzie v. McLeod, 10 Bing. 385; Mangan v. Foley, 33 Mo. App. 250; King v. New York etc. R. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49.

It also seems to be settled that the master is liable for the negligence of a person employed by his servant in the prosecution of the master's business, or of a person who assists his servant at his request, provided the servant had express or implied authority to procure assistance, and the negligent act complained of was done within the scope of the employment: See 26 Cyc. 1521; Quarman v. Burnett etc., 4 Jur. 969; Haluptzok v. Great Northern etc. R. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739.

The uncontradicted evidence shows that Zachary, the "hall boy," had no express authority to employ anyone to operate the elevators. It being no part of his duty to operate them or

to see that they were operated, it would seem clear that he had no implied power to employ another to do work he was not employed to do, and for the doing of which he was in no way responsible.

[251] In the case of Taylor v. Baltimore & Ohio R. Co., 108 Va. 817, 62 S. E. 798, 2 Va. App. 650, recently decided by this court, which involved the question of whether or not the railroad company was liable for injuries suffered by the plaintiff, who had been requested by the conductor in charge of a freight train of the railroad company to assist him in unloading freight as he was late and his men were out of place, it was held that the plaintiff was not entitled to recover, because the conductor had no authority to create the relation of master and servant between the railroad company and the plaintiff, as well as because he had no intention of creating such relation in requesting the plaintiff to assist him in his work. It was held in that case, quoting with approval 1 Elliott on Railroads, section 202, that while the conductor has no general authority to make contracts on the part of the company, he "may in rare instances of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties."

If a conductor in charge of a freight train has no implied authority to employ another to assist him in performing his duties when his train is behind time and a brakeman is out of place, a fortiori, Zachary, the "hall boy," who was not charged with the duty of operating the elevator or of seeing that it was operated, could not create the relation of master and servant between the defendant and the boy running it when the plaintiff was injured because the elevator boys were out of place and the plaintiff was being delayed.

Since the relation of master and servant did not exist between the boy running the elevator at the time of the accident and the defendant, it was not liable as master or employer for the injuries resulting to the plaintiff from the boy's incompetency or negligence. If liable to the plaintiff at all, it must be because the defendant was guilty of negligence in leaving the elevator door open with no one in charge of it when the plaintiff [252] came into the hall to be carried upon it, and that this negligence was the proximate cause of his injuries.

Conceding for the purposes of this case that the conditions which existed at that time were not merely a breach of the contract between the defendant and the Board of Trade by which the former had agreed to keep in operation a sufficient number

of elevators, not exceeding two, to maintain prompt service, but was actionable negligence, was that negligence the proximate cause of the injury?

In the case of Connell's Exrs. v. Chesapeake & O. Ry. Co., 93 Va. 44, 57 Am. St. Rep. 786, 24 S. E. 467, 32 L. R. A. 792, it was held, quoting the language of Justice Miller, in Scheffer v. Washington etc. R. R. Co., 105 U. S. 249, 26 L. ed. 1070, that "to warrant a finding that negligence or an act not amounting to a wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances": Winfree v. Jones, 104 Va. 39, 51 S. E. 153, 1 L. R. A., N. S., 201, and cases cited.

It was said in the last cited case that "a natural consequence is one which has followed from the original act complained of in the usual, ordinary and experienced course of events. A result, therefore, which might reasonably have been anticipated or expected."

In Fowlkes v. Southern Ry. Co., 96 Va. 742, 32 S. E. 464, it was said: "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate consequence of the thing amiss. The maxim of the law here applicable is that in law the immediate and not the remote cause of any event is regarded. If injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate [253] consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote."

Applying these principles to the facts of this case, it seems clear that the condition in which the elevator was when the plaintiff entered the defendant's building to become a passenger upon the elevator was not the proximate cause of the plaintiff's injury. It cannot be said that the natural and probable consequence of leaving the elevator door open while the boy in charge of it was temporarily absent in the building, getting oil or putting on his uniform, would be that a stranger, either as a volunteer or at the request of one of the defendant's employés, without express or implied authority, would undertake to operate the elevator and by his incompetency or negligence injure a person who, during the elevator boy's absence, might come into the building to be carried on the elevator. Neither

can it be said that the defendant ought reasonably to have foreseen that such an injury, or any injury, might probably result from leaving the elevator in the condition in which it was, in the light of attending circumstances.

It follows from what has been said that the court is of opinion that the trial court erred in giving the plaintiff's instruction No. 1, and in refusing to give the defendant's rejected instruction, and that for those errors its judgment must be reversed.

Having reached this conclusion, it is unnecessary to consider the remaining assignment of error, that the court erred in refusing to set aside the verdict of the jury.

The judgment will be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

The Liability of Owners of Elevators Used for Passengers or Employés is the subject of a note to Southern B. & L. Assn. v. Dawson, 56 Am. St. Rep. 806. As to the degree of care exacted of persons maintaining an elevator, see Edwards v. Manufacturers' Bldg. Co., 27 R. I. 248, 114 Am. St. Rep. 37; Springer v. Ford, 189 Ill. 430, 82 Am. St. Rep. 464; and as to the presumption of negligence, if any, arising from the fall of a passenger elevator, see the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 1030, and the subsequent case of Edwards v. Manufacturers' Bldg. Co., 27 R. I. 248, 114 Am. St. Rep. 37.

An Elevator for the Carriage of Persons is not supposed to be a place of danger, to be approached with great caution, but may be assumed to be, when the door is thrown open by an attendant, a place that may be safely entered without stopping to look, listen, or make a special examination. Whether the owner of a building should not have exercised such supervision over it as to make it impossible for a young boy, who was not his servant, to do acts from which the tenants of the building might have derived the impression that the boy was his servant, and was in fact an attendant at the elevator therein, is properly left by the court to the jury to determine as a question of fact: Tousey v. Roberts, 114 N. Y. 312, 11 Am. St. Rep. 655.

PORTSMOUTH COTTON OIL REFINING COMPANY v. OLIVER REFINING COMPANY.

[109 Va. 513, 64 S. E. 56.]

PLEADING—Demurrer.—Where the common counts in assumpsit are in the usual form, a demurrer to them is properly overruled. (p. 927.)

PLEADING—Demurrer—Question of Evidence.—Whether or not an agreement upon which other counts are based can be introduced to sustain a recovery upon the common counts is a question to be determined upon the trial, when the evidence is offered and not upon demurrer. (p. 927.)

PLEADING—Demurrer—Count Partially Ill.—An objection which if sustained would not vitiate the whole count cannot be raised by a general demurrer to such count. (p. 927.)

PLEADING—Demurrer—Count Assigning Several Breaches—Some Valid.—The assignment of a special cause as ground of demurrer does not narrow the scope of the demurrer. Where a count contains several breaches, any one of which is well assigned, this is sufficient to maintain the action, and a general demurrer to the count should be overruled. (p. 927.)

PRINCIPAL AND AGENT — Undisclosed Principal — Contract by Deed with Agent.—A principal cannot sue upon a deed in which his agent is contracted with in his own name; but where the contract is not a deed, either may sue upon it. (p. 928.)

CHOSE IN ACTION—Assignee.—The Beneficial Owner or assignee can, under section 2860 of the code, maintain an action thereon in his own name. (p. 928.)

CONTRACTS—Papers Executed Simultaneously—Construction. Where two papers are executed at the same time, or contemporaneously between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument. (p. 929.)

CONTRACT—Supplemental Agreement for Special Adjustments—Construction.—When, to complete the performance of a contract, preliminary to conveying the property, the parties make an ancillary agreement providing for exceptions and their future adjustment, the presumption is that save as to those matters the conveyance has satisfied the contract. (p. 930.)

DEED — Superseding Contract.—Where a deed has been executed and accepted as a performance of an executory contract to convey real estate, the rights of the parties rest thereafter solely in the deed, even though the deed varies from that intended by the contract; and in such case the law remits the grantee to the covenants in his deed if there is no ingredient of fraud or mistake in the case. (p. 930.)

C. J. Collins and Williams & Tunstall, for Oliver Refining Company.

Thomas H. Willcox and J. W. Willcox, for Portsmouth Cotton Oil Refining Corporation.

[514] BUCHANAN, J. An action of assumpsit was brought by the Portsmouth Cotton Oil Refining Corporation against the Oliver Refining [515] Company. There was a verdict in favor of the plaintiff, a motion to set it aside, which was sustained upon the ground that the damages were excessive; and the trial court ordered that the verdict should be set aside and a new trial granted unless the plaintiff would remit all of its recovery except a named sum. The plaintiff remitted under protest, and a judgment was rendered for the reduced amount. To that judgment each party applied for and obtained a writ of error.

There was a demurrer to the declaration and to each count thereof, which was overruled.

The fourth was the common count in assumpsit. The other three counts were based upon the following agreement in writing:

"This agreement made and entered into this 13th day of July, 1906, by and between Oliver Refining Company (a corporation organized and existing under and by virtue of the laws of the State of Virginia), a party of the first part, and Aspegren & Co., a co-partnership consisting of Adolph Aspegren and John Aspegren, having their office in the Produce Exchange in the city of New York, witnesseth:

"The said second party has offered and does offer to the stockholders, directors and officers of the first party to purchase at and for the price of $125,000.00 the property described as follows: All the buildings of the cooperage and refinery and the boiler house and all the machinery and fixtures therein contained, storage tanks, and thirty-one cars, railroad track and oil lands contained by a straight line running parallel to outside of railroad track of the refinery from the Norfolk and Portsmouth Belt Line Railroad, Paradise Creek, containing about seven acres of land, upon which said buildings and tracks are located, if more or less than seven acres are contained in said tract at the rate of five hundred dollars per acre shall be added to or deducted from said purchase price.

"The said first party also agrees to sell and said second party agrees to buy at its present market value, all the stock in trade, [516] consisting of barrels, caustic soda, Fuller's earth and other material contained in said building and appertaining to said business and to pay therefor in cash.

"Said first party will cause a survey to be made of the lands included in this offer and will attach the same to this instrument, when presented to its stockholders, at a meeting

called for the purpose of passing upon and ratifying this proposition.

"Payment of said sum of $125,000.00, the purchase price of said property in addition to said stock in trade, shall be made as follows: $25,000.00 thereof, in cash upon the delivery of the deed by the first party, which delivery shall be made at the office of the said second party above stated; said deed to be made to Portsmouth Cotton Oil Refining Corporation, which last named concern has been by said second party incorporated for the purpose of taking the title and issuing the securities hereinafter mentioned, said second party agrees to take all proper and necessary steps to authorize the making, execution and delivery of a mortgage of $100,000.00 upon all of the property so transferred to it by the first party and to cause and procure the issue of $100,000.00 six per cent bonds with coupons attached conditioned for the payment of said interest semi-annually at the office of the trustee to whom such mortgage shall be made. Said mortgage and bonds to be a first lien upon all of the property of said corporation then owned by it and all improvements to or additions thereon or thereto, and the principal of said bond shall be payable in gold of standard weight and fineness in ten years from the date of such mortgage; said bonds to be in denominations as follows: 200 bonds of $500 each.

"Said mortgage to contain provisions for the insurance and preservation of the property and all the ordinary and usual conditions attending like mortgages for securing a bond issue and shall be submitted for the approval of said first party before execution. The trustee therein shall be selected by said first party subject to the approval of said second party.

517 "It is understood that a meeting of the stockholders of the said first party has been called at the office of the company in Portsmouth, Va., for Friday, July 20, 1906, for the purpose of considering this agreement and proposition with a view to ratifying the same, and authorizing the proper officers of the company to execute the necessary deeds and transfers.

"The deed of said property when executed and delivered is to be free and clear of all incumbrance and the plant to be subject to the inspection of said second party as to its condition and working order before the acceptance by them of the deed.

"The stock in trade so to be transferred shall be inventoried by said first party (and), shall be paid for at the fair market value thereof for the purposes of this agreement. It is under-

stood that the aggregate of such stock in trade is of the value of about $5,000.00. Plant to be in good working condition when turned over.

"It is agreed, however, that the deed to the Portsmouth Corporation shall be subject to the perpetual right to use the railroad track's scales and use of tracks leading to the tracks of the crushing plant to the party of the first part."

The object of the action was to recover damages for the alleged breach of the provision in the contract of sale, that "the plant should be in good working condition when turned over" to the plaintiff.

The first error assigned by the Oliver Refining Company in its petition for a writ of error is to the action of the court in overruling the demurrer to the declaration.

The objection made to the common counts is without merit. They are in the usual form. Whether or not the agreement upon which the other counts are based could be introduced to sustain a recovery upon the common counts was a question to be determined upon the trial when the evidence was offered and not upon a demurrer to those counts.

The objection made to the first and second counts, that upon
518 a proper construction of the agreement sued on there could be no recovery of damages against the defendant on account of losses resulting from the necessity of purchasing new presses, since the parties in entering into the agreement could not have contemplated any damage on that account, is equally without merit. Conceding for the purposes of the demurrer that this were true, there were other grounds of damage alleged, which, if sustained, by proof, would have entitled the plaintiff to recover. The demurrer to each count is a general demurrer. It goes to the whole of each count, and an objection which, if sustained, would not vitiate the whole count cannot be thus made. The assignment of a special cause as ground of demurrer does not narrow the scope of the demurrer. Where a count contains several breaches any one of which is well assigned, this is sufficient to maintain the action, and a general demurrer to the count should be overruled: See Henderson v. Stringer, 6 Gratt. 130; Wright v. Michie, 6 Gratt. 354.

The other grounds of demurrer are that the agreement on its face shows that the plaintiff is not a party to it; that the provisions therein contained were not made for its sole benefit; and that there is no privity between it and the defendant. The cases of Newberry L. Co. v. Newberry, 95 Va. 119, 27 S.

E. 899, and McIlwaine v. Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473, are relied on to sustain this ground of demurrer.

The instrument sued on in each of those cases was under seal, and the rigid rule of the common law applied except so far as modified by statute. What is said in those cases must therefore be read and considered in connection with their facts. If the agreement sued on in this case had been under seal, it may be that under the principles announced in those cases the plaintiff could not maintain an action upon it, because not made solely for its benefit, even though Aspegren & Company were acting as its agents in the transaction; for it seems to be well settled at common law that where an agent is contracted with by deed in his own name, his principal cannot [519] sue upon it: See Dicey on Parties, side p. 134, and cases cited; Story on Agency, sec. 422; 3 Robinson's Practice, New, 34-37. But it is a well-established rule of law that where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it: National Bank v. Nolting, 94 Va. 263, 26 S. E. 826; 3 Robinson's Practice, New, 34; Dicey on Parties, side pp. 138, 139; Mechem on Agency, sec. 769.

It is averred in the first count in the declaration that, in making the contract sued on, Aspegren & Company were acting for the plaintiff; that the contract was afterward approved by the stockholders of the defendant company as a contract with the plaintiff, that it (the plaintiff) furnished the whole consideration to the defendant provided for by the contract; and that the defendant conveyed and transferred all the property mentioned in it to the plaintiff. If these averments are true, Aspegren & Company, in making the agreement sued on, were the agents of the plaintiff company, and it had the right to bring this action.

The averments of the second and third counts, if true, show that the plaintiff is the assignee or beneficial owner of the contract sued on in each of those counts, and under section 2860 of the code it can maintain an action thereon in its own name.

We are of opinion, therefore, that the demurrer to the declaration and to each count thereof was properly overruled.

The next assignment of error which we will consider is the action of the court in refusing to permit the defendant to introduce in evidence an agreement between the plaintiff, the defendant and Aspegren & Company at the time the deed provided for by the agreement sued on was executed.

The rejected agreement commences as follows: "Memorandum.—In the matter of the purchase of certain land and personal property by Portsmouth Cotton Oil Refining Corporation from the Oliver Refining Company. The parties to this [520] agreement being about to pass the deeds relating to this property, and some unsettled matters not having been provided for, it is understood and agreed that those matters [naming them] are to be hereafter adjusted."

Two of the unsettled matters referred to in that agreement, and which were reserved for future adjustment, were the repairs of certain tank-cars and of the floor of the cooperage building. The tank-cars and cooperage building are specifically mentioned in the agreement of sale, and are parts of the "plant" which that agreement provided should be conveyed to the plaintiff free of all encumbrance and in good working condition when turned over, and was to be subject to the plaintiff's inspection as to its condition and working order before the acceptance of the deed.

Where two papers are executed at the same time or contemporaneously, between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument: See Anderson v. Harvey's Heirs, 10 Gratt. 386; Torrance v. Shedd, 112 Ill. 466; Johnson v. Moore, 28 Mich. 3, and cases cited in notes to 13 Cyc. 614.

The plaintiff having the right under its contract of purchase to inspect the plant as to its condition and working order before the acceptance of the deed, even if it were not its duty to do so, was under no obligation to accept the deed unless the plant was at that time in good working condition. It is true that the plaintiff insists that it could not ascertain whether or not the plant was in good working order until after it was conveyed and turned over to it. This contention, however, seems to contradict the language of the agreement of sale, which expressly provides for an inspection for that purpose before the acceptance of the deed.

If, when the deed was executed and delivered and the contemporaneous agreement entered into, the plaintiff did not [521] intend to receive the plant as in good condition in all respects, except as to tank-cars and the cooperage floor, the agreement ought and naturally would have contained some provision on that subject. When to complete the performance

of a contract and as preliminary to a conveyance of the property the parties come together and make an agreement stipulating for the future adjustment of certain specific matters of difference between them, the law assumes that they intended that, with the exception of things named, the provisions of the contract should, in all other respects, be treated as satisfied by the conveyance made, especially where the contemporaneous agreement in part relates to defects in the property conveyed which the original agreement of sale provided should be in good condition when turned over, which turning over it is conceded was done when the deed of conveyance was made and the contemporaneous agreement entered into: Disbrow v. Harris, 122 N. Y. 362, 25 N. E. 356.

The general rule is and no rule is better settled than that where a deed has been executed and accepted as a performance of an executory contract to convey real estate, the rights of the parties rest thereafter solely in the deed. This is true although the deed thus accepted varies from that provided for in the contract, and the law remits the grantee to his covenants in his deed, if there is no ingredient of fraud or mistake in the case: 2 Devlin on Deeds, sec. 850-a; Shenandoah Valley R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239; Trout v. Norfolk & W. Ry. Co., 107 Va. 576, 59 S. E. 394, 17 L. R. A., N. S., 702, 1 Va. App. 636; note to Clifton v. Jackson Iron Co., 16 Am. St. Rep. 621.

Whether the deed of conveyance executed in this case and accepted by the plaintiff, in the absence of the contemporaneous agreement, would have come within the general rule and rendered the executory contract sued on functus officio by merger, and have furnished the only evidence of the rights of the parties, as is argued by counsel for the defendant, need not be considered, as that is not this case.

The action of the court in refusing to admit the contemporaneous [522] agreement in evidence was error for which its judgment must be reversed.

The defendant assigns other errors, but as they are such as are not likely to arise upon another trial or depend upon the evidence in the case, which will be different, it is unnecessary to consider them.

It follows from what has been said in disposing of the defendant's assignments of error that the plaintiff was not prejudiced by the action of the court in requiring it to remit a part of its recovery, and that its assignment of error is without merit.

The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial not in conflict with the views expressed in this opinion.

Reversed.

Suits by Undisclosed Principals on Contracts made by their agents are discussed in the note to Powell v. Wade, 55 Am. St. Rep. 915. As to the right of setoff in such cases, see Frazier v. Poindexter, 78 Ark. 241, 115 Am. St. Rep. 33.

If an Agent Buys Property in His Own Name with his principal's money, though the name of the principal is undisclosed, the property becomes that of the principal, and the intent of the agent to defraud the principal does not change the effect of the transaction: Kempner v. Dillard, 100 Tex. 505, 123 Am. St. Rep. 822.

An Agent Contracting in His Own Name cannot Escape Liability by pleading that he acted as the agent of another: Stewart-Morehead Co. v. Postal Tel. C. Co., 131 Ga. 31, 127 Am. St. Rep. 205.

As to the Merger of Prior Agreements in a Deed, see the note to Clifton v. Jackson Iron Co., 16 Am. St. Rep. 622; and the subsequent cases of Close v. Zell, 141 Pa. 390, 23 Am. St. Rep. 296; Slocum v. Bracy, 55 Minn. 249, 43 Am. St. Rep. 499; Rackemann v. Riverbank Imp. Co., 167 Mass. 1, 57 Am. St. Rep. 427; Butt v. Smith, 121 Wis. 566, 105 Am. St. Rep. 1039. A quitclaim deed does not merge a prior agreement to sell the land and convey by quitclaim, where it develops that the grantor had no title: Davis v. Lee, 52 Wash. 330, post, p. 973.

CORNELL v. STEELE.

[109 Va. 589, 64 S. E. 1038.]

CONTRACTS—Final Certificate—Conclusiveness—Mala Fides—Fraud.—Notwithstanding a contract provides that the final estimate of a chief engineer on certain work is to be conclusive, if the evidence disclosed an error on his part, either of judgment or calculation, so gross as to imply bad faith and amount to a fraud on the plaintiff, though such may not have been the intention of the chief engineer, the plaintiff will be entitled to recover the just amount due to him according to correct items submitted in his claim. (p. 933.)

CONTRACTS—Final Certificate—Gross Error—Pleading—Averments of Fraud.—Where a contract provides that the final estimates of the chief engineer of certain works shall be conclusive, and they are so grossly incorrect as to amount to bad faith and fraud on the contractor, it is not necessary to allege either the fraud or bad faith, or that such was the engineer's intention; if the evidence is sufficient to justify it, the jury may find that the estimates, etc., of the engineer are so grossly erroneous as to amount to a fraud upon the contractor's rights. (p. 935.)

CONTRACTS—Finality of Referee's Arbitrament.—A stipulation in a contract between a railroad company and a contractor that the estimate made by the former's engineer as to the quality,

character and the value of the work performed by the contractor shall be final against the latter, "without further recourse or appeal," cannot deprive him of the right to resort to the courts for the recovery of what may be due him, notwithstanding the estimates. (pp. 935, 936.)

Perkins & Perkins and Moon & Fife, for the plaintiffs in error.

Harmon & Walsh and Montague & Montague, for the defendant in error.

589 CARDWELL, J. This action was brought by W. I. Steele to recover of J. N. H. Cornell & Co., a foreign corporation, and J. H. Fine, 590 a balance of $7,511.05, alleged to be due Steele from the defendants upon certain work which Steele subcontracted with Cornell & Co., general contractors with the Virginia Air Line Railway Company, to do on the Virginia Air Line Railway, to be constructed by the general contractor from Lindsay, on the C. & O. Railway in Albemarle county, to a point on James river, about twenty miles distant, the plaintiff, Steele, undertaking by his subcontract the construction of four miles of this road within a stated period and according to specifications as to the execution of the work. That Steele performed his part of this contract truly and faithfully seems not to have been questioned, and the controversy arises out of the classification of the material taken out and removed by him, made by Cornell & Co.'s chief engineer in charge of the work.

The contract, which was in evidence at the trial of this cause, shows the price of the excavation of the several kinds of material to be taken out and removed by Steele, viz., earth, loose rock and solid rock, gives the definition of these several classes of material, and provides for monthly payments as the work progressed and for a final estimate on the completion and acceptance of the work; and the contract also provides that the decision of the chief engineer of the general contractor on all questions arising under the contract shall be final as between the parties.

J. H. Fine, who made the estimates on Steele's work, was the chief engineer of the general contractor, and also its vice-president, and as Steele progressed with his work he received monthly payments upon the estimates made by Fine; but, as we shall see later, protested all along that these estimates were incorrect. On the completion of Steele's contract in January, 1908, Fine made a final estimate showing that the general con-

tractor, Cornell & Co., owed Steele $1,775.73, to which Steele objected, alleging that this estimate was based upon an erroneous classification of material excavated and removed, and thereupon Cornell & Co. had the estimate reconsidered and [591] the work re-examined, but insisted that the action of its chief engineer was correct and would not be corrected, and so informed Steele. Whereupon, Steele selected one James Dickey, a competent engineer and an expert, to go over the work and make an estimate of it according to the provisions of the contract, and Dickey's estimate varied materially from that of Fine, the chief difference arising from the classification of material, the difference in the total quantity of material moved, or yardage, caused by certain measurements adopted by Dickey and not allowed by Fine being comparatively slight. Omitting the items of these estimates as to which Dickey and Fine agreed, the latter's final estimate allowed Steele for 42,113.1 cubic yards of earth, $9,896.58; 10,174.8 cubic yards of loose rock, $3,856.42; and 586.9 cubic yards of solid rock, $398.23; total, $14,155.13; while in Dickey's estimate these several items appear as follows: 30,011.1 cubic yards of earth, $7,052.60; 15,559.5 cubic yards of loose rock, $5,912.61; and 10,017.8 cubic yards of solid rock, $7,012.46; total, $19,977.67. The disclosures made by these estimates caused Steele to realize that despite his rigid economy and efficient work, he would sustain a loss of over $3,500 if Fine's estimate of his work was to be adhered to; and thereupon he brought this suit for $7,511.05, the amount of the difference between the final estimate made by Fine and that made by Dickey.

At the trial of the cause, it was submitted to the jury upon four instructions given by the court, to which neither party made objection, and the jury rendered its verdict for the plaintiff, assessing his damages at $3,600, and upon the verdict the court entered the judgment to which this writ of error was awarded.

The instructions of the trial court, in sum and substance, rightly told the jury that, notwithstanding the provision in the contract between the parties that the final estimate of the chief engineer of the general contractor, Cornell & Co., was to be final and conclusive on both parties, if they believed from the [592] evidence Chief Engineer Fine made such error of judgment or mistake in the estimates and classification of the work made by him as amounted to a mistake so gross as necessarily to imply bad faith and amount to a fraud upon the rights of

the plaintiff, they should find for the plaintiff, even though they believed that said engineer had no intention to commit a fraud or to act in bad faith; and further told the jury, that if they believed from the evidence that the estimates or classifications by the company's engineer were not binding on the plaintiff because of gross error or mistake, amounting to a fraud, then they should make such classification of the material removed as they deemed proper, under the evidence and according to the provisions of the contract, and assess the plaintiff's damages according to that classification at the prices specified in the contract, subject to proper credits.

The contract between the parties is explicit as to the classification of the material that was to be removed and the prices to be paid therefor, solid rock being recognized as the most expensive material, and therefore a higher price for its removal was fixed than for the removal of earth or loose rock. It will, therefore, be seen that the subject of classification of the work done by defendant in error was the crucial point in the case, for the determination of the jury, and we deem it only necessary to refer briefly to the evidence to show that it was sufficient to warrant the jury in regarding the estimate made by Fine so grossly erroneous as to amount to a fraud upon the rights of defendant in error.

The material classified as solid rock by defendant in error and Dickey, and disallowed by Fine, is clearly and unmistakably proven to be the same material, of the same nature and character of rock as that allowed defendant in error and classified by Fine as solid rock to the extent of five hundred and sixty-nine cubic yards. In other words, the evidence shows that the rock, classified as solid rock by defendant in error and by Dickey, was of the identical kind, character and formation as the five hundred and sixty-nine yards of solid rock [593] allowed by the estimates made by Fine, and that the arbitrary rejection by him of over nine thousand cubic yards of this solid rock removed by defendant in error, and classifying the same with other material far less expensive to remove, was an error of judgment or mistake so gross as to amount to a fraud upon defendant in error's rights; and if the jury believed in the truth and correctness of this evidence, it was of itself sufficient to sustain its finding in his favor: Mills v. Norfolk & W. Ry. Co., 90 Va. 523, 19 S. E. 171, 91 Va. 613, 22 S. E. 556.

In the report of that case last mentioned, the syllabus in part is as follows: "Whether the plaintiff was entitled to

recover the higher or the lower of the two prices fixed by the contract for different classes of work, or whether he had waived or abandoned his right to recover the higher price, were questions of fact which were properly left to the determination of the jury, under instructions which correctly propounded the law, and gave them great latitude in the range of their inquiry."

The defendant in error in this case, testifying in his own behalf, stated that he all along protested that the classification of the material removed by him, made by Chief Engineer Fine in his monthly estimates, was grossly erroneous, and this statement is not disproved; but plaintiffs in error rely upon the contention, in support of which numerous authorities are cited, that fraud must be established by clear and satisfactory proof. The authorities cited sustain the proposition stated, but are not at all in conflict with the law as expounded in the instructions given in this case with the approval of plaintiffs in error, nor with the decided cases applicable to the facts submitted to the jury for determination.

In Mills v. Norfolk & W. Ry. Co., 90 Va. 523, 19 S. E. 171, 91 Va. 613, 22 S. E. 556, it was expressly stated that to avoid the engineer's estimate and classification in a case like this, which is so grossly erroneous as to imply fraud, it is not necessary to impute or prove moral wrong to the engineer. All that is necessary in such a case is that the evidence be sufficient to justify the jury in finding that the [594] estimates and classifications of the engineer are so grossly erroneous as to amount to a fraud upon the rights of the injured party.

In the case of Kistler v. Indianapolis etc. R. Co., 88 Ind. 460, the contract between a railroad company and one who undertook to do certain work in its construction fixed the prices of the various kinds of work to be done, and provided that the engineer of the road should make estimates of the work from time to time upon which payment should be made and a final estimate which should be also paid, and that all disputes as to the meaning and execution of the contract should be referred to the engineer, and his decision should be final: Held, that where the engineer had failed to estimate the work, or by neglect, or by mistake, underestimated it, suit could be maintained for the recovery of the correct amount. In that case the court emphasizes that to entitle the contractor to recover the correct amount due him for work done, it was not necessary to allege and prove that the engineer making the estimates acted corruptly or fraudulently.

In a later case decided by the same court, Louisville etc. Ry. Co. v. Donnegan, 111 Ind. 179, 12 N. E. 153, it was held: "A stipulation in a contract between a railroad company and a contractor, that the estimate made by the former's engineer as to the quality, character and the value of the work performed by the contractor shall be final against the latter, 'without further recourse or appeal,' cannot deprive him of the right to resort to the courts for the recovery of what may be due him, notwithstanding the estimates."

In that case it was considered that the estimates of the engineers were so grossly erroneous as to amount to a fraud upon the contractor, although moral turpitude was neither charged nor attempted to be proved; in other words, where the mistake is so gross as to amount to a fraud upon the rights of the contractor, he is not precluded from bringing his action to recover the correct amount due him, notwithstanding the provisions of [595] the contractor or the fact that he had received and receipted for payments on estimates made during the progress of the work and before the final estimate: See, also, Edwards v. Hartshorn, 72 Kan. 19, 82 Pac. 520, 1 L. R. A., N. S., 1050, where almost the precise facts were involved as in this case.

We are of opinion that there is no error in the judgment of the circuit court complained of, and it is, therefore, affirmed.

Affirmed.

If the Parties to a Building Contract agree that the architect shall pass upon the work and certify upon the payments to be made, his decision is generally binding and can be attacked only for fraud, mistake, and the like: See the note to Baltimore etc. Ry. Co. v. Scholes, 56 Am. St. Rep. 312; Young v. Stein, 152 Mich. 310, 125 Am. St. Rep. 412. An agreement that an architect's certificate shall be a condition precedent to a contractor's right to payment, while usually valid, is always deemed to embody the condition that the architect shall exercise his function as arbitrator honestly and in good faith: Halsey v. Waukesha Springs etc. Co., 125 Wis. 311, 110 Am. St. Rep. 838.

STRAUSE v. RICHMOND WOODWORKING COMPANY.

[109 Va. 724, 65 S. E. 659.]

CORPORATIONS — Promoters — Rights of Creditors.—Those dealing with promoters of corporations have the double security of the promoters and the corporation when formed except the promoters have contracted themselves out of liability. (p. 940.)

CORPORATIONS—Promoters—Rights of Creditors—Selection of Debtor.—Where the creditor of a newly formed corporation has manifested no intention to treat the promoter as his debtor, and has delivered goods to and been paid by the corporation before and after incorporation and up to its insolvency, he cannot then charge the promoter with a balance due on accounts merely because the negotiation originated in a letter signed by the promoter when the corporation was inchoate. (p. 940.)

APPEAL AND ERROR—Ignoring Oral and Mentioning Written Evidence.—An instruction which directs the attention of the jury to the written evidence only, ignoring the oral testimony, and authorizes a verdict on this evidence, singled out, is misleading, and constitutes reversible error. (p. 940.)

APPEAL AND ERROR—Advancement and Relegation of Parts of Evidence.—An instruction must not call attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relative to the matter in issue. (p. 940.)

CORPORATIONS—Promoter's Liability Expressly Negatived.—A promoter cannot be held liable in the face of a contract against liability, fairly and legally entered into; and in determining the question whether he had been freed by the other party, facts as to the latter's acts or the agreement providing for the promoter's immunity are not to be ignored. (p. 942.)

A. G. Collins and Leake & Carter, for the plaintiff in error.

Braxton, Williams & Eggleston, for the defendant in error.

725 CARDWELL, J. This writ of error is to the judgment of the law and equity court of the city of Richmond in an action of trespass on the case in assumpsit, brought by defendant in error against plaintiff in error to recover a balance alleged to be due on account for the manufacture of a certain implement called a shock binder, delivered to the "American Shock Binder Corporation," pursuant to contract entered into by defendant in error with plaintiff in error. The verdict and judgment are for three thousand five hundred and two dollars and twenty-four cents, and we are asked to review and reverse the judgment because of misdirection of the jury in giving and refusing instructions.

It appears that there were negotiations between plaintiff in error and one Louis Smith, the general manager of defendant in error, leading up to and culminating in certain letters which are alleged to evidence the contract between the parties to this controversy. These letters are as follows:

[726] "May 22, 1906.

"Mr. M. M. Strause, c/o Bache Implement Co., City.

"Dear Sir: As per your request, we take pleasure in quoting you on 25M shock binders, as per sample submitted.

"We can furnish this lot at 23¢ each, f. o. b. our works. Terms: 2% in 10 days; 30 days net. This estimate is based on the following specifications:

"The binder to be manufactured equal in workmanship and material to the sample submitted, to have not over 10 feet of rope to each binder; your company is to furnish the necessary castings, finished complete with holes drilled to secure same to spindle. We will not assume any responsibility for any delay in the delivery of these castings.

"We would suggest that you place your order with us at once, as it will take a little time to prepare for this work, and you have our assurance that everything possible will be done to rush this order to completion upon receipt of castings. We cannot promise prompt delivery if the order is not placed before May 29th, owing to the large quantity of other work at our mill.

"Sincerely trusting to hear favorably from you, we remain,

"Yours very truly,

"RICHMOND WOODWORKING COMPANY,

"LOUIS SMITH,

"General Manager."

"May 29/06.

"Richmond Woodworking Co., City.

"Dear Sirs: Yours of the 22nd instant received, and I herewith order 25,000 Fountaine shock binders, as per sample now in your [727] possession, upon the terms and conditions specified in your letter of 22nd instant, at the price of twenty-three cents each.

"Yours truly,

"M. M. STRAUSE,

"For American Shock Binder Corp."

The oral testimony and the letters themselves tended to prove that there had been not only negotiations between the parties prior to the letters, but that the general manager and agent of the defendant in error was apprised and fully understood that plaintiff in error was negotiating for and on behalf of the American Shock Binder Corporation, which was chartered on the thirteenth day of June, 1906, and organized on the twenty-second day of June, 1906. Such was the character of the negotiations leading up to the written corre-

spondence, that it was fully understood that plaintiff in error was acting for the company in process of being organized, and not for himself, and in fact this is admitted by Smith in his examination as a witness on behalf of defendant in error.

It further appears that the first shock binders, by direction of plaintiff in error, and quite naturally in view of the facts and circumstances which the evidence tended to prove, were delivered by defendant in error, not to the plaintiff in error, Strause, but to the American Shock Binder Corporation, on the twenty-ninth day of June, 1906, about two weeks after it was chartered and about one week after it was organized, and were accompanied by a delivery ticket addressed, not to the plaintiff in error, but to the American Shock Binder Corporation; that all the shock binders made were so delivered; that accounts were rendered by defendant in error, not to plaintiff in error, but to the shock binder corporation; that all the charges on the books of defendant in error therefor were made, not against plaintiff in error, but against the American Shock Binder Corporation, and all payments thereon, amounting to more [728] than fifteen hundred dollars, were made by that corporation's checks; that the account on the books of defendant in error against the shock binder corporation remained as charged up to the trial of this cause; and that the bill against plaintiff in error sued on was made out against plaintiff in error, as stated by defendant in error's bookkeeper and witness, "subsequently, after all this trouble" (referring, no doubt, to trouble in getting payment from the shock binder corporation), and after the shock binder corporation had become insolvent.

After the evidence had gone to the jury, the trial court gave, at the request of the defendant in error, four instructions Nos. 1, 2, 4 and 5, over the objection of plaintiff in error, and refused to give instructions "A" and "B," asked by him; and these rulings of the court constitute plaintiff in error's first assignment of error.

While all of the four instructions given for defendant in error were excepted to, the objection urged here is against instruction No. 1, which is in these words:

"If the jury believe from the evidence that the defendant wrote or caused to be written, to the plaintiff, and mailed or delivered, or caused to be mailed or delivered, to the plaintiff, the letter in evidence, which is dated May 29/06, and which is signed 'M. M. Strause, for American Shock Binder

Corp.,' and if the jury further believe from the evidence that the defendant, in using the words following his name, viz.: 'For American Shock Binder Corp.,' referred to a contemplated or proposed corporation, but one for which no charter of incorporation had, at that time, been granted, then the jury are instructed that the said letter bound the defendant, M. M. Strause, personally and individually, just as if the said words 'for American Shock Binder Corp.' had not been added after the defendant's name; and that the said letter, together with the letter of the plaintiff, to which it refers, constituted a contract between the plaintiff in this case and the said defendant, M. M. Strause, personally and individually."

[729] Upon the soundest reasoning, the tendency of the courts in recent years is to an adherence to the doctrine, that those dealing with promoters should be left with the double security of the promoter and the company when one is formed, unless it clearly appears that the liability of the promoter was not intended, or that it was intended to be released when the liability of the corporation began; but where the evidence, as in this case, consisting of oral statements of witnesses as to facts and circumstances and a correspondence in writing, tends to show that it was not intended by the contracting parties that a person active in the promotion and organization of a corporation should be liable for goods or supplies furnished to the corporation, but that the party furnishing the goods or supplies understood and agreed that he was to look to, and did in fact look to and receive payment in part from, the corporation, and was not to look to or demand payment from the promoter or organizer of the corporation, and in fact did not look to or demand payment from him until the insolvency of the corporation; an instruction which directs the attention of the jury to the written evidence only, ignoring the oral testimony, and authorizes a verdict on this evidence, singled out, is misleading and constitutes reversible error.

"An instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relative to the matter in issue": Douglas Land Co. v. Thayer Co., 107 Va. 292, 58 S. E. 1101, and authorities there cited.

It is very true that the bill of exception taken with respect to the rulings of the court on the instructions asked and refused certifies that "it was contended by the counsel for

the defendant as well as counsel for the plaintiff, in argument of the instructions, that the construction of the contract and the liability or nonliability of the defendant on the letters and evidence in the case was a matter of law for the court to determine and not for the jury"; still the question as to what was [730] the contract—what the understanding and agreement of the parties—as to the liability or nonliability of plaintiff in error was a question of fact for the jury; and in submitting that question to them they should have been directed to take into consideration all the evidence, oral and written, bearing upon that issue.

While instruction "A," asked by plaintiff in error and refused, refers to the facts and circumstances surrounding the parties in their dealings leading up to the two letters referred to in defendant in error's instruction No. 1, it did not as fully and as fairly as it should have done submit the question as to what was the understanding and agreement of the parties with respect to the liability or nonliability of plaintiff in error, to be determined upon a consideration of all the evidence bearing upon that issue; therefore it was not error to refuse the instruction.

The theory of defendant in error that, in the face of the facts and circumstances which the evidence tended to prove, plaintiff in error was liable in this action, rests entirely upon that line of authorities sustaining the doctrine as stated in Taylor on Private Corporations, section 76, viz.: "It follows that the promoter of a future corporation ordinarily is personally liable to the other contracting party, because the promoter has no principal, and the subsequent adoption of the contract by the corporation, when organized, will not free the promoter from his liability to the other contracting party without the consent of the latter, because it cannot be presumed that a party contracting gives credit to a corporation not yet organized, and, therefore, not yet capable of being bound."

The rule as thus stated is general and is unquestionably sound, but to apply it to this case for the benefit of defendant in error, not only would the exception indicated in the rule have to be ignored, but also the elementary doctrine that parties sui juris may enter into any contract that they choose to enter into, if the contract be not for an immoral or illegal purpose.

[731] The general rule as to a promoter's liability cannot, in reason or fair dealing, be carried to the extent of holding

him liable in the face of his contract against liability, fairly and legally entered into; and, in determining the question whether or not he has been freed from liability by the other contracting party, facts as to the latter's acts, or of an agreement that he was not to be liable, are not to be ignored. Admitted facts, that the creditor delivered his goods to the corporation after its organization, charged the corporation therefor on his books, received payment at different times from the debtor corporation, and never rendered a bill to the promoter for goods delivered to the corporation, or demanded payment of him, until after the solvency of the corporation became questionable, are very potential in the determination of the question of liability or nonliability of the promoter.

Instruction "B," asked by plaintiff in error, is as follows: "The burden is on the plaintiff in this case to prove by a preponderance of the evidence that the defendant agreed to make himself personally responsible for the manufacture of shock binders, and if the plaintiff had notice of or from the facts and circumstances surrounding the case, ought to have known that the shock binders contracted for were to be made for a corporation to be formed at the time the contract was made, but which was formed when said shock binders were made, the defendant is not liable personally, unless he agreed to become so, and no such agreement could have existed, unless the minds of the plaintiff and defendant were in accord on this point, unless the defendant employed such language as clearly showed that he intended to bind himself personally, and not the corporation. The fact that the plaintiff may have thought the defendant intended to make himself liable, if such fact existed, is not sufficient to bind the defendant."

For the reasons above stated, the first part of the instruction relating to the burden of proof as to whether plaintiff in error agreed to make himself personally responsible for the [732] manufacture of the shock binders, etc., is not a correct statement of the law; and the latter part of the instruction, relating to facts and circumstances under which he would be responsible, is but a statement of propositions of law not necessary to have been stated had the jury been correctly instructed upon the main and controlling features of the case. If upon another trial of the case the evidence be substantially as at the former trial, and the jury is instructed as to the law in accordance with the views expressed herein, the giving of instruction "B" in any form will be unnecessary to a proper guidance of the jury in determining the facts.

The remaining assignment of error involves a review of the evidence, and as the case has to be remanded because of misdirection of the jury at the former trial, we deem it inexpedient to express any opinion with respect to the evidence.

The judgment of the lower court will be reversed and annulled, the verdict of the jury set aside, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

Reversed.

The Liability of Corporations and Promoters on Contracts of the Latter is discussed in the notes to Hardware Co. v. Hardware Co., 13 Am. St. Rep. 28; Pittsburg Min. Co. v. Spooner, 17 Am. St. Rep. 161. The relation of a promoter to the corporation is a fiduciary one: Hinkley v. Oil and Pipe-line Co., 132 Iowa, 396, 119 Am. St. Rep. 564; Old Dominion etc. Co. v. Bigelow, 188 Mass. 315, 108 Am. St. Rep. 479; and this relation does not necessarily cease when the corporation is organized to do business: Pietsch v. Milbrath, 123 Wis. 647, 107 Am. St. Rep. 1017.

WHITE OAK COAL COMPANY v. CITY OF MANCHESTER.

[109 Va. 749, 64 S. E. 944.]

HIGHWAYS—Public Use—Local Control.—The highways of the commonwealth, urban and rural, belong primarily to the public and the absolute dominion over them is lodged in the legislature. The control of streets is commonly delegated to the municipalities in such measure as the legislature sees fit to bestow, but the use of them remains in the public at large, subject only to such limitations as the municipalities are authorized by law to impose. (p. 944.)

MUNICIPAL CORPORATIONS—License Tax on Vehicles—Local not General.—It is reasonable for a municipality to lay a license tax upon vehicles of residents, and such persons as reside out of the municipality, yet employ their vehicles for business within it; but to levy such tax on vehicles of nonresidents, whose business or pleasure casually carries them into or through the municipality, would be in derogation of their reserved rights to use the highways of the commonwealth and impose intolerable conditions upon the public, and lead to absurd results. (pp. 944, 945.)

MUNICIPAL CORPORATIONS — Control of Highways — Construction of Grant.—The grant by the legislature of municipal control over streets must be construed strictly in the interest of common right. (p. 945.)

Page & Leary, for the plaintiff in error.

Charles L. Page, for the defendant in error.

[730] WHITTLE, J. The plaintiff in error, the White Oak Coal Company, is a corporation engaged in business as a coal merchant at the city of Richmond, with its yards, offices and stables located in that city, where it pays a license tax on the wagons employed in its business. Having sold a consignment of coal to a customer in Chesterfield county, it caused the cars containing the coal to be stopped on a siding of the railroad company in the city of Manchester, and from that point proceeded to haul the coal in its wagons over the streets of the city to the place of business of the purchaser outside the city limits.

The charter of the city provides that "The council may grant or refuse licenses to owners or keepers of wagons, drays and other wheel carriages kept or employed in the city for hire, and may require the owners and keepers of wagons, drays and carts, using them in the city, to take out a license therefor, and may require taxes to be paid thereon, and subject the same to [731] such regulations as they may deem proper, and prescribe fees and compensation."

The ordinance passed in pursuance of the foregoing provision declares, that "No wagon, dray or other wheel carriage shall be kept or employed in the city for hire, directly or indirectly, unless the owner or keeper thereof obtain a license therefor."

Upon the foregoing state of facts the plaintiff in error controverts the contention that the city had authority to impose a license tax on its wagons.

The general principle is well recognized, that the highways of the commonwealth, whether urban or rural, belong primarily to the public; and that the absolute dominion over them is lodged in the legislature. It is true the control of streets is commonly delegated to the municipalities in which they are located, in such measure as the legislature sees fit to bestow. Nevertheless, the use of them remains in the public at large, subject only to such limitations as the municipalities are authorized by law to impose: City of Richmond v. Smith, 101 Va. 161, 43 S. E. 345; Elliott on Roads and Streets, 2d ed., sec. 645. Moreover, it is the policy of the state that each locality shall bear the burden of maintaining its own highways.

Bearing in mind these principles, it is generally regarded as a reasonable exercise of such charter powers to lay a license tax upon vehicles of residents of the municipality, and upon persons residing outside of the corporate limits who

employ their vehicles in furtherance of business and occupations carried on within the city. But to levy such tax on vehicles of nonresidents, whose business or pleasure casually carries them into or through the city, would be in derogation of their reserved right to use the highways of the commonwealth and impose intolerable conditions upon the public, and lead to absurd results.

As corollary to these well-settled rules, the grant by the legislature of municipal control over streets must be construed strictly in the interest of common right.

[752] In Bennett v. Birmingham, 31 Pa. 15, discussing the power of cities to demand such exactions, the court says: "Such statutes and ordinances are contrary to the usual course of taxation, and embarrassing to the public, and ought to be strictly construed." In that case, by act of the legislature, the town council of Birmingham "were authorized to direct all owners of carts, wagons and other vehicles using the paved streets of said borough, to pay such moderate license for such use as they might by ordinance direct." The court held that this grant of power did not authorize the imposition of a tax on vehicles owned by nonresidents and used in hauling goods and produce through the town from one adjacent township to another.

So also in the case of Cary v. North Plainfield, 49 N. J. L. 110, 7 Atl. 42, the court said: "The inconvenience attendant upon the exercise by every municipality in the state of the power of excluding from its limits all unlicensed vehicles engaged in transporting goods or passengers for hire is manifest. Its legitimate operation would require the owners of such vehicles to obtain licenses not only from the authorities of the place where their business had its headquarters, but also from every neighboring town into which their casual engagements might call them, or else to unload their vehicles at the border line. A general law having effects so burdensome or so absurd is not to be anticipated, and only unequivocal language could convince a court that such legislation was intended. The statute now under review is not of this character. Its terms are satisfied by holding that license taxes are to be imposed only by that municipality in which the business or occupation is carried on or conducted": Commonwealth v. Stodder, 2 Cush. 562, 48 Am. Dec. 679; St. Charles v. Nolle, 51 Mo. 122, 11 Am. Rep. 440; East St. Louis v. Bux, 43 Ill. App. 276.

The same principle is recognized by this court in Frommer v. City of Richmond, 31 Gratt. 646, 31 Am. Rep. 746. Frommer lived outside of the city limits, but rented a stall in the 753 city market, where he conducted his business as a butcher. He prepared his meat for market at his residence, and used his carts to haul it to his stall in the market. Upon these facts, the court held that Frommer was amenable to license tax on the carts thus used. The court rested its decision on the ground that the license tax was exacted for the privilege of using the carts on the streets of the city in pursuit of the owner's business in the city.

If the plaintiff in error had established a coal-yard within the corporate limits of Manchester, the case would have been analogous to Frommer's case and ruled by it. But it is clear that the sporadic act of hauling a single consignment of coal from the siding in Manchester over the streets of the city to its customer on the outside was not carrying on such a business or occupation within the city as would subject the coal company to the license tax on vehicles imposed by the ordinance.

The conviction and fine imposed for the alleged violation of the ordinance was consequently illegal, and the judgment must be reversed and the proceeding dismissed with costs.

Reversed.

The Imposition of License Taxes on Owners of Vehicles is discussed in the note to Hager v. Walker, 129 Am. St. Rep. 284–286.

JENNINGS v. COMMONWEALTH.

[109 Va. 821, 62 S. E. 1080.]

CRIMINAL LAW—Seduction—Divorced Female—Construction of Code.—A woman who has been married and divorced is not an unmarried female within the intendment of section 3677 of the code which prohibits the seduction of "any unmarried female of previous chaste character." (p. 947.)

CRIMINAL LAW—Seduction—Unmarried Female—Construction of Code.—The code prohibiting the seduction of unmarried females under pain of imprisonment, being a highly penal statute, must be construed strictly in the interest of the liberty of the citizen, not to be extended but limited to cases clearly within the language used. (pp. 947, 948.)

Gorden & Gorden, for the plaintiff in error.

Robert Catlett, assistant to the attorney general, for the commonwealth.

[821] WHITTLE, J. The accused, Charles Jennings, brings error to a judgment of the circuit court of Louisa county, by which he was convicted of seduction of the prosecutrix under promise of marriage, and sentenced to two years confinement in the state penitentiary.

The prosecution arose under Virginia Code, 1904, section 3677. That portion of the section applicable to this case is as follows: "If any person, under promise of marriage, seduce and have [822] illicit connection with any unmarried female of previous chaste character he shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary not less than two, nor more than ten years."

The female alleged to have been seduced was a divorced woman, and the sole question for our determination is whether or not a woman who has been married and divorced is an "unmarried female" within the intendment of section 3677.

It is conceded that in its ordinary and primary sense the word "unmarried" means "never having been married"; but it is contended that the term is of flexible import, and that circumstances may be sufficient to show that it is used in the less comprehensive sense of "not having a husband or wife at the time in question": 2 Bouvier's Law Dictionary 1181; Words and Phrases, 7196.

In Pratt v. Mathew, 22 Beav. 328, Sir John Romilly, master of the rolls, held that in a gift to a woman unmarried at the time, with direction that if she dies unmarried it shall go over, the word "unmarried" is to be construed as "never having been married." Though he says, the meaning of the word is to be determined according to the circumstances attending its use.

This statement of the rule is settled by numerous decisions: Day v. Barnard, 30 L. J. Eq. 220; Dalrymple v. Hall, L. R. 16 Ch. D. 715; Moberly v. Strode, 3 Ves. Jr. 450; Bell v. Phyn, 7 Ves. Jr. 455; Clarke v. Cotts, 9 H. L. Cas. 601; Hall v. Robertson, 21 Eng. L. & Eq. 504; Heywood v. Heywood, 29 Beav. 9; Radford v. Willis, L. R. 7 App. Cas. 7; Mertens v. Walley, L. R. 26 Ch. D. 576; Blundell v. Defalbe, 57 L. J. Ch. 576.

There is nothing in the context of this act to indicate that the legislature employed the word "unmarried" otherwise than in its usual and ordinary sense; and, being a highly penal statute, we must construe it strictly in the interest of the liberty of the citizen. It is a rule of general application

that [823] such statutes are not to be extended by construction, but must be limited to cases clearly within the language used: Fox's Admr. v. Commonwealth, 16 Gratt. 1; Harris v. Commonwealth, 81 Va. 240, 59 Am. Rep. 666; Street v. Broaddus, 96 Va. 823, 32 S. E. 466; Gates v. City of Richmond, 103 Va. 702, 49 S. E. 965.

In the case of United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. Rep. 625, 33 L. ed. 1080, Fuller, C. J., observes: "There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute."

So, in the case of United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37, Marshall, C. J., lays down the principle as follows: "The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous indeed to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated": See, also, Bishop on Statutory Crimes, sec. 193.

In this sort of offenses, at common law, the woman was considered particeps criminis, and the man was not punishable criminally for his participation in the joint delinquency: Anderson v. Commonwealth, 5 Rand. 627, 16 Am. Dec. 776. But in process of time, experience and a more enlightened public sentiment [824] showed, that in many instances unmarried females of chaste character needed the protection of the strong arm of the law to shield them in their innocency from the lustful machinations of evil-disposed men, who resorted to the blandishments of courtship and false promises of marriage to accomplish the ruin of their too confiding victims.

But the case is wholly different with women who have been married. They have known man; and, possessed of the knowledge which such intercourse imparts, if chaste, are immune from the seducer's wiles.

It is the purpose of the enactment under consideration, as gathered both from the language and the reason of the law, to include the former and not the latter class of females.

For these reasons, we are of opinion to reverse the judgment of the circuit court, and remand the case for a new trial.

Reversed.

The Crime of Seduction is discussed in the notes to Bradshaw v. Jones, 76 Am. St. Rep. 670; State v. Carson, 87 Am. Dec. 405.

SUTHERLAND v. COMMONWEALTH.

[109 Va. 834, 65 S. E. 15.]

CRIMINAL LAW—Concealed Weapons About His Person Hid from Observation—Construction of Statute.—A man carrying a pistol in its scabbard, in a pair of saddle-bags with the lids pulled down hiding the contents from view, or having a pistol concealed in a rug in the bottom of his buggy, or in saddle-bags when riding on a public road, does not violate the statute against carrying about his person concealed weapons, as the construction of that part of the statute is that the weapon shall be so accessible as to afford prompt and immediate use if desired. (p. 950.)

CRIMINAL LAW—Statute—Construction.—A case within the reason or mischief of a statute is not within its provisions to punish a crime not enumerated in the statute merely because it is of a kindred character with those which are enumerated. (p. 951.)

S. H. Sutherland, for the plaintiff in error.

Wm. A. Anderson, attorney general, for the commonwealth.

834 HARRISON, J. In this case the accused was charged with unlawfully carrying about his person a pistol which was concealed from common observation.

The evidence in support of this charge is that the accused placed a pistol, encased in its scabbard, in a pair of saddle-bags, pulled the lids of the saddle-bags down, hiding the pistol from 835 view, and carried the saddle-bags in his hand down the road until out of sight.

The question presented is whether or not it is a violation of the statute against carrying concealed weapons for a man to carry in his hand a pair of saddle-bags containing a pistol, which is hidden from common observation.

So much of the statute as is necessary to the consideration of this question is in these words: "If any person carry about his person hid from common observation, any pistol, ... he shall be fined not less than twenty dollars nor more than one hundred dollars": Acts 1908, p. 381.

This is a penal statute, and it is an ancient maxim of the law that all such statutes must be construed strictly against the state and favorably to the liberty of the citizen. The maxim is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature and not in the judicial department. No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute which imposes such penalty. There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute. If these principles are violated, the fate of the accused is determined by the arbitrary discretion of the judges and not by the express authority of the law: Harris v. Commonwealth, 81 Va. 240, 59 Am. Rep. 666; Lascallett v. Commonwealth, 89 Va. 878, 17 S. E. 546; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37.

In the light of this fundamental rule of construction, we are of opinion that the question raised by this record must be answered in the negative. The purpose of the statute was to interdict the practice of carrying a deadly weapon about the person, concealed, and yet so accessible as to afford prompt and immediate use. "About the person" must mean that it is so connected with the person as to be readily accessible for use or surprise if desired. A pistol in a scabbard and in a pair of [836] saddle-bags with the lids down, though the saddle-bags be in the hand, does not fall within the language of the statute, which says: "If a person carry about his person, hid from common observation, any pistol," etc.

Evidence that the defendant had a pistol concealed under a rug in the bottom of the buggy in which he was riding was held not to be sufficient to convict him of carrying a pistol concealed about his person: Ladd v. State, 92 Ala. 58, 9 South. 401.

Evidence that the defendant had a pistol concealed in saddle-bags while riding along the public road was held not to be sufficient to convict him of carrying a pistol concealed about his person: Cunningham v. State, 76 Ala. 88.

The act of which the accused stands convicted in this case does not come within the spirit, and certainly not within the letter of the statute, which it must do.

As said by Chief Justice Marshall in United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37, "it would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute because it is of a kindred character with those which are enumerated."

If the statute be less comprehensive than the legislature intended, it is for that body to extend its operation and not for the courts to do so.

The judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with this opinion.

Reversed.

To Constitute the Offense of Unlawfully Carrying Weapons, it is not necessary under the Tennessee statute that the weapon, unless it is a razor, should be concealed about the person. Therefore a hack-driver, who, with the intent of going armed, carries a pistol in a box under his seat on the hack, is guilty of the crime: Kendall v. State, 118 Tenn. 156, 121 Am. St. Rep. 994.

CASES

IN THE

SUPREME COURT

OF

WASHINGTON.

IN RE HOLLOPETER.

[52 Wash. 41, 100 Pac. 159.]

MARRIAGE—License for Minor Procured by Fraud.—The marriage of a minor is not void because the license was secured by fraud. (p. 954.)

MARRIAGE—Effect of Absence of License.—A marriage without a license is valid, in the absence of an express statutory provision to the contrary. (p. 954.)

MARRIAGE—Female Under Age of Consent.—A Female Fourteen Years old is within the common-law age of consent, and is not, as a matter of law, incapable of contracting marriage; and the common-law age of consent is not overcome by a statute fixing eighteen years as the age under which a female cannot consent to sexual intercourse. (p. 955.)

MARRIAGE—Minor not having Consent of Parents.—The marriage of a female under legal age is not void because contracted without the consent of her parents. (p. 955.)

MARRIAGE.—Parents cannot Maintain an Action to Annul the marriage of their child, under legal age, procured by fraud and without their consent, when the statute gives only to the parties to the marriage the right to maintain such actions. (p. 956.)

MARRIAGE.—A Minor Becomes of Full Age When He Marries, and may maintain an action in his own name to enforce his right to the custody of his minor wife. (p. 957.)

King & King and E. N. Steele, for the appellant.

Vance & Mitchell, for the respondents.

[43] CHADWICK, J. This was an action brought originally by Grover Hollopeter, as husband of Imogene Hollopeter, on her behalf, alleging that Nat Glenn and Mrs. Nat Glenn, her parents, were restraining her of her liberty. From the petition and return, it appears that on the seventh day of July, 1908, petitioner procured a marriage license to be issued by the county auditor of Thurston county, authorizing the marriage of Grover Hollopeter and Imogene Glenn; that they were married on the same day by a minister of the gospel; that they went on a wedding trip to North Yakima and Ta-

coma, where they remained several days; that the marriage was consummated; that Imogene Glenn was a minor of the age of fourteen years, and Grover Hollopeter a minor of the age of nineteen years; that the writing purporting to give the consent of Mrs. Glenn to the issuance of a license was made out and signed by her daughter Imogene, as she contends, with her mother's permission and consent and in her presence. The mother, however, denies that this was so. The testimony is conflicting, and we are content to hold with the trial court that Mrs. Glenn did not in fact consent to the marriage. Petitioner was arrested at Tacoma, while returning from the wedding trip, upon a charge of forgery. While he was in custody, Mr. and Mrs. Glenn forcibly took possession of the person of Imogene, and have since restrained her of her liberty. A proceeding for annulment of the marriage was begun by the parents of Imogene while the habeas corpus proceeding was pending. Both cases were consolidated, and are now brought here upon the appeal of Grover Hollopeter.

From the testimony it appears that Grover Hollopeter was a young man of full growth, and has been for some time past earning his own living, and while at work has earned from three to four dollars per day. The testimony would also indicate [44] that Imogene was a young woman of mature mind. The court found:

"That Imogene Glenn was, on the —— day of July, 1908, of the age of fourteen years; that on said date the defendant was of the age of nineteen years; that on the said last-mentioned date the said minor child, Imogene Glenn, and the said minor, Grover Hollopeter, procured a license to marry from the auditor of above county and state, and thereafter were united in marriage by a properly ordained minister of the gospel.

"That the parents, or either of them, of the said minor child, Imogene Glenn, did not consent in writing, or at all, as required by law, to the issuance of said marriage license or to the said marriage; that the signature purporting to be the signature of one of the parents of said Imogene Glenn was affixed thereto by the said minor without the knowledge or consent of her parents, or either of them, all of which facts were known to the defendant, Grover Hollopeter; that the parents of the said Grover Hollopeter did not sign the written consent to the marriage of their son, and that their names were affixed to said consent by one Mrs. ——— Gil-

bert, a daughter of defendant's parents; that both of the said parents of defendant are able to read and write, and that they had in a vague and general way authorized their daughter, Mrs. Gilbert, to consent to the said marriage, the vague authorization having no reference to any particular time; that the defendant's parents appeared in court and expressed their willingness to ratify, and did ratify, in so far as they might, the act of their said daughter in signing their names to said consent.

"That after the marriage between said Imogene Glenn and Grover Hollopeter, that they did cohabit together as husband and wife, and did continue to so cohabit for over a week and until the plaintiff herein N. G. Glenn and R. A. Glenn by main force took the said Imogene Glenn from the said Grover Hollopeter, and took her to their home, where they ever since said time have kept her confined against her will and against the will and desire of this defendant.

"That Grover is able and willing and desires to make a home for the said Imogene Glenn and provide for her, and that the said Imogene Glenn is willing and desires to make her home with the said defendant."

[45] From which facts the court make the following conclusions of law:

"That Imogene Glenn being of nonage, her parents, being her natural and lawful guardians, may on her behalf, and on their own behalf, as such parents, maintain an action to avoid and annul such marriage.

"That the said marriage should be annulled, avoided and set aside as having been entered into by parties not capable of contracting, and the conditions precedent to the issuance of the marriage license never having been complied with."

We are asked to hold the marriage void, for the reasons that the license was obtained by fraud, and that Imogene was incapable of consenting thereto. Assuming the fact to be as found by the lower court, that the mother of Imogene did not consent to the marriage of her daughter, this would not avoid the marriage in the absence of a statute expressly declaring it to be so: 19 Am. & Eng. Ency. of Law, 2d ed., p. 1190; 26 Cyc. 835.

In the absence of any express declaration that a marriage without a license is void, the marriage is universally held to be valid: 19 Am. & Eng. Ency. of Law, 2d ed., 1191. A party to the wrongful issuance of a license, or who wrongfully performs the marriage ceremony, may be punished: Ballinger's

Code, secs. 4482, 4483 (Pierce's Code, secs. 6275, 6276); 26 Cyc. 835. A party who procures the issuance of a marriage license by means of a fraudulent affidavit may be convicted of forgery. But a sound public policy has declared that the validity of the marriage in such cases shall not be inquired into: Bishop on Marriage, Divorce and Separation, sec. 529.

Imogene was within the common-law age of consent, so that we cannot hold, as a matter of law, as did the lower court, that she was incapable of consenting to the marriage. But it is argued that the common-law age of consent is overcome in this state by the enactment of the law fixing the age of eighteen as the age under which a female cannot consent to carnal sexual intercourse. The fact that the law permits the marriage of minors at all is enough to overcome the argument [46] advanced in behalf of this proposition. To so hold would be to say, in effect, that the enactment of the statute covering and defining the crime of statutory rape was a repeal of the law permitting infants to marry, even though they had the consent of their parents. Such was manifestly not the intention of the statute, for it is sometimes important that those under the statutory age should marry, and under certain conditions such marriages are to be encouraged. Applied to a particular case, the rule that infants of the age of fifteen and twenty, as the parties now are in this case, may marry, may seem harsh. But it must be remembered that it is the same rule that would sustain the marriage of a man all but twenty-one and a woman who is not quite eighteen. Experience has taught us that the rule that marriage solemnized and consummated without the consent of a parent is valid is not only salutary but wholesome and necessary, although there are now, and always will be, those who oppose the thought of marriage under legal age.

In England it was sought to prevent the voluntary marriage of persons under legal age, by providing that marriages solemnized under a license should be void when entered into without the consent of the father if living, or if dead, of the guardian or mother: Lord Hardwick's Marriage Act, 26 George II, c. 33. All manner of mischiefs followed the enactment of this law. Marriages consented to by a mother, the father being beyond seas and supposed to be dead, were declared void. Children were bastardized, and subsequent consent of the parents held to be ineffectual to sustain the marriage. The courts finally endeavored to cure the hard-

ship of the rule by holding that the burden was on the crown or parent to prove the negative of consent, and by finding consent from the slightest circumstances. So anomalous had the situation become that parliament finally passed an act, 3 George IV, chapter 75, followed by 19 and 20 Victoria, chapter 119, providing that, although the consent of the parents or guardians be required by law, the absence of it would in [47] no case render the marriage void. This is the law in every state of the Union where the question has been passed upon, with the possible exception of the state of Texas.

The remaining question, Have the parents of Imogene capacity to sue to annul the marriage? is determined by the foregoing discussion; but because of the able and earnest argument made in this behalf, we have decided to express our views upon it at greater length. As suggested in the oral argument, there is but little authority directly in point. Under the statute—in this state the whole law of marriage is regulated by the statute—it is provided that marriages may be annulled where a party was incapable of consenting thereto for want of legal age or sufficient understanding, or where the consent of either party is obtained by force or fraud, but then only at the instance of the party laboring under the disability: Ballinger's Code, sec. 4477 (Pierce's Code, sec. 6262). There being no statute permitting a parent to maintain an action to annul the marriage of a child in this state, and considering the policy of the law to sustain, rather than abrogate, the marriage relation, we are constrained to hold that the parents cannot maintain their action. We have held the marriage valid. A decree of nullity is entered only upon the theory that a valid marriage never existed. This is in accord with the general rule that a third party cannot maintain an action for the annulment of the marriage: 26 Cyc. 842, 910; Ridgely v. Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800; McKinney v. Clarke, 2 Swan (Tenn.), 320, 58 Am. Dec. 59. While it has been declared in England, under the statute of 43 Elizabeth, 32, and in some states under similar statutes, that a parent may maintain an action to annul a marriage, yet the fact that the marriage is valid and the right of the parent is not absolute but wholly dependent upon the statute, and that the mere will of the parent cannot avail over the welfare of the infant, is recognized.

"The marriage contracts of infants are not dependent upon the consent of their parents to the marriage, and parents may

[48] not have them annulled upon the ground of their nonconsent. It is only the infant wife who may maintain an action to annul her marriage on the ground that it took place without the consent of her father, mother, guardian, or other person having legal charge of her person: Code Civ. Proc., sec. 1742. Neither an infant husband nor a parent or guardian may maintain such an action, and the reasons therefor are not difficult to discover. The right of a parent to maintain an action for the annulment of the marriage of his infant son or daughter rests solely upon the authority conferred by sections 1744 and 1750 of the Code of Civil Procedure, and the grounds therefor are limited to the fact that one of the parties to the marriage had not attained the age of legal consent, or that the consent of one of the parties was obtained by force, duress, or fraud. But has the parent a right to maintain such an action irrespective of the infant, and without making such infant a party to the action? I think not. The parent's right to maintain such an action is clearly in behalf of the infant, and is in no way dependent upon any right which the parent may possess to control or restrain the marriage. 'All persons having an interest in the subject of the action should be joined as plaintiffs or defendants. The complaint alleges that Glen D. Fero consents to the bringing of the action, and he certainly is united in interest with either the plaintiff or the defendant. If he desires to have the marriage annulled, he is interested in obtaining the judgment demanded; but if, on the other hand, he is satisfied with his marital relations, his interest is adverse to that of the plaintiff. In either case the controversy ought not to be determined until he is brought into the action. The rule contended for by the plaintiff's counsel would permit a parent, guardian, or "any relative" of a party to invalidate a marriage without the consent or knowledge of either of the parties thereto, and, if it were to obtain, might prove subversive to social order, sound policy and good morals': Fero v. Fero, 62 App. Div. 470, 70 N. Y. Supp. 742"; Wood v. Baker, 43 Misc. Rep. 310, 88 N. Y. Supp. 854.

Under the general rule of law, Grover Hollopeter became of lawful age when the marriage ceremony was performed. He is thus entitled to sue in his own name. The ordinary legal consequences follow his marriage, and he is entitled to [49] the society and services of his wife: Bishop on Marriage, Divorce and Separation, 557.

The decree of the lower court annulling the marriage is reversed, with instructions to issue the writ prayed for.

Rudkin, C. J., Crow, Mount and Fullerton, JJ., concur.

Dunbar and Gose, JJ., took no part.

The Marriage of a Person Under Legal Age, though without the consent of the parents, is not void, but at most merely voidable at the option of the minor: See the note to State v. Lowell, 79 Am. St. Rep. 374; Sturgis v. Sturgis, 51 Or. 10, 131 Am. St. Rep. 724.

Marriage Emancipates a Minor Child from Parental Control. Hence when a girl fourteen years of age marries, her father has no legal right to restrain her from living with her husband if she so chooses: See the note to Vance v. Calhoun, 113 Am. St. Rep. 118.

A Marriage Contracted Without a License is not Void, unless the statute expressly so declares: See the note to State v. Lowell, 79 Am. St. Rep. 361. It has been held, however, that such marriage has no force and effect if not followed by cohabitation: Hawkins v. Hawkins, 142 Ala. 571, 110 Am. St. Rep. 53. But it is doubtful if cohabitation has any effect further than to afford evidence of the marriage: See the note to Klipfel v. Klipfel, 124 Am. St. Rep. 112.

McPHEE v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

[52 Wash. 154, 100 Pac. 174.]

SHERIFF—Liability to Third Persons.—A sheriff is generally not liable at the suit of third persons unless expressly bound by the duties of his office. (p. 960.)

SHERIFF—Liability for Reward When Prisoner Escapes.—One entitled to a reward offered by third persons cannot recover against the sheriff for permitting the prisoner to escape. (pp. 960, 962.)

Macdonald & Reiter and H. M. Brooks, for the appellants.

Happy & Hindman and Gunn & Rasch, for the respondents.

155 CHADWICK, J. This action was begun by plaintiff to recover damages. It was alleged in the complaint that plaintiffs had effected the capture of one Ed. McDonald and one George Frankhauser, who had on the twelfth day of September, 1907, unlawfully and feloniously stopped and robbed a mail and passenger train operated by the Great Northern Railway Company, from which valuable packages containing approximately the sum of forty thousand dollars in lawful money of the United States had been taken; that rewards for the arrest and conviction of each of the guilty persons

were offered, by the United States of America in the sum of one thousand dollars, the Great Northern Railway Company in the sum of five thousand dollars, and the Marine Insurance Company of London, a corporation, in the sum of one thousand dollars; said rewards aggregating the sum of fourteen thousand dollars.

It is further alleged that plaintiffs captured and turned over to the United States marshal for Montana, and he, under an order issued by the United States district court for the district of Montana, in turn delivered, each of the guilty parties to defendant Shoemaker as sheriff of Lewis and Clark county, in the state of Montana, for their safekeeping in the county jail of said county; that plaintiffs were possessed of "information, facts, and material and competent evidence" sufficient to secure the conviction of the said McDonald and Frankhauser, and each of them; that the defendant Shoemaker did not "well, truly, or faithfully perform [156] his duties" as sheriff by safely keeping the said prisoners, but carelessly, negligently, and unfaithfully suffered and permitted them to escape from the jail in which he had confined them, and that they have been ever since, and now are, fugitives from justice; that plaintiffs have been damaged in the sum of fourteen thousand dollars by reason of his negligence. The United States Fidelity & Guaranty Company, a corporation, surety upon the sheriff's official bond, was joined as defendant.

The condition of the sheriff's bond was that he would "well, truly and faithfully perform all of his duties as such sheriff." Section 1064 of the Political Code of Montana pertains to official bonds, and provides that such bonds shall be "in force and obligatory upon the principal and sureties therein to and for the state of Montana and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity. It also provides that "any person so injured or aggrieved may bring suit on such bond in his own name without any assignment thereof." A general demurrer was interposed to the complaint and sustained by the court below. From an order dismissing plaintiff's action, they have appealed.

The prisoners were properly turned over to respondent Shoemaker, as sheriff of Lewis and Clark county, Montana, and that it was his official duty to safely keep them must be conceded. The only question before us is whether he is responsible to appellants under his official bond, the conditions

of which, together with the statute amplifying them, have been hereinbefore quoted. It is a fundamental principle that the obligation of an official bond will not be extended by construction beyond its expressed terms, but will be considered by the court according to its true intent and meaning: 25 Am. & Eng. Ency. of Law, 2d ed., 723. A sheriff owes a twofold duty: one to the public, and one to private individuals who are concerned in the execution of civil and quasi civil process. He is liable upon his official bond for a breach [157] of such duty. But the duty in either event must be direct; the cause of action must result to the party injured; it must operate as a deprivation of an existing right. Whatever contracts may be assumed by or between third persons can be made as between themselves to depend directly or incidentally upon the act of a public officer, but we know of no rule that would make the officer liable to pay a damage to such third person, although the loss was occasioned by his wrongful act or default. In the case at bar third parties had promised to pay rewards in the event of the arrest and conviction of certain train robbers. Acting upon this offer, appellants undertook to, and did, arrest the guilty parties. They were turned over to respondent Shoemaker for safekeeping, and escaped. Shoemaker was not a party to the contract and owed no duty to either party to it, either to receive the prisoners or to keep them safely. The chance of an escape might be denominated a hazard of the contract. His whole duty was to the public and to the prisoners. The general rule is that a sheriff is never liable at the suit of third persons, unless expressly bound by the duty of his office: Strong v. Campbell, 11 Barb. 135; Harrington v. Ward, 9 Mass. 251; South v. Maryland, 18 How. 396, 15 L. ed. 433; Hullinger v. Worrell, 83 Ill. 220; State v. Wade, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628.

To this rule one exception has sometimes been declared; that is, that he owes a duty to his prisoner to keep him in health and free from harm; and for any breach of such duty resulting in death or injury he is liable to the prisoner, or if he be dead, to those entitled to recover for his wrongful death. But his survivors could not maintain the action unless the deceased, if alive, could have maintained an action on the case: State of Indiana v. Gobin, 94 Fed. 48; Asher v. Cabell, 50 Fed. 818, 1 C. C. A. 693.

We have searched the books in vain for authorities upon the concrete question whether a party who was entitled to a reward could recover against a sheriff on his bond for

damages suffered by the escape of the prisoner, and must therefore look at the general principles of the law for guidance.

The liability of a sheriff who suffers or permits one to escape who has been arrested on mesne or final process, to be held pending the satisfaction of a debt or judgment, is not to be confused with the case before us. A sheriff has been held liable in instances so arising, upon the theory that the body of the debtor stands in lieu of the debt, whether the incarceration be for a fixed term or continued pending satisfaction or payment.

Appellants' principal reliance is upon the following cases: Asher v. Cabell, 50 Fed. 818, 1 C. C. A. 693; Appeal of Jenkins, 25 Ind. App. 532, 81 Am. St. Rep. 114, 58 N. E. 560; Tennessee v. Hill, 60 Fed. 1005, 9 C. C. A. 326, 24 L. R. A. 170; McPeek v. Western Union Tel. Co., 107 Iowa, 356, 70 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214. In the case of Asher v. Cabell, 50 Fed. 818, 1 C. C. A. 693, a surviving widow was permitted to sustain an action against the United States marshal for the wrongful death of her husband, who had been taken from his custody by a mob and by it slain. The case was sustained upon the theory that it was the duty of the marshal to safely keep and protect his prisoner. The liability grew out of the personal obligation which was within the intent and meaning of his bond. The negligent performance of his duty to deceased created a right of action. In the case at bar, respondent Shoemaker owed no official duty to appellants. The case of Jenkins was in its facts on all-fours with the case of Asher v. Cabell, which the court cited and relied upon as authority. The case of Tennessee v. Hill was a suit by the public, the state of Tennessee, and is not on that account an authority here; for it cannot be denied that the public could recover the expenses incurred upon recapture of a prisoner negligently permitted to escape by the officer having his custody. In McPeek v. Western Union Tel. Co. the company failed to deliver a message which, if delivered in time, would have resulted in the arrest of a criminal and the recovery of a reward by the plaintiff. The court held the company to account. While the soundness of the decision may well be questioned on account of the remoteness of the damages sustained, yet admitting its value, it can be readily distinguished from the case at bar. When the company undertook to transmit the message, it impliedly promised to act promptly, and became liable to the sender

for a breach of such duty. The obligation was direct. But the case is not controlling here for the reason that there was no duty, either express or implied, on the part of Shoemaker to keep the prisoners for appellants. His duty was to keep them for the public, and produce them for trial.

Other cases cited by appellants are in themselves correct expressions of the law when applied to the facts involved, but they are not in point. The underlying principle in all the cases is that all recoveries against a public officer on his bond for the involuntary escape of a prisoner are limited to actual damages, damages arising out of and to be measured by the wrongful act itself; and while there may be no authority for it, we may add—for principle sanctions it—that damages can in no case be measured by losses incurred or profits anticipated under an independent contract between third parties, although the performance of the contract depends upon the conduct of the officer. That part of the statute of Montana, "for the use and benefit of persons who may be injured or aggrieved," cited and relied upon by appellants, must be read in connection with the conditions of the bond, and when so considered it must be held to refer only to such liabilities as arise within the fair intendment and meaning of the obligation itself.

The judgment of the lower court is affirmed.

Rudkin, C. J., Fullerton, Gose, Crow, Mount and Dunbar, JJ., concur.

The Acts for Which Sureties on Official Bonds are Liable are discussed in the note to Feller v. Gates, 91 Am. St. Rep. 497; and the liability of ministerial officers to private individuals for the nonperformance or misperformance of official duties is discussed in the note to Worden v. Witt, 95 Am. St. Rep. 72. Subsequent decisions on this question are Gage v. Springer, 211 Ill. 200, 103 Am. St. Rep. 191; Moynihan v. Todd, 188 Mass. 301, 108 Am. St. Rep. 473.

SEATTLE v. JOHN C. REGAN & COMPANY.

[52 Wash. 262, 100 Pac. 731.]

JUDGMENT—Res Judicata.—A Judgment Recovered Against a City for injuries suffered from a defective sidewalk, in an action wherein the contractor (alleged to be responsible for the defect) and his sureties were given an opportunity to defend, is conclusive against them, in an action over by the city on their contract and bond wherein they agreed to save the city harmless from all actions and judgments resulting from the negligence of the contractor, of the fact that a defect existed which was not properly guarded, but not as to whether the contractor was responsible therefor. (p. 965.)

MUNICIPALITY—Premature Action Against.—Where an Action Against a City for damages from a defective street is prematurely commenced, in that it is brought before the expiration of sixty days after the rejection of the claim, but the city's counsel waives the objection, this is not a bar to an action against the contractors and their sureties upon an indemnity agreement to save the city harmless from such actions, if they were given opportunity to defend in the original action and refused to do so. (p. 967.)

Roberts & Hulbert, for the appellants.

Scott Calhoun and Bruce C. Shorts, for the respondent.

263 FULLERTON, J. In July, 1903, John C. Regan & Company entered into a contract with the city of Seattle by the terms of which they agreed, for a stated consideration, to construct concrete sidewalks between certain designated points. The contract was in writing and contained, among others, a condition to the effect that the contractors would erect and maintain good and sufficient guards, barricades and signals at all unsafe places at or near where the work contemplated in the contract was to be done, and would indemnify and save harmless the city of Seattle from all suits and actions of every name and description brought against the city for or on account of any injuries or damages received or sustained by any person by reason of the failure of the contractors to erect and maintain such guards, barricades or signals, or by or in consequence of any negligence on the part of the contractors, their agents or employés, while carrying on the work. The contractors, also, at the time of entering 264 into the contract, gave a bond to the city, with the appellant National Surety Company as surety, conditioned that they would faithfully perform all of the conditions of the contract. The contractors thereafter entered upon the performance of the work, and while so engaged one Margaret Brennan, while passing along the street where the work was being carried on, caught her foot on some large nails or spikes

that had been left protruding through a girder of an old wooden walk, the top boards of which had been removed to make room for the cement walk, and was thrown down and injured.

The accident to Mrs. Brennan occurred August 20, 1903, and on September 14th thereafter she duly filed with the city clerk of the city of Seattle a claim for damages, as prescribed in the city charter. This claim was rejected by the city, and on October 3, 1903, she brought an action in the superior court of King county against the city to recover for her injuries. The city, conceiving that the obstruction causing the injury was one for which the contractors were liable, served a written notice upon them and their surety notifying them of the pendency of the action, and tendering them its defense. Neither the contractors nor the surety appeared, and the city itself defended. The case was twice tried to a jury. The first trial resulted in a verdict for the city. This verdict was set aside by the trial court, and on appeal its order to that effect was affirmed by this court: Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092. On the second trial a verdict was returned against the city for nine hundred and ninety-nine dollars, and a judgment entered against it for that sum, with costs. This judgment was likewise affirmed by this court on the appeal of the city: Brennan v. Seattle, 46 Wash. 427, 90 Pac. 434. The city thereupon paid the judgment and brought the present action against the contractors and their surety on the bond, to recover the amount so paid. The case was tried before the court sitting without a jury, and resulted in a judgment in favor of the city for the amount paid in satisfaction of the judgment Mrs. [265] Brennan recovered against it. From this judgment the contractors and surety appeal.

The principal assignments of error question the sufficiency of the evidence to sustain the judgment. It is contended that the court gave too great an effect to the judgment obtained by Mrs. Brennan against the city; that it held that the negligence of John C. Regan & Company was conclusively established by that judgment; that it denied the appellants the right to dispute liability for the defect which it is alleged caused the injury to Mrs. Brennan; and that, at the final argument and hearing, it excluded all evidence of the appellants on the question of guards and barricades and all evidence on the question whether the injury occurred upon the work of the contractors. Our examination of the record,

however, convinces us that the court's ruling was not so broad as these objections would indicate.

The judgment offered in evidence, since the appellants were notified of the pendency of action in which it was obtained and were given an opportunity to defend that action, was conclusive of every fact necessary to be proven in order to entitle the plaintiff therein to recover; that is to say, it was conclusive evidence of the existence of the defect in the street, of the primary liability of the city for existence of such defect, of the fact that the plaintiff in that action was injured without fault on her part, and of the amount awarded her in the judgment. It was not, of course, conclusive of the fact that the contractors were the cause of the defect on which the plaintiff was injured. But when the city proved the contract and bond, by which it appeared that the appellants had undertaken to save the city harmless from an action for damages brought against it by negligence on the part of the contracting appellant, and proved the judgment obtained against it by Mrs. Brennan, and so much of the judgment-roll therein as showed the nature of the defect on which the recovery was had, and the fact that the appellants [266] had been given timely notice to defend that action, nothing remained to be proven in order to make a case against the appellants other than the fact that the contractors were the responsible cause of the defect for which the recovery was had. The city was not obligated to show, as the appellants argue, that the defect must have been upon some part of the work they were engaged in constructing. They could not, without incurring liability upon their bond, throw the materials of the old sidewalk it was necessary for them to remove into the middle of the street merely because their work did not extend to that part of the street; nor could they, without incurring such liability, take up the boards and leave exposed girders containing dangerous nails and spikes, even though the boards so removed were outside of their work, and it was no part of their duty to remove that part of the walk. Nor did the trial judge deny to the appellants the right to introduce evidence tending to show that they did not cause this defect. On the contrary, he gave them the fullest opportunity to show this fact; he merely denied their right to contest anew the question whether any defect existed at the place where the injury was alleged to have occurred, and whether the defect, if it did exist, was properly guarded: Denny v. Sayward, 10 Wash. 422, 39 Pac.

119; Doremus v. Root, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; Spokane v. Costello, 33 Wash. 98, 74 Pac. 58; Spokane v. Costello, 42 Wash. 182, 84 Pac. 652; Seattle v. Saulez, 47 Wash. 365, 92 Pac. 140; American Bonding Co. v. Loeb, 47 Wash. 447, 92 Pac. 282; 23 Cyc. 1273d; 24 Am. & Eng. Ency. of Law, 2d ed., p. 740.

The next objection raises the question of the sufficiency of the evidence to justify the finding of the court to the effect that the contractors were responsible for the defect which caused the injury recovered for in the action of Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092; but without entering upon a review of the evidence at length, we think it decidedly preponderates [267] in favor of the finding. One of the employés of the contractors testified that he himself tore up the old walk at the place of the injury, and that it was torn out for its full width. In this he is corroborated by a number of witnesses who testified as to the condition of the place immediately before and after the accident. It is true this witness states that he drove down all of the spikes and nails that were left protruding by the removal of the boards of the walk; but as to this, if he were not mistaken in fact, the question was concluded against the appellants by the result of the other trial, as that was a question, and a necessary question, at issue in that trial. We are of opinion, therefore, that the trial judge correctly determined the issues of fact.

The city charter of the city of Seattle provides that no action shall be begun against the city on a claim for personal injuries until sixty days have elapsed from the time the claim for such damages is filed with the city. This action, as will be observed from the dates above given, was begun within less than sixty days after the filing of the claim with the city, although not until after it had been rejected by the city council and notice thereof given the claimant. After the action had been begun this objection was waived by the city's counsel, and this waiver is thought to relieve the appellants from liability, since, as they contend, the objection if raised would have been fatal to the maintenance of the action. But we think this objection not tenable. It may be that had the objection been insisted upon, this particular action could not have been maintained. But the dismissal of this action for that reason would not have been a bar to the prosecution of another action for the same cause, and only a few days' delay could have been gained at most by an insistence upon the objection. As a defense, therefore, it was no more potent

than any other dilatory motion counsel might have filed and insisted upon. But it is not the rule that a defendant must, in this kind of a case, insist on every objection that suggests [268] itself in order to be able to bind the person liable over to him for any recovery that may be had therein. He is only required to exercise good faith and avoid fraud and collusion to be entitled to so recover. The purpose of the notice to the person liable over is to give him a chance to make such defenses to the action as he deems fit. But to make such defenses he must come into the action. He cannot stay out of the case and at the same time dictate to his principal what defenses shall be interposed. This would be giving him the double advantage of having such issues determined as he wished determined without subjecting himself to the corresponding hazards arising from their presentation, and such is not the policy of the rule.

We have not overlooked the case of Seattle v. Northern Pac. R. Co., 47 Wash. 552, 92 Pac. 411. While a majority of the court think a correct result was arrived at in that case, we think the language used in some instances was unwarranted and contrary to what had been previously decided by us. To the extent that it is thus conflicting, we do not feel constrained to follow it.

The judgment appealed from is affirmed.

Rudkin, C. J., Crow, Dunbar, Chadwick and Gose, JJ., concur.

MOUNT, J. I concur in the result in this case, but not in the criticism of Seattle v. Northern Pac. R. Co., 47 Wash. 552, 92 Pac. 411.

As to Who are Bound by Judgments Against a Municipal Corporation, see the note to Henderson Co. v. Henderson Bridge Co., 105 Am. St. Rep. 204. A judgment against a city in an action against it for personal injury, of which a lot owner has notice, is conclusive upon him as to the fact, cause and extent of such injury, but not as to his responsibility therefor: Lincoln v. First Nat. Bank, 67 Neb. 401, 108 Am. St. Rep. 690.

As to How Far a Judgment Against a Principal is Binding upon His Sureties, see the note to Charles v. Hoskins, 83 Am. Dec. 380; and the subsequent cases of Beh v. Bay, 127 Iowa, 246, 109 Am. St. Rep. 385; Park v. Ensign, 66 Kan. 50, 97 Am. St. Rep. 352.

IN RE MILECKE.

[52 Wash. 312, 100 Pac. 743.]

HABEAS CORPUS.—The Sufficiency of a Warrant issued by a court of competent jurisdiction will not be inquired into on habeas corpus; the remedy is by appeal. (p. 968.)

CONSTITUTIONAL LAW—Power of Court to Annul Statute. It is only when statutes are clearly in opposition to the fundamental law that courts will declare them unconstitutional, and not then to nullify a law that seems unjust, but rather to preserve the declaration of right reserved and made immune from legislative interference by the people themselves. (p. 970.)

CONSTITUTIONAL LAW—Imprisonment for Debt.—The Word "Debt," as used in the constitutional prohibition against imprisonment for debt, is confined to obligations arising out of contracts, express or implied, as distinguished from torts. (p. 970.)

CONSTITUTIONAL LAW—Defrauding Innkeeper as a Crime. A statute making it a crime punishable by fine or imprisonment to fraudulently procure accommodations of an innkeeper and not pay therefor, does not offend the constitutional prohibition against imprisonment for debt. (p. 970.)

CONSTITUTIONAL LAW—Making Certain Facts Prima Facie Evidence of Guilt.—A statute providing that when it is shown that a person has refused or neglected to pay for his accommodations at an inn, or has surreptitiously removed his baggage, this shall be prima facie evidence of his intent to defraud the innkeeper, violates no constitutional provision. (p. 972.)

Swanson & Ripley, for the appellant.

R. M. Barnhart and Donald F. Kizer, for the respondent.

313 CHADWICK, J. The petitioner was arrested and charged, in the police court of the city of Spokane, with having violated the provisions of chapter 131, Laws of 1903, page 244, entitled, "An act for the protection of hotel, boarding-house, restaurant, and lodging-house keepers, and providing a penalty." Upon conviction he applied for a writ of habeas corpus in the superior court of Spokane county. This appeal is prosecuted from an order denying a writ.

Error is assigned in that the statute is unconstitutional and the conviction was unwarranted and for the reason that the warrant did not state facts sufficient to justify the arrest of appellant. Before addressing ourselves to the first and more important assignment, we will dispose of the objection to the sufficiency of the warrant. This court has repeatedly held that the sufficiency of a warrant issued by a court of competent jurisdiction will not be inquired into upon an application for a writ of habeas corpus. The remedy of petitioner is by an appeal from the final judgment and is ample for his protection: In re Casey, 27 Wash. 686, 68 Pac. 185; In re

Barbee, 19 Wash. 306, 53 Pac. 155; In re Nolan, 21 Wash. 395, 58 Pac. 222. To the same effect, State v. Superior Court, 40 Wash. 555, 111 Am. St. Rep. 925, 82 Pac. 877, 2 L. R. A., N. S., 395; State v. [314] Hinkle, 47 Wash. 156, 91 Pac. 640; State v. Superior Court, 51 Wash. 572, 99 Pac. 740.

The only question open for our consideration is the constitutionality of the law. That part of the act upon which the conviction of appellant must depend is as follows:

"A person who obtains any food lodging or accommodation at a hotel, boarding-house, restaurant, or lodging-house, without paying therefor, or with intent to defraud the proprietor or manager thereof, or who obtains credit at a hotel, boarding-house, or lodging-house by the use of false pretense, or who after obtaining board, lodging or accommodations at a hotel, boarding-house, restaurant, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food, lodging or accommodation, is guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than ten dollars nor more than fifty dollars, or imprisonment in the county jail not less than ten nor more than thirty days": Laws 1903, p. 244, sec. 1.

It is urged that, under the guise of a penal statute, it provides for imprisonment for debt, in contravention of section 17, article 1, of the constitution, and that it grants privileges to a class which upon the same terms do not belong to all citizens, in violation of section 12, article 1. Similar statutes have been construed by the courts of several of the states: Ex parte King, 102 Ala. 182, 15 South. 524; Chauncey v. State, 130 Ala. 71, 89 Am. St. Rep. 17, 30 South. 403; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; Hutchinson v. Davis, 58 Ill. App. 358; State v. Benson, 28 Minn. 424, 10 N. W. 471; State v. Engle, 156 Ind. 339, 58 N. E. 698.

Counsel insists, however, that the constitutional provisions in all the states passing upon this question, with the exception of Alabama, differ from our own, in that they provide that the legislature shall make no law authorizing imprisonment for debt in civil cases except in a case of fraud; whereas the constitution of this state makes no mention of the word "fraud," but limits the power of the legislature to providing for the imprisonment of absconding debtors. It is insisted [315] that under the one form of expression, imprisonment may be authorized if there be fraud in the inception of the debt; in the other (Washington) it can only be authorized in the

case of an absconding debtor. Imprisonment for debt is abhorrent to the spirit of free government, and is not to be tolerated under the form of penal statutes. That no man shall oppress his debtor or restrain him of his liberty has come to be a fixed principle, cherished by the people, and so guarded by constitutional provisions that the legislature cannot give ear to those who seek to use the power of the state to coerce the payment of their debts. Did we believe the statute under consideration was thus offensive, we would declare it unconstitutional without hesitation. But the solemn enactments of the legislative body are not to be ruthlessly stricken down. It is the duty of the court to sustain them if possible. It is only when they are clearly in opposition to the fundamental law that the judgment of the court will intervene, and not then to nullify a law that seems unjust, but rather to preserve the declaration of right reserved and made immune from legislative interference by the people themselves. We cannot read the statute as does counsel for appellant. It does not in our judgment warrant imprisonment for a debt. It would be beyond our province to hold that a person could be imprisoned for a simple contract debt; or, to put it in the way of counsel for appellant, simply because he did not pay his hotel bill. The hotel-keeper, if he should undertake to use the law as a whip to compel the payment of an overdue account honestly contracted, would himself be subjected to the penalties of the law, and become liable for damages in a civil action. The law under consideration goes no further than to say that the fraudulent incurring of a debt is a crime. Appellant has obtained a thing of value with intent to defraud. He is liable, as much so as is the one who by fraudulent pretense obtains the goods of a merchant or the money of a banker.

The use of the word "debt" in the discussion of this kind [316] of legislation has unfortunately raised an issue of law that is unwarranted. The fault of counsel's reasoning is in assuming that, because the fraud of the appellant resulted in a debt, he can find protection under section 17, article 1, of the constitution. In construing this provision the word "debt" is confined to an obligation arising out of a contract, express or implied. It is never extended to cover a tort.

"A person who willfully injures another in person, property, or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury a debt. But he is in fact a

wrongdoer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he is pecuniarily unable to pay what he promised to. For instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees ought not to be considered in the same category as an unfortunate debtor. He ought to be liable to arrest in action for damages by the party injured. Deny him this remedy, and in the majority of such cases it would amount to a denial of justice, and a deliberate repudiation and disregard of the injunction contained in section 10 of the same article—'every man shall have remedy by due course of law for injury done him in person, property or reputation.' It may be admitted that a penalty given by statute is technically a debt. It does not, however, arise upon contract, but by operation of law. It is imposed as a quasi punishment for the violation of law or the neglect or refusal to perform sume duty to the public or individuals enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are, either in morals or law, wrongdoers, and not simply unfortunate debtors unable to perform their pecuniary obligations. I do not think the constitutional provision prohibiting imprisonment for debt was intended to apply to or include such cases": United States v. Walsh, 1 Deady (U. S.), 281, Fed. Cas. No. 16,635. See, also, Lee v. State, 75 Ala. 29; Ex parte Hardy, 68 Ala. 303; United States v. Walsh, 1 Abb. (U. S.) 66, Fed. Cas. No. 16,635; Bray v. State, 140 Ala. 172, 37 South. 250.

The principle underlying this class of enactments is so [317] thoroughly reasoned in the case of State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656, that we feel warranted in adopting the expressions of that court as our own:

"The offense consists, not in the creation of a debt, nor in its nonpayment, but rather in the fraud through which credit may be procured or payment evaded. The latter, and not the former, is the thing for which punishment is to be inflicted. As well said by one of the attorneys for the state, the legislative intent was 'to punish the debtor for his fraud, and not for his debt.' Honest debtors are not within the act. It relates to those alone who shall intentionally pursue a certain course of fraudulent conduct; and that course of fraudulent conduct, intentionally pursued, constitutes the offense for which punishment is prescribed, and without which

punishment will not be inflicted. Without intentional fraud no offense is committed, no penalty incurred. The intention of the legislature, as we get it from the words and the tenor of the act, was to authorize punishment, including imprisonment, not for debt, but alone for particular intentional frauds, whereby the offender may obtain the property of his victim, ... for temporary use in case of lodging, and for absolute consumption in case of food, without compensation; or whereby, after obtaining such accommodations, he would defeat the landlord's lien upon his baggage. To our minds, this is not only a fair and reasonable construction of the act, but the most easy and natural one that can be given the language employed. The manifest object was to protect the property and the lien of the landlord against those persons who would, by intentional fraud, wrongfully use or consume the one or defeat the other; and, to make that protection effectual, the offender is subjected to punishment for his fraud, whether practiced in the wrongful use or consumption of the landlord's property or in the removal of his own property upon which the landlord has a lien. In either case the landlord has an interest in property, which the state, as a matter of public policy or of individual right, may well protect by the passage and enforcement of a penal statute such as that before us."

Nor do we think that that part of section 2 of the act, providing that if it be shown that a party has refused or neglected to pay for his accommodations, or has removed or [318] surreptitiously attempts to remove, his baggage, such showing shall be prima facie evidence of guilt, does violence to any constitutional provision. It is elementary that, when a crime is defined, the legislature may provide the quantum as well as the order of proof. It is not going beyond sound reason to say that, when a person asks for and receives accommodations at a hotel for which he does not pay, or if he undertakes to destroy the innkeeper's lien on his baggage, he should assume the burden of showing an honest intent. We are not without precedent to sustain us on this point. It is like unto the statute (Ballinger's Code, sec. 1705; Pierce's Code, sec. 1607), that puts upon one who is charged with an unlawful entry or an unlawful breaking and entry, the burden of explaining his conduct to the satisfaction of a jury, or suffering the presumption that his entry was actuated by a burglarious intent. In the case at bar appellant has at least done a wrong, and the reasoning employed in the case of State v. Anderson, 5 Wash. 350, 31 Pac. 369, is pertinent:

"The presumption provided for is not a conclusive one, and even without the aid of such legislation the jury would be justified in finding a criminal intent from the fact of the unlawful entry, if, under all the circumstances surrounding the case, such a presumption would be a reasonable one. It is the constitutional right of defendant to demand proof of his guilt before he shall be convicted of a crime, but it does not follow from such fact that it is beyond the power of the legislature to provide that a certain presumption may follow from the establishment of a fact, from which such presumption may follow as a reasonable conclusion": See, also, State v. Kyle, 14 Wash. 550, 45 Pac. 147; State v. Eubank, 33 Wash. 293, 74 Pac. 378; State v. Lawson, 40 Wash. 455, 82 Pac. 750.

The point made by appellant, that the act creates special privileges, is not discussed in his brief, nor do we find any merit in it.

The judgment of the lower court is affirmed.

Rudkin, C. J., Fullerton, Gose, Dunbar, Mount, and Crow, JJ., concur.

The Constitutionality of Statutes Making It a Crime to Defraud an Innkeeper is considered in the note to 78 Am. St. Rep. 242. In Chauncey v. State, 130 Ala. 71, 89 Am. St. Rep. 17, it is held that an act to punish persons who by fraud induce a hotel-keeper to furnish board or lodging, and fail or refuse to pay for the same, is not unconstitutional as conferring special privileges on hotel-keepers.

The Legislature may Prescribe that Certain Facts shall be Prima Facie Evidence of a certain other fact which they have a tendency to prove: People v. McBride, 234 Ill. 146, 123 Am. St. Rep. 82; Hammond v. State, 78 Ohio St. 15, 125 Am. St. Rep. 684, and cases cited in the cross-reference note thereto.

DAVIS v. LEE.

[52 Wash. 330, 100 Pac. 752.]

VENDOR AND VENDEE—Merger in Deed of Contract to Sell. A quitclaim deed does not merge a prior agreement to sell the land and convey by quitclaim, where it develops that the grantor had no title; and in such a case, the grantee may recover the purchase money paid. (pp. 977, 979.)

VENDOR AND VENDEE—Implied Obligation to Make Title. An agreement to sell land is in legal effect an agreement to sell a title to the land; and in the absence of a stipulation to the con-

trary, the law implies an undertaking on the part of the vendor to make a good title. (pp. 978, 979.)

QUITCLAIM DEED—Extent of Obligation of Grantor.—The impression is erroneous that an agreement to sell land by a quitclaim deed, or other conveyance of less worth than a warranty deed, absolves the vendor from any obligation other than the execution of his deed, and that it is a reservation of immunity on his part from all liability for a breach of his contract or failure of title. (p. 979.)

VENDOR AND VENDEE—Right of Vendee to Recover Money. If a vendor who contracts to sell land has no title, or fails or refuses to furnish a proper title at the time the vendee is entitled to it, the latter can maintain an action to recover the purchase price. (p. 980.)

DEED—Change of Printed Form so as to Substitute "Quitclaim Deed" for "Deed."—The fact that the words "a deed to said premises" as printed in a contract to sell land are erased and the words "quitclaim deed to said premises," written in lieu thereof, does not show an intention to limit the contract to the legal effect of a quitclaim deed, since the written words are not inconsistent with the contract to sell, and a quitclaim deed is, under liberal rules of construction, in effect a bargain and sale deed or a "deed," and as effectual to convey title as either of them. (p. 981.)

INTEREST.—Where a Vendee of Land Recovers the Purchase Price from a vendor who fails or refuses to make title, he is entitled to the legal rate of interest, but no more. (p. 982.)

Fred H. Peterson, for the appellants.

W. F. Freudenberg, for the respondent.

832 CHADWICK, J. Prior to the 4th of May, 1903, defendant Charles S. Lee had acquired a tax title to the lands hereinafter described. On that day, he, as party of the first part, and D. P. Merritt and H. Merritt, as parties of the second part, entered into the following contract.

"REAL ESTATE CONTRACT.

"It is hereby mutually agreed, by and between Charles S. Lee, unmarried, of Ballard, Wash., the party of the first part, and Harry Merritt and D. P. Merritt, the parties of the second part, that said party of the first part will sell to said parties of the second part, their heirs and assigns, and said parties of the second part will purchase of said party of the first part, his heirs, executors or administrators, the following described lots, tracts or parcels of land, situate in King County, Washington: All of lots one (1) two (2) three (3) four (4) and five (5) in block seventy-two (72) in Salmon Bay Park Addition to the city of Seattle now in Ballard, with the appurtenances thereunto belonging, on the following terms:

"First, the purchase price for said land is two hundred fifty & no-100 dollars, of which the sum of twenty-five & no-100 dollars to be paid on or before the — day of ———, whereof is hereby acknowledged by said party of the first part; and the further sum of two hundred twenty-five & no-100 dollars to be paid on or before the — day of ———, A. D. 19—, with interest thereon from this date until paid at the rate of 8 per cent per annum, as follows, to wit: Ten & no-100 on the first day of each and every following month until fully paid, and the said parties of the second part, in consideration of the premises, hereby agree that they will regularly and seasonably pay all taxes and assessments which may be hereafter lawfully imposed on said premises. All improvements placed thereon shall remain, and shall not be removed before the final payment be made for said above described premises. In case the said parties of the second 333 part, their legal representatives or assigns, shall pay the several sums of money aforesaid, punctually at the several times above specified, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, according to the true intent and tenor thereof, then the said party of the first part shall make to the said second party, his heirs or assigns, upon request, and upon surrender of this agreement, a quitclaim deed to said premises. But in case the second parties shall fail to make the payments as set forth in this agreement, or any of them, punctually, and upon the terms and at the times specified, the times of payment being declared to be of the essence of this agreement, or permit any lien for labor or material to be filed against said real estate, then the party of the first part, his heirs, executors or assigns, shall have the right to declare this agreement null and void, and in such case all the rights and interest of second parties hereby created or then existing shall utterly cease and determine, and the premises shall revert to and revest in said first party without any declaration of forfeiture or act of re-entry, and second parties shall have no right of reclamation or compensation for money paid or improvements made, as absolutely, fully and perfectly as if this agreement had never been made, and in such event such payments shall be retained by said party of the first part as compensation for the use and occupancy of said premises by said parties of the second part, and as rental thereof. And it is further agreed, that no assignment of this agreement shall be valid without the consent and signature of Charles S. Lee or W. H. Vernon,

agent, the party of the first part. And the said second parties hereby agree to pay to said first party the remaining principal and interest as follows: Payments to be made on or before the above dates to Charles S. Lee or W. H. Vernon, Agt., or order. Interest due, to be deducted from any payment made.

"Witness our hands and seals in duplicate, this 4th day of May, A. D. 1903.

"CHARLES S. LEE. (Seal)
"D. P. MERRITT. (Seal)
"H. MERRITT. (Seal)

"Signed, sealed and delivered in presence of
"H. GALLOWAY,
"W. H. VERNON."

334 Thereafter the Merritts sold all right, title, and interest in the contract to Joseph I. Davis and Zula Davis, his wife, plaintiffs herein. All payments were made as stipulated, and a quitclaim deed was executed by defendant Lee on the twenty-second day of September, 1905, which was delivered to Mrs. Davis, but she denies that it was ever accepted as a discharge of defendants' contract. It was never recorded. Just prior to the last payment, plaintiffs were threatened with an action of ejectment. They notified defendant Vernon, who had acted throughout for defendant Lee, of the pendency of the action. When the action was brought, Lee was made a party to the suit. He thereupon served notice on plaintiffs that, if they did not immediately pay the balance due—a matter of seventeen dollars and ten cents—he would forfeit the contract. Plaintiffs accordingly paid the amount, taking a receipt in full and a quitclaim deed. Lee did not defend the action of ejectment, but filed a disclaimer of any interest in the land, and was dismissed as a party. Plaintiffs assumed to defend the title, but were unsuccessful. After judgment against them, they purchased the property from the owner; whereupon they brought this action to recover the purchase price and the costs and expenses incurred in the action of ejectment. Pending the trial in the court below, plaintiff Joseph I. Davis died, and the action has since been prosecuted under the original title by Zula Davis, in accordance with the stipulation of the parties. The trial court found for the plaintiffs in the sum of two hundred and fifty dollars, the purchase price, with interest at the rate of ten per cent per annum, but denied a recovery for the costs and expenses incurred in defending their title.

Appellants assign numerous errors, but aside from a general assignment as to the admission of testimony, they all go to the one legal proposition, Did the appellant Lee perform his contract by the execution and delivery of a quitclaim deed? Appellants contend that, whatever the original contract may have been, and whatever agreements or assurances may have been given during the life of the contract, they were all [335] merged in the deed, and by its acceptance appellants took only such title as Lee had, and are without remedy. We agree with counsel that the general rule is that "a deed made in full execution of a contract of sale of land merges the provisions of the contract therein, and this rule extends to and includes all prior negotiations and agreements leading up to the execution of the deed, all prior purposes, stipulations and oral agreements, all collateral promises, including promises made contemporaneously with the execution of the deed." Like most all rules, the one quoted has its exceptions, and continuing the same text we find the following: "A deed is not, however, always a merger of the articles of agreements, etc., nor are a vendor's or a purchaser's covenants necessarily merged or discharged, and a parol agreement may be suspended by the subsequently executed instrument. The question of merger has also been declared to be one of construction to be gathered from a consideration of the entire contents of the instruments": 13 Cyc. 616.

Appellant Lee agreed to sell certain described town lots. The purchase price for the land, not his right, title or interest, but the land itself, was agreed upon, which sum the vendees agreed to pay in installments, and in the meantime to pay all taxes and assessments thereafter to be levied on the premises. The intention of the parties must be gathered from the instruments, and their conduct with reference thereto. That respondent and her husband intended to buy the land, rather than an uncertain interest, cannot be questioned; and, in our opinion, they were justified in relying upon the text of the contract. The rule governing this case is well stated in Morris v. Whitcher, 20 N. Y. 41, as follows: "In all cases, then, where there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a performance, the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intention may exist in or out of the deed. If plainly expressed in the very terms of the deed, the evidence

will be decisive. If not so expressed, the [336] question is open to other evidence, and I think in absence of all proof there is no presumption that either party, in giving or accepting a conveyance, intends to give up the benefit of covenants of which the conveyance is not a performance or satisfaction. There are remarks of judges, in cases which need not be particularly referred to, which seem in their result to deny the possible coexistence of a deed and of a collateral writing, which qualifies its effect, especially if the collateral writing be made before the deed. But I have shown, I trust, that there is no such rule as observations of that nature would appear to suggest": See, also, Brennan v. Schellhamer, 13 N. Y. Supp. 558; Disbrow v. Harris, 122 N. Y. 362, 25 N. E. 356.

Error is also predicated upon the allowance of oral testimony as to the conversations and assurances made by defendant Vernon with regard to the condition of the title after the written contract had been signed. Inasmuch as the case was tried by the court without a jury and is here to be tried de novo, the error, if any, cannot be held to be prejudicial. It is possible to determine this case upon the contract and deed without reference to the oral testimony. The rights and obligations of the parties cannot be measured by the deed alone. The contract is entitled to equal consideration.

"It is not the ordinary case of the breach of a covenant in a deed, where the remedy would be a suit on the warranty, but the respective contracts here are dependent upon each other. The deed was made in consideration of a separate instrument in writing entered into between the grantor and grantee, and it is very evident from that contract that it was not simply a deed of the fee that the appellant was contracting with reference to, but that it was the real title to the land, and the character of the deed was simply stipulated as a compliance with the forms prescribed for conveying such title; in other words, there is nothing to indicate that the appellants were contracting for the shadow rather than the substance": Moody v. Spokane & University Heights St. R. Co., 5 Wash. 699, 32 Pac. 751.

Respondent undertook to buy something more than a [337] chance title. This the contract shows. To segregate the words "a quitclaim deed to said premises," and hold her to the legal import of those words, without reference to their relation to other words and covenants in the contract, would be an injustice to the buyer and do violence to accepted rules of construction. If a party agrees to sell land, it is in

legal effect an agreement to sell a title to the land. In the absence of a stipulation to the contrary, the law implies an undertaking on the part of the vendor to make a good title: 29 Am. & Eng. Ency. of Law, 2d ed., p. 606; Ankeny v. Clark, 1 Wash. 549, 20 Pac. 583; 2 Warvelle on Vendors, 2d ed., 836. The form of conveyance is a secondary consideration. There may be reasons for giving or receiving a quitclaim deed. These will not be inquired into so long as that form of deed will convey the title agreed to be conveyed, in the contract itself.

Much of appellants' brief is taken up with a discussion of the effect of a quitclaim deed. The authorities cited refer to executed rather than executory contracts, and are not in point for that reason. The impression prevails to some extent that an agreement to sell land by quitclaim deed or other conveyance of less worth than a warranty deed, absolves the vendor from any obligation other than the execution and delivery of his deed; that it is a reservation of immunity on his part from all liability in damages for a breach of his contract or failure of title. This is erroneous. The effect of a quitclaim deed was considered in the case of Ankeny v. Clark, 1 Wash. 549, 20 Pac. 583, where, after some discussion, the court said: "Under the statutes of our territory, a quitclaim deed is just as effectual to convey the title to real estate as any other form of deed, and a grantee in a quitclaim deed is entitled to the same presumptions as to bona fides, and has the same rights, as a grantee in a deed of general warranty. This is undoubtedly true of a quitclaim deed which purports on its face to convey, not merely an interest, but the real estate itself."

[338] The effect of a covenant to convey by special warranty deed was discussed in the case of Baldwin v. Brown, 48 Wash. 303, 93 Pac. 413: "As the controversy is not as to the effect of a special warranty deed, but as to a contract to 'convey' by special warranty deed, and as the contract contains the expression 'that the said J. W. Brown reserves the right and title to said land until the same is paid for in full,' the respondent claims, and apparently the trial court was of the opinion, that appellant by said contract purported to have 'right and title' to said land, and agreed to 'convey' the same, and that the contract contemplated this, and that as a court of competent jurisdiction, prior to the final payment on this contract, had decided that appellant had no right or title whatever to said five acres, he was therefore unable to 'con-

vey' by a special warranty deed, or by any other form of conveyance. The court, therefore, held that the appellant was not in a position to require respondent to pay for that which the former had agreed to, but could not, convey. We think this position must be maintained."

While in this case there is no express reservation of a title, reference to the whole contract shows that it was the intent of the vendor to retain title until full payment. He has made time the essence of the contract, and provided for forfeiture not only on account of failure to meet payments, but for any impairment of title by mechanics' liens, tax sales, etc. The case, therefore, rests upon the same principle. If a vendor who contracts to sell land has no title, or fails or refuses to furnish a proper title at the time the vendee is entitled to it, the latter can maintain an action to recover the purchase price. The vendor has assumed the attitude of ownership, and a failure to perform is in law a misrepresentation for which an action will lie. Appellants undertake to meet this proposition by reference to the case of Decker v. Schulze, 11 Wash. 47, 48 Am. St. Rep. 858, 39 Pac. 261, 27 L. R. A. 335. They quote the following: "Generally speaking, a purchaser after a conveyance has no remedy, except upon the covenants he has obtained, although [339] evicted for want of title; and however fatal the defect of title may be, if there is no fraudulent concealment on the part of the seller, the purchaser's only remedy is under the covenants."

This is no more than a statement of an abstract proposition of law, and was evidently used to illustrate the main question before the court, which was the construction of pleadings. In that case plaintiffs had alleged that defendants were not seised in fee simple or possessed of the right to sell and convey. On this point the court said: "This is, at most, equivalent merely to a statement that their interest in the granted premises was less than a fee simple estate, and cannot be held to be equivalent to an allegation that they had no estate or interest in the premises. We think this is wholly insufficient to constitute good pleading, at law or in equity."

In this case an absolute failure of title is alleged, and it will thus be seen that that case is not authoritative. We think the true rule is announced in the case of Sears v. Stinson, 3 Wash. 615, 29 Pac. 205, where the court upheld an action of this character, saying: "But there is no reason either why he could not compel the party who has sold him more than he can deliver to return the excess payment; and

that is simply what it amounts to. It is not a case in deceit, and a different rule of damage will apply altogether. There is no deceit alleged. It is an action under the statute, where the complaint is a plain and concise statement of facts, constituting a cause of action. In this case the statement is, that by reason of false representations made by defendant, the plaintiff paid for more land than he received. There certainly can be nothing inequitable in this procedure if a just measure of damages is employed. The purchaser pays for what he gets, the vendor gets pay for what he has to sell; this is all he is entitled to, let his mistake be ever so innocent."

And in the latter case of Curtley v. Security Sav. Soc., 46 Wash. 50, 89 Pac. 180: "While this court has, in common with many other courts, held that false representations involving mere matters of [340] opinion, or question of judgment, as much within the knowledge of one party as the other, are not grounds for an action of deceit, it has also held that false representations as to the quantity of land contained in a given description, or false representations as to the boundaries and location of land, or as to its title, if made positively and with the intent that they should be relied upon, were not of that sort, but were actionable if relied upon by the vendee to his injury: Hanson v. Tompkins, 2 Wash. 508, 27 Pac. 73; Sears v. Stinson, 3 Wash. 615, 29 Pac. 205; Lawson v. Vernon, 38 Wash. 422, 107 Am. St. Rep. 880, 80 Pac. 559; Freeman v. Gloyd, 43 Wash. 607, 86 Pac. 1051. Such, also, is the general rule: 14 Am. & Eng. Ency. of Law, 2d ed., pp. 24, 88; 29 Am. & Eng. Ency. of Law, 654-657; David v. Park, 103 Mass. 501."

It is further argued that, because the words "a deed to said premises" as printed in the contract were erased, and the words "quitclaim deed to said premises" written in lieu thereof, an intention of the parties to limit their contract to the legal effect of a quitclaim deed was manifested. It is the rule that, where written words are inconsistent with or contradict part of a printed form, the written words will be presumed to disclose the true intent of the parties. But the rule has no application to this case, for two reasons: 1. There is no inconsistency in the contract; and 2. A quitclaim deed in a case like this is, under our liberal rule of construction, in effect a bargain and sale deed or a "deed" as provided in the erased portion, and just as effectual to convey title as either of them.

Our conclusion is that the appellant Lee agreed, in consideration of a certain sum, to do two things: to sell the land described in the contract, and make a quitclaim deed. He has made the deed but he has failed to sell the land. The contract was mutual. As he reserved the right to protect his engagements by apt clauses in the contract, he will be bound upon payment to the full performances of his obligation. Having agreed to sell something he never owned, he cannot discharge that part of his agreement. Hence, it follows that respondent is entitled to recover the purchase
341 price. The contract was signed by appellant Vernon as agent for appellant Lee. He transacted all the business between the parties, but a careful reading of the statement of facts fails to disclose any act on his part inconsistent with the relation of agency. He could not have sued for a breach of the contract or for specific performance. He should not then be held liable as a principal. We think the court erred in rendering judgment against him.

In entering judgment the lower court fixed the rate of interest at ten per cent per annum. In this the court erred. Respondent is entitled to recover the legal rate of interest, but no more.

The case is affirmed as to appellant Lee, and reversed as to appellant Vernon, with instructions to the lower court to modify the judgment in so far as it provides for more than the legal rate of interest. Appellant Vernon will recover his costs against respondent. Respondent will recover her costs against appellant Lee.

Rudkin, C. J., Dunbar, Gose, Fullerton, and Mount, JJ., concur.

Crow, Morris, and Parker, JJ., took no part.

As to the Merger of Prior Agreements in a Deed, see the note to Clifton v. Jackson Iron Co., 16 Am. St. Rep. 622; and the subsequent cases of Close v. Zell, 141 Pa. 390, 23 Am. St. Rep. 296; Slocum v. Bracy, 55 Minn. 249, 43 Am. St. Rep. 499; Rackemann v. Riverbank Imp. Co., 167 Mass. 1, 57 Am. St. Rep. 427; Butt v. Smith, 121 Wis. 566, 105 Am. St. Rep. 1039.

The Effect of a Quitclaim Deed is the subject of a note to Babcock v. Wells, 105 Am. St. Rep. 854.

DAVISON v. WALLA WALLA.

[52 Wash. 453, 100 Pac. 981.]

MUNICIPAL CORPORATION — Enactment of Ordinance — Pleading.—If an answer alleges that an ordinance was duly passed, a denial in the reply which merely questions the power of the city to pass the ordinance does not put in issue the regularity of the proceedings leading up to the enactment. (p. 984.)

MUNICIPAL CORPORATION—Fire Limits—Judicial Proceedings.—Measures taken by a city to establish and maintain fire limits are merely the exercise of the police power without the necessity of a resort to judicial proceedings. (p. 984.)

MUNICIPAL CORPORATION—Authority to Establish Fire Limits.—Under a charter authorizing a city to establish fire limits and provide for the removal of structures erected contrary to its prohibition, a city may, within prescribed limits, prohibit the repair of wooden buildings which have been damaged by fire to the extent of thirty per cent of their value. In estimating this percentage only the superstructure is considered in case of a building with concrete foundation. (p. 985.)

Brooks & Bartlett and John H. Pedigo, for the appellant.

Oscar Cain and J. C. Hurspool, for the respondent.

454 FULLERTON, J. The city of Walla Walla is a municipal corporation operating under a special charter enacted by the legislative assembly of the territory of Washington. Section 4 of the charter gives the city power to make regulations for prevention of accidents by fire, and "on petition of the owners of one-half of the ground included within any prescribed limits within the city, to prohibit the erection within such limits of any building or any addition to any building, unless the outer walls thereof be made of brick and mortar and iron, or stone and mortar, and to provide for the removal of any building, or any addition erected contrary to such prohibition." Pursuant to this provision of its charter, the city enacted an ordinance creating fire limits, within which it made it unlawful to erect any building other than those defined in the city charter, or to repair or rebuild, without the consent of the city council, any wooden building within the fire limits that should be damaged by fire to an extent equaling thirty per centum of its value.

The appellant owned a framed structure erected upon a concrete basement within the fire limits, which was destroyed by fire to an extent greater than thirty per centum of the value of the building if the concrete basement is not included in the estimate of value, but less than thirty per centum of its value if the concrete basement is included in such estimate.

The city authorities, claiming that the building was destroyed to such an extent as to prevent the owner from rebuilding, [455] threatened to remove the portion of the structure remaining, when this action was begun to enjoin them from so doing. At the trial the court held with the city, and dismissed the action. The owner appeals.

The appellant attacks the validity of the ordinance. He complains that it was not shown that the ordinance was preceded by the preliminary petition prescribed by the city charter. But as we read the record, there was no issue on this question. The city in its answer pleaded that the ordinance was duly passed, while the denial in the reply merely questions the power of the city to pass the ordinance, not that the preliminary steps were not properly taken. This form of denial does not put in issue the regularity of the proceedings leading up to the passage of the ordinance, and the city was not called upon to prove them.

It is next insisted that the ordinance is arbitrary and confiscatory, in that it attempts to confer upon the city power to destroy property of the citizen without first ascertaining by a judicial proceeding whether the property is within the terms of the ordinance, or subject to destruction thereunder. But to prevent the erection of a building within a prohibited area, or take down a building erected therein in violation of an ordinance prohibiting its erection, is not a condemnation of the property to a public use, but is merely the exercise of the police power of the state, and may be done by the city without a resort to judicial proceedings: Eichenlaub v. St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; McKibbin v. Fort Smith, 35 Ark. 352; Klingler v. Bickel, 117 Pa. 326, 11 Atl. 555; Hine v. New Haven, 40 Conn. 478; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830.

Whether the particular ordinance is valid, since it requires the removal of a wooden building only thirty per centum of which is destroyed, is a more serious question. A case in point, supporting the ordinance, is Ironside v. Vinita, 6 Ind. Ter. 485, 98 S. W. 167. In that case the charter empowered the municipality to make regulations for the purpose of guarding [456] against accidents by fire, and to prohibit the erection of any building, or any addition to any building, more than ten feet high, unless the outer walls thereof be made of brick or mortar, or of iron or stone and mortar; and to provide for the removal of any building or additions erected to any building contrary to such prohibition. Act-

ing under this charter, the city enacted an ordinance establishing fire limits, and making it unlawful to repair or rebuild any wooden building within such fire limits which had been damaged to an extent of twenty-five per cent of the value thereof, without obtaining permission from the town council. It was held that ample authority was given the city by the charter to erect the ordinance. In our judgment this conclusion is just, when it is remembered that the purpose of a fire limit is to prevent the destruction of human life and property by fire, and we adopt it as a proper construction of the ordinance in question here.

Finally, it is urged that the value of the concrete basement should be taken into consideration in estimating the value of the building and the relative proportion thereof which the fire destroyed. While it is true that the term "building" without other description usually includes the foundation upon which it rests, it is manifest that it was not so intended by this ordinance. The concrete foundation is not in the least objectionable. It complies strictly with the terms of the ordinance. The whole danger lies in the wooden superstructure, and it is this only that must be considered in determining the percentage of destruction.

The judgment will stand affirmed.

Chadwick, Gose, Crow, Mount, and Dunbar, JJ., concur.

Municipal Corporations have the Power Under the General Welfare Clause commonly contained in their charters to establish fire limits and to forbid the erection or removal of wooden buildings within the limits prescribed: Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368. See, also, Eureka City v. Wilson, 15 Utah, 67, 62 Am. St. Rep. 904; Fire Department of New York v. Gilmour, 149 N. Y. 453, 52 Am. St. Rep. 748; State v. City of Kearney, 25 Neb. 262, 13 Am. St. Rep. 493. And a building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceedings: Lemmon v. Town of Guthrie Center, 113 Iowa, 36, 86 Am. St. Rep. 361. For subsequent cases on this subject, see Sylvania v. Hilton, 123 Ga. 754, 107 Am. St. Rep. 162; note to Bostick v. Sams, 93 Am. St. Rep. 405; Cochran v. Preston, 108 Md. 220, 129 Am. St. Rep. 432.

CUMMINGS v. DOLAN.

[52 Wash. 496, 100 Pac. 989.]

LETTER OF ATTORNEY—What Land Included Under Power to Sell.—A power of attorney to convey any of the principals' land, excepting the farm occupied by them in Green River Valley, authorizes the agent to convey a lot in that valley that has never been occupied by the principals. (p. 988.)

MARKETABLE TITLE—Test for Determining Whether Cloud Exists.—The test by which to determine whether a deed casts a cloud is, would the owner of the property, in ejectment by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery; if so a cloud would exist, if not, no shade would be cast by the presence of the deed. (p. 989.)

MARKETABLE TITLE—What Does not Constitute Cloud.—A conveyance not falling in the chain of title, as from one who never had any connection with the property, does not constitute a cloud upon such title. (pp. 989, 990.)

MARKETABLE TITLE—Mortgage by Stranger to Chain of Title.—A mortgage on property, given by strangers to the title, does not constitute a cloud on the title and authorize a vendee to rescind for want of a marketable title on the part of his vendor; but if the contrary were conceded, a quitclaim deed would cure the defect. (pp. 989, 990.)

MARKETABLE TITLE.—To Render a Title Marketable It is Necessary only that it shall be free from reasonable doubt; a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion, but only such title as a reasonably well informed and intelligent purchaser, acting upon business principles, would be willing to accept. (p. 990.)

John E. Ryan, for the appellant.

Godman & Embree, Aust & Terhune and W. A. Keene, for the respondent.

[496] CROW, J. Action by J. M. Cummings v. James Dolan to recover five hundred dollars earnest-money paid by plaintiff to the defendant on a contract for the purchase of real estate. A verdict was refused in favor of the plaintiff, but the trial court sustained defendant's motion for judgment notwithstanding the [497] verdict, and dismissed the action. The plaintiff has appealed.

The undisputed evidence shows that on November 3, 1906, the respondent executed and delivered to the appellant the following written instrument:

"Seattle, Washington, November 3, 1906.

"Received from J. M. Cummings the sum of Five hundred ($500.00) Dollars as deposit and part of purchase price of the property herein described, viz.: The Southeast quarter (SE¼) of the Southeast quarter (SE¼) of Lot twelve

(12), Section twenty-six (26), township 21, Range 5 East; also lots six and seven (6 & 7), Section 25, township 21. Range 5 East, containing 91.25 acres lying and being in King County, Washington, together with all appurtenances thereunto belonging. The above deposit to be held by me in trust for the owner. The total purchase price for said property is Thirty-six hundred fifty dollars ($3,650.00), payable as follows: Two thousand dollars ($2,000) cash in hand (including the amount of this receipt) to be paid on approval of abstract, and balance to be paid, viz., Eight Hundred and twenty-five ($825.00) dollars on November 3, 1907, and Eight Hundred and twenty-five ($825.00) dollars on May 3, 1908, with interest on deferred payments at the rate of seven per cent per annum until fully paid, the same to be secured by mortgage on said property.

"The purchaser shall be furnished a complete abstract showing good and marketable title in the owner and be allowed ten days for examination thereof, whereupon he agrees to complete the purchase in the manner and upon the terms herein, and that in case of his failure so to do, the said sum of money hereby receipted for shall be forfeited as liquidated damages.

"It is further agreed that if the title is not good and cannot be made good within a reasonable time thereafter, the said sum of money this day paid shall be refunded.

"JAMES DOLAN, Agent.

"Subject to owner's approval.

"J. H. VAN ASSELT, Witness.

"I hereby agree to the above provision.

"J. M. CUMMINGS, Purchaser."

That shortly thereafter the respondent furnished an abstract of title which appellant delivered to his attorney for [498] examination and an opinion, at the same time authorizing the attorney to represent him in passing upon the title and closing the deal; that the attorney directed respondent's attention to certain alleged defects in the title, as shown by the abstract, and requested him to correct the same as follows: (1) An unsatisfied real estate mortgage from W. G. Simpson and Sarah P. Simpson, his wife, to Lilienthal & Co. on lot 7 of the land above mentioned; (2) an unsatisfied chattel mortgage from W. G. Simpson and wife to Lilienthal & Co. on a hop crop on lot 7; and (3) an agreement between W. G. Simpson and wife and Lilienthal & Co. reciting that Simpson was the owner of lot 7; that to remedy these alleged de-

fects the respondent procured quitclaim deeds from W. G. Simpson and Sarah P. Simpson, his wife, to lot 7, and an affidavit from W. G. Simpson showing that neither he nor his wife, Sarah P. Simpson, ever had or claimed any interest, ownership, or title in or to lot 7, and that the mortgages and agreement executed by them had by mistake described the land in question, instead of other lands which Simpson and wife did own, and which they actually intended to encumber.

The evidence further shows that the mortgages and agreement were executed in 1892; that Simpson and wife had never been in possession of the land; that the abstract failed to connect them with the chain of title; that it only disclosed the mortgages and agreement as being of record; that the respondent was ready, willing, and able to complete the sale on his part, and offered to do so; that appellant's attorney, after the above corrections of the title had been made, notified respondent's attorney there was no ingress to, or egress from, the land, and that by reason thereof his client would not complete the purchase or make payment. The appellant now calls attention to the further fact that the abstract shows the title to have been at one time held by one Jennie L. Shafer, that it was afterward conveyed by Jennie Shafer, and that no identification of Jennie L. Shafer and Jennie Shafer as [499] one and the same person has been furnished. This alleged defect was not called to the respondent's attention, nor was he requested to cure the same by furnishing evidence of identification, or in any other manner, at any time prior to the appellant's refusal to complete the purchase.

The appellant further contends that the quitclaim deed from Sarah P. Simpson was executed by William G. Simpson as her attorney in fact, that the power of attorney contained the following: "Excepting, however, the farm occupied by me and my husband as a homestead in Green River valley, King county, Washington, to which land and farm this power of attorney does not extend"; that lot 7 above described was located in Green River valley, and that a presumption arises that W. G. Simpson was not authorized to execute the quitclaim deed under the power of attorney. The uncontradicted evidence is that neither W. G. Simpson nor his wife ever lived upon the land in dispute in this action. This being the fact, he had authority to execute the quitclaim deed under his power of attorney.

Appellant vigorously insists that the defects to which he actually directed the attention of respondent's attorney, were

such a serious cloud upon the title as to render it bad and unmarketable, and that the instruments obtained by respondent did not cure the same or remove the cloud. Respondent contends that the title as originally disclosed by the abstract was good and marketable; that they were unauthorized instruments executed by mistake by strangers to the title; that they constituted no cloud thereon; that if conceded to be a cloud, they were in any event cured by the quitclaim deeds and affidavit; that any technical objection as to the want of identification of Jennie L. Shafer and Jennie Shafer was waived by appellant's failure to call respondent's attention thereto; that the power of attorney authorized the execution of the quitclaim deed by W. G. Simpson for his wife, and that the appellant refused to take the land for the sole reason that he claimed there was no ingress or egress, a fact 500 which he has not pleaded, and upon which he does not and cannot now rely as an excuse for nonperformance of the contract of sale upon his party. We think all of these contentions made by respondent should be sustained. While there is some conflict in the evidence on immaterial matters, there is no dispute as to any material fact. It therefore became a question of law for the court to determine what judgment should be entered. The appellant's principal objection to the title was based upon the supposed interests of Simpson and wife, and Lilienthal & Co., but under the undisputed facts it is apparent that they had no interest whatever in lot 7, they being entirely outside of the chain of title and strangers thereto. The existence and record of the instruments complained of was not a sufficient excuse for rejecting the title, especially after the respondent had procured the quitclaim deeds and affidavit to explain and remove any asserted cloud.

In Pixley v. Huggins, 15 Cal. 127, Chief Justice Field said: "The true test, as we conceive, by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed."

Under this rule no shade would be cast by the presence of the Simpson mortgages and agreement. In the same case Chief Justice Field further said: "A conveyance not falling in the chain of title, as from one who never had any connec-

tion with the property, would not constitute a cloud upon such title. No action could be supported upon such a conveyance, even in the absence of rebutting proof, any more than upon so much waste paper."

In Ward v. Dewey, 16 N. Y. 519, Selden, J., said: "If an entire stranger assumes to convey the premises to which he has no shadow of title, and of which another is in [501] possession, no real cloud is thereby created. There is nothing to give such a deed even the semblance of force. It can never be used to the serious annoyance or injury of the owner. A word of explanation would dissipate the apparent cloud."

In Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S. E. 663, the court said: "There is a vast distinction between a deed which purports to have derived its existence through the true owner of the original and paramount title, and a deed executed by one unconnected with, and an entire stranger to, such title. There would be abundant reason to regard with apprehension a conveyance which, though really void because of some latent infirmity, bears apparently the stamp of force and validity, and assumes to trace its way through connecting links back to the fountain-head from which flowed the original title. On the other hand, an instrument which springs from no definite source of right whatsoever can never properly be considered a cloud upon title": See, also, Dunklin County v. Clark, 51 Mo. 60; Lick v. Ray, 43 Cal. 83; Lytle v. Sandefur, 93 Ala. 396, 9 South. 260.

Appellant's contract calls for a "good and marketable title." The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt; in other words, that a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion, he can only demand such title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept.

"A purchaser is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim a marketable title, and that means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept": Todd v. Union Dime Sav. Inst., 128 N. Y. 636, 28 N. E. 504.

Such a title was tendered the appellant. His contract provided that when such title was furnished by respondent he [502] should complete the purchase, and that in case of his failure so to do, the five hundred dollars earnest-money should be forfeited as liquidated damages. A good and marketable title having been tendered, and appellant having failed to accept the same, the trial court properly entered judgment in favor of the respondent, notwithstanding the verdict of the jury.

The judgment is affirmed.

Mount, Gose, Fullerton and Chadwick, JJ., concur.

Dunbar, Morris and Parker, JJ., took no part.

WHAT IS A MARKETABLE TITLE.

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I. Introductory Remarks.

It was said last year by the appellate division of the supreme court of New York in Mutchnick v. Davis, 130 App. Div. 417, 114 N. Y. Supp. 997, that, "In the absence of any stipulations to the contrary, a marketable title to real property is always presumed to be bargained for"; and speaking to the same point the highest judicial tribunal of that state said in the earlier case of Moore v. Williams, 115 N. Y. 586, 12 Am. St. Rep. 844, 22 N. E. 233, 5 L. R. A. 654: "It is familiar law that an agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects"; and "a good title means not merely a title valid in fact, but a marketable title."

The law, as thus stated in these two cases, is found running through all the books, and shows the prime importance of the inquiry to which our attention is directed in this note, and its importance is further

emphasized when we consider that the distinction which once prevailed as to marketable titles between courts of law and equity no longer exists under our judicial system, and that actions at law by the vendee to recover back purchase money can be based upon the grounds that would justify equity in refusing to compel him to accept the title: Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785; Howe v. Coates, 97 Minn. 385, 114 Am. St. Rep. 723, 107 N. W. 397, 4 L. R. A., N. S., 1170; Methodist Episcopal Church Home v. Thompson, 108 N. Y. 618, 15 N. E. 193; Moore v. Williams, 115 N. Y. 586, 12 Am. St. Rep. 844, 22 N. E. 233, 5 L. R. A. 654; Brokaw v. Duffy, 165 N. Y. 391, 59 N. E. 196; and that a title, though it may be good in fact, is not necessarily a marketable title: Block v. Ryon, 4 App. D. C. 283; Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99, 67 L. R. A. 785; Howe v. Coates, 97 Minn. 385, 114 Am. St. Rep. 723, 107 N. W. 397, 4 L. R. A., N. S., 1170.

II. Definitions and General Principles Controlling.

It is difficult to give any clear definition of the term "marketable" or "merchantable" title; in fact Vice-Chancellor Stevenson, of the court of chancery of New Jersey, has said that "no exact definition has been, or probably can be, formulated of either a marketable or unmarketable title": Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483.

Various descriptions, however, have been attempted by many of the courts, and from these it is easy to determine what general rule or test should be applied in determining whether a title is or is not marketable.

A marketable title is one "fairly deducible of record, free from reasonable doubt or litigation," and not "depending upon matters which rest in parol": Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315.

A marketable title is "a title not subject to such reasonable doubt as would create a just apprehension, one that would be regarded as merchantable, so that persons of reasonable prudence and intelligence would be willing to take it, and pay the fair value of the land": Hale v. Cravener, 128 Ill. 408, 21 N. E. 534.

A marketable title is "one which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as security for a loan of money": Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981.

"A marketable title is one of such a character as should assure to the vendee a peaceable enjoyment of the property": Barnard v. Brown, 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038. In giving its definition of what constitutes a marketable title, the supreme court of Minnesota in the comparatively recent case of Howe v. Coates, 97 Minn. 385, 107 N. W. 397, 114 N. W. 723, 4 L. R. A., N. S., 1170, first quoted from Sugden on Vendors, chapter 10, section 3: "A court of equity is anxious to protect a purchaser and give to him reasonable security for his title, not compelling him to take a title without knowing whether it is good or bad. The inclination of the court is

in favor of the vendee, and the vendor claiming to be exempted from the general rule is required clearly to establish a case of exception. To enable equity to enforce the specific performance against a purchaser, the title to the estate ought, like Caesar's wife, to be free even from suspicion, for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him. It has, therefore, become a settled and invariable rule that a purchaser shall not be compelled to accept a doubtful title; and the court will not have regard to its own opinion only, but will take into account what the opinion of other competent persons may be." The court then remarked that the standard set by Caesar for his wife was a little higher than the law requires for a title, and proceeded to define a marketable title to be "A title free from reasonable doubt—what Lord Elden, in Stapylton v. Scott, 16 Ves. 272, called a rational doubt."

A title is not marketable "where the written title contains on its face some notice of something outside which may lead to some fact that may disturb the title," or "where the title depends necessarily upon matter in pais": Rutherford Land & Imp. Co. v. Sanntrock (N. J. Ch.), 44 Atl. 938.

"A title dependent on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and (2) where there is no reasonable ground for apprehending that the same fact cannot be in like manner proved, if necessary, at any time thereafter for the protection of the purchaser": Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483.

"A title may be doubtful, which is to say unmarketable, because of the uncertainty of some matter of fact appearing in the course of the deduction of it. And if, after the vendor has produced all the proofs that he can, a rational doubt still remains, a title is not marketable": Shriver v. Shriver, 86 N. Y. 575.

And again: "A marketable title is one that is free from reasonable doubt. There is reasonable doubt where there is uncertainty as to some fact appearing in the course of its deduction, and the doubt must be such as affects the value of the land or will interfere with its sale": Vought v. Williams, 120 N. Y. 253, 17 Am. St. Rep. 634, 24 N. E. 195, 8 L. R. A. 591.

A marketable title "means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept": Todd v. Union Dime Sav. Inst., 128 N. Y. 636, 28 N. E. 504.

A title is marketable if "it is such that it ought to satisfy a man of ordinary prudence": Rife v. Lybarger, 49 Ohio St. 422, 31 N. E. 768, 17 L. R. A. 403.

"A title is not marketable where it exposes the party holding it to litigation": Swayne v. Lyon, 67 Pa. 436.

"In equity a marketable title is one in which there is no doubt involved, either as to matter of law or fact": Herman v. Somers, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; and: "It is a great, though perhaps a common, mistake, to suppose that a doubtful title can be made marketable by an opinion of a court on a case stated between vendor and vendee": Pratt v. Eby, 67 Pa. 396.

"The test of a marketable title is whether it is clear beyond a reasonable doubt, and will not expose the purchaser to litigation": Miller v. Bronson, 26 R. I. 62, 58 Atl. 257.

"A title in litigation is unmarketable": Corbett v. McGregor (Tex. Civ. App.), 84 S. W. 278.

A marketable title is one "free from reasonable doubt": Connelly v. Putnam (Tex. Civ. App.), 111 S. W. 164; and to same effect is Muller v. Palmer, 144 Cal. 305, 77 Pac. 954; Jeffries v. Jeffries, 117 Mass. 184; Townshend v. Goodfellow, 40 Minn. 312, 12 Am. St. Rep. 736, 41 N. W. 1056, 3 L. R. A. 739; Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905; Moore v. Williams, 115 N. Y. 586, 12 Am. St. Rep. 844, 22 N. E. 233, 5 L. R. A. 654; Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. 925; Wadick v. Mace, 118 App. Div. 777, 103 N. Y. Supp. 889; Mitchell v. Stinmetz, 97 Pa. 251; Holmes v. Wood, 168 Pa. 530, 32 Atl. 54; Cummings v. Dolan, 52 Wash. 496, ante, p. 986, 100 Pac. 989; Morrison v. Waggy, 43 W. Va. 405, 27 S. E. 314; Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

"A marketable title should be such as not only to enable the purchaser to hold the land without question, but to sell it without difficulty if he desires": Lindsley v. Humbrecht (C. C.), 162 Fed. 548.

The foregoing cases establish beyond question that there is a uniform concurrence of judicial opinion upon the proposition that a title is not marketable unless it is free from reasonable doubt, both as to matters of law and fact. But it is by no means easy to determine the amount of doubt necessary to induce a court to declare that a title is unmarketable within the meaning of the rule.

Certain it is, as shown in the principal case (ante, p. 986), that in deciding whether a title is or is not marketable, the courts have not enforced the rule that it must be free from reasonable doubt with that degree of strictness which Caesar required of his wife, "to be free even from suspicion"; and will not declare a title unmarketable merely because of some objection thereto which is based on speculation, theory or possibility: Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; Street v. French, 147 Ill. 342, 35 N. E. 814; Gill v. Wells, 59 Md. 492; Hayes v. Harmony Grove Cemetery, 108 Mass. 400; Methodist Episcopal Church v. Roberson, 63 N. J. Eq. 431, 58 Atl. 1056; Zelman v. Kaufherr (N. J. Ch.), 73 Atl. 1048; Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. Supp. 371; Wallenberg v. Rose, 45 Or. 615, 78 Pac. 751; Thompson v.

Dulles, 5 Rich. Eq. (S. C.) 370; Laurens v. Lucas, 6 Rich. Eq. (S. C.) 217; Miller v. Cramer, 48 S. C. 282, 26 S. E. 657.

"The law does not compel anyone to take a doubtful title. But on this subject the court acts on a moral certainty, and a purchaser will not be permitted to object to a title on account of a bare possibility": Miller v. Cramer, 48 S. C. 282, 26 S. E. 657.

"A threat or even the possibility of a contest will not be sufficient. The doubt must be considerable and rational, such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous and astute niceties, but such as produces real bona fide hesitation in the mind of the chancellor": Gill v. Wells, 59 Md. 492.

"There must be some debatable ground on which the objection to the title can be justified": Zelman v. Kaufherr (N. J. Ch.), 73 Atl. 1048; and to same effect is Vreeland v. Blauvelt, 23 N. J. Eq. 483.

It is manifestly impossible to lay down any precise rule as to the amount of doubt which should prompt a court to declare a title unmarketable.

In Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161, the supreme court of Illinois approved the rule which it said was laid down in the English case of Pyrke v. Waddingham, 10 Hare, 1, and adopted in the later case of Mullins v. Frinder, L. R. 10 Eq. 449: "A doubtful title which a purchaser will not be compelled to accept is not only a title upon which the court entertains doubts, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser if its own opinion in favor of the title should turn out not to be well founded; if doubts as to the title arise upon a question connected with the general law, the court is to judge whether the general law on the point is or is not settled; and if it is not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, specific performance will be denied." And this rule was again given in the later case of Street v. French, 147 Ill. 342, 35 N. E. 814.

The supreme court of Pennsylvania, in Speakman v. Forepaugh, 44 Pa. 363, said: "Every title is doubtful which invites or exposes the party holding it to litigation. If there be a color of an outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say that it is so, a purchaser will not be held to take it, and encounter the hazard of litigation"; and this principle was quoted with approval in the later case of Herman v. Somers, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050.

All of these depositions or rules, however, amount to nothing more than a statement of the general principles involved where the ques-

tion of whether a title is or is not marketable is before the court, and the only method of ascertaining how these general principles should be applied under any given circumstances is by a review of the cases where their application has been made.

III. Illustrations Showing Sufficiency of Title in General.

a. Where Title was Held Marketable.—In Singleton v. Close, 130 Ga. 716, 61 S. E. 722, plaintiff sought to compel defendant to specifically perform his contract for the purchase of land. Defendant refused to accept title upon the ground that it was unmarketable because a previous owner of the premises was living separate and apart from his wife at the time he conveyed the premises to plaintiff's grantor. No divorce suit had been brought at the time this conveyance was made. It was held that section 2436, Civil Code of 1895, providing that "After a separation, no transfer by the husband of any of the property except bona fide in payment of pre-existing debts shall pass the title so as to avoid the vesting thereof, according to the final verdict of the jury in the cause," construed in connection with its cognate sections (2435 and 2438), does not restrict a transfer by a husband of his property made bona fide and for value prior to the institution of a divorce suit, but is operative only on conveyances made by the husband pending an action for divorce.

In White v. Bates, 234 Ill. 276, 84 N. E. 906, the action was to recover stipulated damages for breach of a contract for the purchase of a house and lot in an addition to the city of Bloomington, in McLean county. The defense was that plaintiff had not tendered a marketable title. Judgment went for plaintiff in the circuit court, but this was reversed by the court of appeals, and the case came before the supreme court on a certificate of importance signed by the judges of the appellate court. The objection to the title was based on three grounds, first, that the abstract showed that the original patentees of the land were S. Durley and G. T. Gorham, and there was no proof that they were the same persons who afterward conveyed it as Samuel Durley and Gardner T. Gorham.

It appeared from the abstract, however, that a portion of the land was entered by Samuel Durley in 1835, and the land entry book showed that the other portion was entered by S. Durley and G. T. Gorham in 1833. The abstract also showed that in 1837 Samuel Durley and his wife, Sarah A. Durley, conveyed to Gardner T. Gorham that portion of the land entered by Samuel Durley, and also an undivided half of the land entered by S. Durley and G. T. Gorham. It also appeared from the abstract that Gardner T. Gorham and his wife subsequently conveyed all of the premises to another. This evidence was held sufficient to "warrant any reasonably prudent person" in assuming that S. Durley and G. T. Gorham who entered the land were identically the same persons who afterward conveyed it under the names of Samuel Durley and Gardner T. Gorham.

The second objection was that the abstract failed to show that a sale made by virtue of a power contained in a trust deed was adver-

tised for "at least twenty successive days in a public newspaper published in Bloomington, Illinois," as required by the terms of the trust deed. The certificate of publication signed by the publisher recited that the advertisement was published in Bloomington in a daily newspaper for twenty successive times.

The court said that the objections that "twenty successive times" is not equivalent to "twenty successive days," and that there was nothing to show that the newspaper was published in Bloomington, Illinois, could not be sustained, and the general presumption that a trustee performs his duty could be invoked in support of the action. "The proof is that the publication was made in Bloomington. If the publication was made in Bloomington, Indiana, or Bloomington of any other state than Illinois, the trustee was guilty of a violation of his plain duty."

The third contention upon which the title was claimed to be unmarketable was that a deed in the chain of title made by one of the grantors and his wife did not show that the grantors released their right of homestead in the premises. It appeared from a continuation of the abstract, however, that the grantors resided in another state when the deed was executed, and that the husband died leaving homestead property there, and this objection was not sustained; and it was finally held by the supreme court that the judgment of the circuit court in holding that the abstract showed a merchantable title to the premises was correct, and the judgment of the appellate court was therefore reversed and that of the circuit court affirmed.

In Ditchey v. Lee, 167 Ind. 267, 78 N. E. 972, plaintiff sought to recover back money paid under a contract for the purchase price of land, upon the ground that the vendor could not furnish a marketable title to the land. One of the grantors in the chain of title had acquired the property through a will which devised it "upon the condition" that the devisee pay to the testator's widow during life a certain sum which was made a charge upon the land, but no provision was made for a forfeiture of the title, nor was a devise ever made in case of default of payment of such charge. Plaintiff had knowledge of the terms of this will at the time he entered into the contract for the purchase of the land. It was held that the word "condition" was used in the sense of "consideration," and did not render the title unmarketable apart from the annual charge on it, of which plaintiff had knowledge and therefore contracted with reference to this defect.

In Prichard v. Mulhall, 140 Iowa, 1, 118 N. W. 43, the defendants in an action for the specific performance of a contract for the purchase of land depended upon the ground that plaintiff could not furnish a marketable title to the land, because it did not appear from the abstract that he was the owner, for the reason that the title came by descent, and it appeared from the abstract that there had been no administration of the decedent's estate, and the subsequent conveyances to the present holder did not show who were the

decedent's heirs, nor that the grantors were his sole and only heirs. The abstract did show, however, two affidavits duly attested and recorded, to the effect that such grantors were the sole and only heirs of the decedent, and that all the debts against the estate had been fully paid and discharged, though no administration on the estate had been had. It was held that, in view of code, section 2957, permitting the recording of affidavits to explain apparent defects in title, there was no such defect as to create a cloud destroying the merchantability of the title. In making this ruling, however, the court admitted that there might be some creditors of the deceased who would be entitled to insist upon administration, and eventually to have the land or some part of it subjected to the payment of claims, but regarded this as only possible, and as not reaching that plane of probability that entitled the purchaser to refuse to accept the title, but in reaching this conclusion the court seems to have been considerably influenced by the fact that by reason of the short time remaining for the filing of claims against the decedent's estate, and the further fact that the defendant failed to make known his objections to the abstract after it was corrected and returned, he thereby waived the irregularities of which he now complains.

In Kendall v. Crawford, 25 Ky. Law Rep. 1224, 77 S. W. 364, the defendant refused to perform his contract of purchase upon the ground that his vendor could not convey a marketable title. The deed to the plaintiff conveyed the title to her and her husband for life, with remainder over to the heirs of the wife. Afterward the husband and wife conveyed the premises to a trustee for the sole use and benefit of the wife. Subsequently the husband died and the widow adopted one J. as her heir at law. Learning some years afterward that the property had been conveyed to her in such manner that she held only a life estate therein, with remainder over to her heirs, she began an action in which she made the trustee and J. parties defendant, alleging that the property had been purchased with her money and that it was intended that it should be conveyed to her in fee simple, but by mistake of the draftsman only a life estate had been conveyed, and praying for a reformation of the deed and for the termination of the trust estate. Both the trustee and J. admitted the truth of the allegations in the bill and consented to the relief prayed for, and a decree reforming the original deed as prayed was entered. It was held that the court had jurisdiction to correct the mistake of the draftsman in the original deed and that plaintiff's title to the premises was marketable. In reply to the objection that the decree did not bind unknown or possible heirs of the plaintiff, the court said that she was a widow, sixty-one years of age, and had been twice married and borne no children, and that the record showed that she had no collateral kin of whom she had any knowledge; and since the court had jurisdiction of the subject and had all the parties in being who were interested in the question before it, it seemed that the decree vested the fee simple title in the

plaintiff, and a judgment enforcing specific performance of the contract of purchase was accordingly affirmed.

In Sisters of Mercy in City of Baltimore v. Benzinger, 95 Md. 684, 53 Atl. 448, the question of the marketability of a title depended upon the proper construction of a will. The testator devised the remainder in fee in his realty to certain charitable corporations, including the "Sisters of the Roman Catholic Asylum for Widows," and, later in the devise, the "Little Sisters of the Poor as tenants in common, share and share alike." The latter devisee had borne both designations, having been incorporated under the first, and later under the second, name. It was contended that by reason of this fact either the "bequest to the Roman Catholic Asylum or the one to the Little Sisters of the Poor must fail," in which case one share would by law revert to the heirs of the testator; and they not having been made parties to the proceedings, the trustee could not convey a marketable title. But, it was held that notwithstanding one corporation was twice named, making apparently six devisees, testator's intention was that, there being in fact but five, each should take an undivided one-fifth interest, and hence the objection that the title to a sixth interest passed as intestate property to the heirs at law who were not parties, and that the title was therefore not marketable, was untenable.

In Newbold v. Condon, 104 Md. 100, 64 Atl. 356, the contract of purchase described the third boundary line of the land as nineteen and one-half perches. One of the grantors in the chain of title acquired title through a partition sale. The trustee appointed to make the sale in partition executed a deed reciting the decree and sale to the grantee therein, but erroneously described the length of the third line in the boundary as ten and one-half perches instead of nineteen and one-half perches; and the purchaser refused to perform his contract of purchase upon the ground that the vendor could not convey a merchantable title to the land described in the contract. The grantee in the deed which erroneously described the length of the third line took possession of the land described in the contract. By reversing the calls of the survey and running the lines in opposite directions the two descriptions would be reconciled and harmonize the quantity of land with that called for in the grant. It was held that plaintiff was entitled to specific performance of the contract of purchase.

In Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785, it was held that since a decree of distribution of a probate court assigning the residue of an estate of a deceased person is in the nature of a judgment in rem, and is conclusive upon all persons interested in the estate whether then in being or not, a doubt as to the construction of such a decree will not render a title unmarketable within the meaning of the rule. "The validity of the title," said the court, "did not depend upon matters of fact not of record. The title rested wholly upon record evidence. Hence the doubt, if any, was one purely of law, as to the construction and effect of these

records. If the insufficiency of the title had depended upon the construction of the will, it would have been unquestionably doubtful and unmarketable. But it wholly depended upon the effect of the decree of distribution. The mere fact that laymen, or even some lawyers, may have had some doubt as to the conclusiveness of the decrees of the probate court upon persons not in being who may be interested in the estate of a deceased person, was not such a doubt as to render the title unmarketable in any legal sense, or constitute any ground for a court refusing specific performance. The only possible legal doubt worthy of consideration is as to the sufficiency of the decree of distribution, in form and substance, to constitute an assignment of the whole estate in the property to the devisees named. Generally, where courts have refused to compel specific performance on the ground of doubt on a question of law arising upon the construction or legal effect of record muniments of title, it has been where not only was the doubt a grave one, but where there were interested parties not before the court, and consequently not bound by its decision, who might afterward subject the vendee to vexatious and expensive litigation. A title cannot be considered doubtful where there is no question of fact involved in a decision as to its validity, but one of law only, upon which the court where the controversy is litigated is competent finally to pass."

And in Mathew v. Lightner, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992, plaintiff sought to recover money paid to defendant on account of the purchase price of a lot which defendant agreed to convey, on the ground that defendant's title thereto was unmarketable. It appeared that a former owner of the land had conveyed it to his daughter "for and during her natural life, without power of alienation, and after her death to her heirs and their assigns forever." This daughter was still living and had one child, who was also living, and also had a grandchild living and several nephews and nieces living. Defendant, claiming to be the owner of the lot by virtue of a tax title, obtained a decree quieting his title against the grantee in the deed and her husband, and also against the grantee's daughter and granddaughter. The plaintiff claimed that the deed referred to created a contingent remainder in the heirs of the grantee, and hence until her death it was uncertain who would be entitled to the remainder; but it was held that the decree quieting the defendant's title was conclusive as to the state of the title, and there being no question of fact involved, the title was marketable, and a judgment in favor of defendant was affirmed.

The very recent case of Zelman v. Kaufherr (N. J. Ch.), 73 Atl. 1048, well illustrates that a mere remote possibility of litigation will not be sufficient to render a title unmarketable so as to excuse a purchaser from completing his contract of purchase. The defense made in this case to a bill to compel specific performance was that in the deed from the complainant's grantor to the complainant, there was a restriction "that dwellings are the only buildings to be erected on the front portion of said lots, ... and shall be kept back ten

feet from the street line," and that complainant had violated this covenant and thereby rendered it unsafe for defendant to accept the title. It appeared that in 1887 the then owner of a tract which embraced the lots in controversy had conveyed lots out of this tract to different grantees, and in several of such conveyances imposed restrictions similar to that above mentioned. In every instance these restrictions had been violated, apparently without objection on the part of the grantor. It had been over two years since the complainant in this case had violated the covenants in the deed. In holding that the possibility of injury was so remote that it did not afford the defendant any just ground for refusing to perform his contract of purchase, the court said: "The question is whether under these circumstances the complainant is able to give a marketable title; that is, a title that will not expose the purchaser to litigation in regard to it. The doubt about the title must be a rational doubt; or, as it has been otherwise characterized, 'real and not fanciful.' There must, it is said, be some debatable grounds on which the objection to the title can be justified. There is no doubtful question of law or fact present. The only conceivable litigation would be either an action at law for damages or a bill for mandatory injunction"; and then went on to say that the action at law could only be brought against the complainant, as it was she only who broke the covenant, and that in an application for mandatory injunction an objection that relief had not been promptly sought would be unanswerable.

In Hoepfner v. Sevestre, 56 Hun, 640, 10 N. Y. Supp. 51, it was held that, where a testator devises all his property to executors in trust to apply the personalty and the rents of the realty to the payment of his debts and of specific legacies, and, after their payment, then over to designated persons, the trust, even if invalid as such, is good as a power, so that the testator did not die intestate as to any of his property; and a purchaser under a decree of sale rendered in an action for the partition of the land, to which all the devisees and legatees were parties, takes a marketable title, though testator's heirs were not represented.

And the title of a bona fide purchaser, or of those claiming under him, is not rendered unmarketable by a prior deed to the same premises, by his grantor to a third person, and which was not recorded until after the record of his deed: Abraham v. Mayer, 7 Misc. Rep. 250, 27 N. Y. Supp. 264. This decision was rendered by the city court of New York, but the same ruling was afterward made by the supreme court of that state in Jay v. Wilson, 91 Hun, 391, 36 N. Y. Supp. 186, though Judge O'Brien dissented.

While no one will probably dispute the correctness of the proposition that the title of a bona fide purchaser of land who records his deed is not affected by the subsequent record of a prior deed of which he had no notice, still the vital question of whether he had such notice is a question of fact which can be, and frequently is, only determined by a trial, and it hardly seems consonant with the

rule that a title is not marketable which exposes a purchaser to litigation, to compel him to accept such a title without a quitclaim from the holder of the prior deed, or until the adverse claim has been judicially determined.

In Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387, the purchaser at a partition sale was compelled to take a title as marketable where a party to whom the property had been devised had afterward left home unmarried, and had not been heard from for forty years before the trial of the partition suit brought by his collateral kindred, and if living would be sixty-one years of age, although it was not shown that he was dead or that he left no widow or children surviving him. The court, after remarking that the presumption of the death of the devisee did not depend solely on the lapse of time, but was aided by the fact that if living he would have almost certainly asserted some claim to the property, and if he had left a wife or children he would have informed them of his inheritance and they would have asserted their claim, said: "It is well settled that a purchaser on a judicial sale is entitled to a marketable title, that is, a title free from reasonable doubt; and courts are not disposed to compel a purchaser to take a title when a doubtful question of fact relating to an outstanding right is not concluded by the judgment under which the sale is made. But the rule is not absolute that a disputable fact, not determined by the judgment, is in every case a bar to the enforcement of the sale. It depends in some degree on discretion. If the existence of the alleged fact which is supposed to cloud the title is a possibility merely, or the alleged outstanding right is a very improbable and remote contingency, which according to ordinary experience has no probable basis, the court may, I suppose, compel the purchaser in such a case to complete the purchase."

In Ebling v. Dreyer, 79 Hun, 319, 29 N. Y. Supp. 459, a testator devised a parcel of land to each of his four children for life, "and upon their deaths, respectively, to their respective children forever." Afterward, by Laws of 1872, chapter 479, the supreme court was authorized, upon the application of the four children and their legal issue in being, to sell the land. The act also provided that the sale should be made by a referee appointed by the court, and that the life tenants might be paid a gross sum in lieu of their several life interests. The act did not provide, however, that the value of each life estate should be computed with reference to the life tenant's age, or that the value of the different parcels should be separately ascertained, and the proceeds of each parcel paid to the devisees thereof. The land was sold without reference to the several parcels, and the value of the life estates was ascertained by averaging the lives of the life tenants. It was held that a title acquired under such proceedings was not marketable, since the legislation had no power to authorize the sale of four separate parcels of land in which four separate families of infants were severally interested, and that the avails of the sale brought into a common fund and the liens and the interests of the life tenants be deducted from the entire fund

based on the average age of all of the life tenants. But this judgment was reversed by the court of appeals (149 N. Y. 460, 44 N. E. 155), where in reply to the further contention that even if the title was good in fact, specific performance should not be compelled, because the question raised remained open, inasmuch as the grandchildren of the testator, born since the sale under the statute, were not parties to the action and would not therefore be bound by the determination. Judge Vann, speaking for the court of appeals, said: "There would be much force in this position if the alleged defects in the title depended upon questions of fact or upon doubtful questions of law; but as they rest wholly on the construction of a statute, and a decree made thereunder, we do not think we should hesitate, under the circumstances, in declaring the title free from judicial doubt and requiring the defendant to perform his contract."

In Simon v. Vanderveer, 84 Hun, 452, 32 N. Y. Supp. 394, plaintiff sought to recover the purchase price paid under a contract for the purchase of land, upon the ground that the defendants could not furnish a marketable title to the land. Defendant had entered into an agreement with one D., who was to act as his agent in surveying the land and laying it out in lots, and for the sale thereof, defendant to pay the cost of the survey and of improvements, and to accept three thousand dollars per acre for the land, and seventy-five per cent of the amount realized on sales of the lots in excess of the three thousand dollars per acre, and expenses, and D. to receive the balance. It was held that this agreement did not give D. any title or interest in the land, and therefore defendant's title was marketable, notwithstanding an action was pending between D. and the defendant on the agreement, and D. had filed a lis pendens, and the judgment of the circuit court in favor of plaintiff was reversed.

In Brown v. Mount, 38 App. Div. 440, 56 N. Y. Supp. 613, it was held by the appellate division of the supreme court that a judgment construing a will through which all parties claim title to land, though erroneous, being in an action to which every person having any possible interest in the land was a party, makes the title marketable, so that a purchaser must complete his purchase.

And in Adams v. Backer, 29 Misc. Rep. 93, 60 N. Y. Supp. 683, the defendant in a suit for specific performance of a contract for the purchase of land objected that the title to the land was not marketable. By the will of a former owner the executors were given power to sell the land, but this power was never exercised, and a residuary devisee postponed division of the realty till the youngest child reached the age of twenty-one years. A necessary sale of land, which the widow was adjudged to hold as trustee for the estate, subject to the rights of the testator's children and those entitled under the will, was ordered. It was held that the judgment and sale passed a marketable title, notwithstanding the infancy of devisee's after-born grandchildren, and that the right to appeal from the judgment had not expired.

And where a wife, after the passage of the married woman's act, depriving a husband of all right and interest in his wife's real estate, with her own money, and for full value, purchased lands of an estate sold by her husband as executor of a will, at auction sale, after extensive advertisement and spirited bidding, and the proceeds were accounted for by the executor as part of the estate, she acquired a marketable title to such lands: Miller v. Weinstein, 52 App. Div. 533, 65 N. Y. Supp. 387.

In Board of Education etc. v. Reilly, 71 App. Div. 468, 75 N. Y. Supp. 876, the language of the habendum clause in a deed conveying property to trustees of a school district in fee simple was "to have and to hold the above-granted premises for the uses and purposes of the school district, upon which to erect a schoolhouse," etc. It was held that this did not make the title of the school district unmarketable, not making the conveyance one in trust, nor operating as a dedication of the property to the particular use, nor being effective as a limitation on the time of enjoyment, but being a mere recital of the purposes for which the trustees bought the land.

In Pell v. Pell, 65 App. Div. 388, 73 N. Y. Supp. 81 (affirmed in 169 N. Y. 607, 62 N. E. 1099), the successful bidder at a sale of land under a decree in partition refused to complete his purchase and accept the referee's deed for alleged defects in the title to a part of the premises formerly a part of a highway. The parties to the partition claimed under conveyance describing the tract, including that in controversy, as beginning at the east side of the highway, at the northwest corner of the land of S., directly opposite to the southeast corner "of the land above conveyed." The reference to the "land above conveyed" was to a westerly tract, the southeast corner of which was in the center of the highway, and from the conveyances under which S. claimed it was evident that his northwesterly corner was in the center of the highway. The highway had long been discontinued, and the premises had been used by successive holders since 1851, and such holders had not been disturbed in their possession. It was held that the referee's deed tendered a marketable title which the purchaser was compelled to accept. While it appeared reasonably certain from the evidence in this case that the owner of the strip in dispute had acquired title by adverse possession, the ruling was not based on that ground, as the court said that the proof on that point might not be sufficient, but that upon a careful consideration of the entire case the title was "marketable and free from reasonable doubt."

Likewise, in Hagan v. Drucker, 90 App. Div. 28, 85 N. Y. Supp. 601, the action was to compel specific performance of a contract for the purchase of land. The defendant claimed the title was unmarketable because of an alleged defect in a deed in plaintiff's chain of title from a referee in partition. In the partition suit, the complaint alleged that the deceased owner left surviving as his only heirs certain brothers and sisters, and witnesses testified that decedent left surviving such brothers and sisters, and related when each of

them died, and what heirs at law they left. But it did not appear from any testimony whether decedent left any widow, parent, or children. Decedent left a will but did not devise the property partitioned. The will referred to his wife, but mentioned no children. No child appeared to contest the will, nor did anyone make any claim to the land for seventy years after the partition. It was held that the title of one claiming a portion of the land partitioned under the deed in such proceedings was a marketable title which the vendee could not refuse, notwithstanding the lack of affirmative proof that the decedent did not leave any widow, parent, or child, the court saying that the judgment of the lower court in directing specific performance of the contract of purchase could "safely be rested upon the ground that the liability to have the title questioned is a mere possibility, and is so remote that no real defect can be said to exist," and added: "The purchaser is entitled to receive a marketable title, but such fact does not entitle him to demand a title absolutely free from all suspicion or possible defect. The requirement is answered when a title is presented which business men, in the exercise of that degree of prudence which usually characterizes their acts and controls their judgment, would be willing to and ought to accept."

In Grosso v. Marx, 45 Misc. Rep. 500, 92 N. Y. Supp. 773, it was held that when a judgment debtor has been discharged in bankruptcy, the fact that there are uncanceled judgments docketed against him does not render the real estate which he formerly owned unmarketable.

In Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. Supp. 371, the vendee in a contract of purchase refused to accept the title upon the ground that it was unmarketable. The premises consisted of a corner lot in the city of New York in which a building stood. The lower part of the building was of stone and the outer surface of the stone work projected two inches over the street line and within that of the sidewalk, which might be withdrawn from the use of the public, but this projection did not affect easements of light, air and access possessed by the owners of adjoining property. The building had been standing for about five years, and no complaint, so far as appeared, had ever been made by the municipality. It was held that the possibility of action by the city to remove the encroachment was so remote that it should be disregarded in determining the marketability of the title.

So, too, in Messinger v. Foster, 115 App. Div. 689, 101 N. Y. Supp. 387, it was held that where persons having possession of land as mortgagees in possession, and suit to redeem from them is barred, they have a marketable title, which is not affected by the fact that an action of ejectment, by reason of a disability of insanity or imprisonment, is not barred.

In Tolosi v. Lese, 120 App. Div. 53, 104 N. Y. Supp. 1095, under the terms of a will, there was no express devise of the premises to the executor and executrix, but they were expressly authorized to

collect the rents and were given a power of sale. In a subsequent clause of the will, the premises were expressly devised to the children of the testatrix, and the executor and executrix were expressly directed, after executing the power of sale, to pay over to each adult child his share. The executor and executrix did not exercise their power of sale, but acquiesced in a partition sale in a proceeding instituted by the successor in interest of one of the devisees. There was no evidence of bad faith or prejudice to the rights of any of the parties in the partition proceeding. The plaintiff in the present action refused to comply with a contract of purchase he had made for the premises, and sought to recover from defendant the down payment—upon the ground that under the will under which the defendant claimed title, "valid trusts were created in which the entire legal estate passed to the trustees," and that the partition proceeding by the successor in interest of one of the devisees was void. It was held that the judgment in partition was binding upon all the parties in interest, until vacated in a direct proceeding, and that the likelihood of such an application and of its success after all the parties but one were of age and had received their shares of the proceeds of the sale, and the infant's share had been accepted and held by trustees in accordance with the provisions of the will, was too improbable to render the title to the premises unmarketable, and judgment was accordingly awarded to the defendant.

And in Odell v. Claussen, 120 App. Div. 535, 104 N. Y. Supp. 1104, the issue submitted was whether the plaintiff individually and as executor could convey to defendant a marketable title to certain premises, under the power of sale contained in a will. The testatrix left no children, and by her will devised all her property, both real and personal, to her husband (the plaintiff) for life, with remainder to her two sisters, and provided that her husband be her sole executor, empowered, in his discretion, to sell any and all of her real estate and give good deeds of conveyance thereof. The husband entered into a contract to convey to defendant the real property mentioned in the will, but defendant refused to accept a deed therefor from the plaintiff individually and as executor, upon the ground that plaintiff being a life tenant could not convey a marketable title to the premises. The husband was an old man seventy-eight years of age, and dependent upon the property left under the will for his support, except the interest on three thousand three hundred and forty-three dollars and eighty-six cents deposited in a trust company, of which he had to first pay taxes and interest charges on a mortgage upon the real estate. It was held that the husband could convey a marketable title to the real estate which defendant was bound to accept.

And in Veit v. Schwob, 127 App. Div. 171, 111 N. Y. Supp. 286, it was held that, in view of real property law (Laws 1896, p. 610, c. 547, sec. 252), providing that an acknowledgment must not be taken by an officer unless he knows or has satisfactory evidence that

the person making it is the person described in and who executed such instrument, a deed and certificate of acknowledgment of a notary attached thereto, that the persons whose acknowledgments he took were known to be the individuals described in and who executed the deed, furnish sufficient evidence that the deed was executed by the persons acknowledging it, and the title in the chain of which the deed is a link is not unmarketable because the names are misspelled in the acknowledgment.

In Port Jefferson Realty Co. v. Woodhull, 128 App. Div. 188, 112 N. Y. Supp. 678, plaintiff, who agreed to purchase from defendant thirty-one acres of land, by a contract dated in 1899, declined to afterward accept a deed therefor and complete the purchase upon the ground that the title was not marketable. The defendant claimed title through the grantee of a deceased former owner. The decedent had conveyed three acres of the thirty-one acres bargained for by plaintiff without his wife's joining. On his death the wife sued for admeasurement of her dower, and in 1879 an interlocutory judgment was entered, adjudging that one-third of the land be set off to her according to its value. No further proceedings were had, though under Code of Civil Procedure, section 1607 et seq., the next necessary steps were the appointment of a referee to lay off a distinct parcel of the land. The widow died in 1899. It was held that the plaintiff could not refuse to take the title on the ground of its unmarketability, since it must be presumed, after twenty years, that the widow had been settled with or had died; it also appearing that the widow died between the date of the contract and the day fixed for passing of title, though the plaintiff did not know of her death until he rejected the title.

Also, in McArthur v. Weaver, 129 App. Div. 743, 113 N. Y. Supp. 1095, the land was conveyed to a named grantee "and his wife." The grantee had contracted to sell the land to defendant, but died without having executed the deed. Afterward his wife, as administratrix of his estate and in her own right, presented defendant with an abstract of title and offered to execute and deliver a deed to the premises which defendant refused to accept upon the ground that she could not convey a marketable title, and this action was brought by the wife to compel defendant to perform his contract of purchase. The case was submitted upon an agreed statement of facts, and it appeared therefrom that the plaintiff was the surviving widow of the grantee and was also his wife prior to the execution and delivery of the deed. It was held that the title was not defective because the deed under which plaintiff held was made to the grantee "and his wife" without naming the wife. While the ruling in this case is doubtless correct under the admissions made by the defendant, the question involved has been the cause of much trouble to attorneys specially charged with the duty of passing on titles, and the loose practice of thus designating one of the grantees in a deed is to be most heartily condemned.

In Bacot v. Fessenden, 130 App. Div. 819, 115 N. Y. Supp. 698, plaintiff's interest in the premises was subject to a life estate in a childless woman upward of sixty-nine years old with a devise over to her children, or upon her death without issue, then to plaintiff. Defendant had contracted to purchase the land, subject to the life estate, but refused to accept the deed tendered upon the ground that the devise over to the children of the life tenant made the title unmarketable. It was held that the probability that the life tenant would have issue so as to defeat plaintiff's estate was so slight as not to make the title unmarketable and justify defendant in rejecting it.

In Reece v. Haymaker, 164 Pa. 575, 30 Atl. 404, it was held that a title under the foreclosure of a mechanic's lien is, in the absence of a showing of defects therein, a marketable title, though subject to attack by the heirs of decedent, who were not made parties to the proceedings to enforce the lien instituted after the owner's death.

And in Young v. Hervey, 207 Pa. 396, 56 Atl. 946, where plaintiff sought to recover money paid under a contract for the purchase price of real estate, and which was defended upon the ground that the title was unmarketable, it appeared that in partition proceedings an unsatisfied recognizance had been given to secure payment of dower to a widow; that the land was sold under sheriff's sale and purchased by the attorney for plaintiff, but no deed was executed to him by the sheriff. The defendant in the judgment thereafter conveyed the land to the attorney and he conveyed it to the plaintiff in this action. After the death of the widow a second scire facias was issued and the vendor (plaintiff) named as tenant, and it was sought to recover the whole balance due on the recognizance. But judgment was rendered for the vendor, from which no appeal was taken. It was held that the vendor had a marketable title, and a judgment in his favor for the purchase price of the land was affirmed.

b. **Where Title was Held not Marketable.**—In Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072, plaintiff sought to compel defendant to specifically perform a contract for the exchange of farms. Defendant refused upon the ground that plaintiff could not furnish a marketable title to the farm owned by him. It appeared from the abstract that a deed in plaintiff's chain of title executed by the heirs of a former owner created an express trust in favor of the creditors of their ancestor. This deed was made in 1901. The abstract was tendered to defendant in 1905. It was held that it could not be said as a matter of law that the creditor of said decedent would be barred by laches or by lapse of time, and that there being no showing in the abstract that there were no debts against the estate, or that, if there were any, they had been paid, the only showing being that the estate had been settled and the administrators discharged, defendant was not required to accept the title.

It was further held in this case that, where the abstract of the vendor's title showed an ancient deed from the trustees of the Illinois and Michigan canal, reciting that the lands conveyed were "part of the lands granted by the United States by act of March 2, 1827, c. 51, 4 Stat. 234, to aid the state in opening the canal to connect the waters of the Illinois river with those of Lake Michigan," but there was nothing to show that the lands had been properly selected and designated so as to vest title in the state, the defendant had reasonable grounds for refusing to accept the title.

And in Smith v. Hunter, 241 Ill. 514, ante, p. 231, 89 N. E. 686, a former owner of the land devised it to her husband for life, to be sold on her death by the executor and the proceeds paid in part to an heir at law. After the will had been admitted to probate the husband obtained a decree in chancery, reforming the deed to the testatrix so as to invest himself with a fee title to the premises. The heir at law named in the will as the beneficiary of the proceeds of the sale of the land was a nonresident, and service was had upon him by publication in the husband's suit to reform the deed. The residence of such heir was unknown and he did not receive the notice required to be sent by mail, nor did he receive a copy of the bill. Under section 19 of the chancery code (Hurd's Rev. Stats. 1908, c. 22), the heir at law had one year after notice in writing given him of the decree, or three years after its entry without notice, in which to appear in the reformation suit and petition the court to be heard touching the merits of the decree rendered therein so far as it affected his rights. The three years had not elapsed between the entry of the decree and the time fixed for the consummation of the sale from plaintiff to defendant, but plaintiff contended that since more than one year had elapsed since the notice to the heir at law by letter and the entry of the decree, the title was good as against such heir; and moreover, that as the executor was a party defendant in the reformation, he represented the nonresident heir in such manner that the decree reforming the deed was binding upon him. Both of these contentions were overruled, and it was held that the title was sufficiently doubtful to be unmarketable. Speaking to the first contention, the court said it thought the notice required must be "something more than a letter which informs him, in general terms, of the result of the litigation to which he had been made a party, but of which he has received no actual notice until a decree has been rendered against him barring him of all his rights in the subject matter of litigation," and of the second contention the court said that by the provisions of the will the title to the land did not vest in testatrix's executor, but descended to her heirs, subject to be devested by sale by her executor upon the death of her husband, who had a life estate in the premises. "There is a difference between a devise to an executor to sell real estate and a devise to an executor of real estate with power to sell. In one case a naked authority is given to sell; in the other an authority to sell, coupled with an in-

terest, is given. In the former case the freehold remains in the heirs until a sale is made by the executor; in the latter case a freehold immediately vests in the executor."

In Hocker v. Brown, 104 La. 524, 29 South. 232, it appeared that in proceedings which led to the sale of minor's property, an order written for the judge to sign accompanying a motion to have the proceedings of the family homologated was never signed, though on the margin of the page on which the order was written the initials of the judge were written, and there was an entry in the minutes of the court that the family meeting was homologated. It was held that this irregularity was sufficiently serious to justify the purchaser in refusing to comply with his contract of purchase for the land.

In Rosier v. Graham, 146 Mo. 352, 48 S. W. 470, specific performance of a contract of sale of real estate was resisted upon the ground that the title tendered was not marketable. A deed in the chain of title was to one and the heirs of her body, forever, but if she should die without issue, then to her mother and her heirs. The mother died leaving her as sole heir, and she had three adult children. It was held that under Revised Statutes of 1835, page 119, section 5, abolishing entails, and providing that the first taker shall hold a life estate, the remainder passing as at common law, the title was not marketable, since it could not be told with certainty who the grantee's heirs would be. "Every purchaser of land," said the court, "has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him or his heirs land in which his money is invested. He has the right to a title which would not only enable him to hold his land, but to hold it in peace, and if he wishes to sell, to be reasonably sure that no flaw will disturb its market value."

In Lamprey v. Whitehead, 64 N. J. Eq. 408, 54 Atl. 803, it was held that a title made by a conveyance executed during the life of the devisee for life, from a child having a vested estate under the provisions of section 10 of the descent act (1 Gen. Stats., p. 1195), being subject to be devested in the event of the death of such child, leaving issue, during the life of the devisee for life, is not a marketable title which a purchaser ought to be compelled to take by a decree for specific performance.

In Methodist Episcopal Church at Bound Brook v. Roberson, 68 N. J. Eq. 431, 58 Atl. 1056, the object of the bill was to obtain a decree requiring the defendant to specifically perform a contract for the purchase of land which complainant had contracted to convey under the name of "Methodist Episcopal Church at Bound Brook, a corporation." There was no title of record in the complainant, but the land had been conveyed in 1848 to A, B, C, D and E, "and others, their associates, trustees, and their successors in office forever," and the habendum clause in this deed recited that it was to "the said trustees and their successors in office forever, in trust that they shall erect and build, or cause to be erected and built thereon, a house

or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and discipline, which from time to time may be agreed upon and adopted by the said church, at their general conferences in the United States of America," and following this was a covenant of warranty to the trustees and their successors. Aside from the claim of title by adverse possession of which there was not sufficient proof, the complainant claimed to own the property as the successor of the trustees in the deed above mentioned, and the defendant admitted that the complainant was the owner of such title as it might have under that deed, but it was held that the complainant did not have such title to the land as the defendant was bound to accept.

In Van Keuren v. Siedler (N. J. Eq.), 66 Atl. 920, a vendee sought to compel specific performance of a contract wherein the defendant agreed to convey to complainant certain land, or for compensation in case defendant was unable to deliver a marketable title to the premises.

The main controversy arose over the existence of a prior recorded contract wherein defendant had contracted to convey the same land to a third person. It was held that if this contract was a binding one, the title was clearly unmarketable, but a demurrer to the bill was sustained upon the ground that complainant entered into his contract of purchase with constructive notice of the existence of the prior contract, and was therefore not entitled to a conveyance if such contract was still alive, and this question could not be judicially ascertained in this suit because the third person in the prior contract was not a party.

In Montrose Realty & Improvement Co. v. Zimmerman (N. J. Ch.), 73 Atl. 846, the question as to the marketability of the title arose out of a power contained in a will. The testator devised the real estate to his executors in trust with power to sell for cash or credit, and at the expiration of three years after his decease, or as near thereto as might be reasonably convenient, to convey the property to a certain trust company on certain other trusts. The trust which was committed, first, to the executors, and, second, to the trust company, included the payment of income to certain of testator's children with remainder in a certain specified event to their issue. In 1905 the only persons in esse having a vested interest in the property, all of whom were of age, for the purpose of aiding the executor in disposing of the land, organized the complainant corporation, and this corporation some six years after the testator's death took title to the land involved in this suit, and issued therefor to the sole surviving executor a certain amount of its capital stock as payment of the purchase money. The objections made by the defendant in answer to this bill for specific performance of his contract to purchase the land were in brief: (1) That when the conveyance was made by the executor to the complainant corporation, his power of sale had expired; (2) that the "sale," so called, was not

made in accordance with the power, but in direct violation thereof, being neither for cash or credit; and (3) that, if it could be held a sale, it is voidable at the instance of any interested person who had not acquiesced therein. All of these objections were sustained, and the court said that it was quite possible that children might yet be born who would be entitled to participate in the benefits conferred by the will, and that while the title might be good in an action of ejectment, "A purchaser will not be compelled, in a suit for specific performance, to take a title which is not free from a reasonable doubt; a contract to purchase the same under those circumstances will not be enforced; and, ... if the title presents a really debatable question, specific performance will not be decreed."

Likewise, where a vendor's title is derived from a sale in a partition suit against an infant defendant, and there is grave doubt as to the validity of the appointment of the guardian ad litem in that proceeding, it is not a marketable title, and the vendee may recover money paid under the contract of sale and for attorney's services in examining the title: Uhl v. Loughran, 2 N. Y. Supp. 190, 14 Civ. Proc. R. 344. The doubt in this case which the court thought sufficient to render the title unmarketable was whether it was possible for a party upon whom service of an order was made in Paris, France, to return to New York and apply for appointment as guardian ad litem within the ten days' time allowed by the order.

And in Stevens v. Banta, 47 Hun, 329, defendants had contracted with plaintiff to convey certain premises and plaintiff had paid part of the purchase money. Plaintiff afterward objected to taking the title upon the ground that it was unmarketable, and brought this action to recover back the down payment and disbursements made in examining the title. It appeared that the property had been sold at auction by the executor of a former owner, under power given in the will, to L., who on the same day conveyed it to the executors. Subsequently an accounting was had before the surrogate of the proceedings of the executors, and in it the account sale of this property to L. was recited. Four of decedent's grandchildren were given an interest in the property by the will, and three of them were minors at the time the account of the executors was settled, but were represented at such hearing by a special guardian, while the fourth, who was an adult, was represented by an attorney. No notice of the executors' sale was made on the guardian of the minors interested in the estate, and no money was paid by the purchaser at such sale, and an action was pending by the special guardian of the minors to set aside the decree settling the final account of executors. It was held that the fact of want of objection to the settlement of the executors' account was not a ratification of the executors' sale of the premises because at that time the infant grandchildren were ignorant of the fact, if such fact existed, that the executors were the real purchasers at the auction sale, and plaintiff in taking the title would subject himself to the risk of having his conveyance set aside upon an application on be-

half of the infant grandchildren, and he therefore had a right to decline to accept the title tendered and to recover in this action.

In Post v. Hazlett, 59 Hun, 621, 12 N. Y. Supp. 838, plaintiff had agreed to sell to defendant lots Nos. 216 and 218, Fifty-third street, and the question to be determined was whether plaintiff could convey a marketable title to said lots. Laws of New York of 1869, chapter 890, entitled "An act to alter the map or plan of the city of New York," providing a means whereby owners of property abutting on Broadway, wherever closed, may acquire title to such parts of said street as are appurtenant thereto, in reversion, as well as in possession, further declares, "That no award shall be made for the reversionary interest in case the parties having such interest shall be entitled to acquire the land." Section 2 provides, "That no person shall acquire or be vested with any right, title or interest in or to any such land, unless he shall have actually paid the amount of such awards, with interest thereon from the day of such report of said commissioners." In 1869 one L. was the owner of certain lots on what was then the southeast corner of Broadway and Fifty-third streets. He acquired the property under a deed which conveyed no title or right to the reversionary interest in that part of the roadbed of Broadway on which the property abutted, and which at the time of this suit constituted lots 216 and 218, Fifty-third street. Thereafter, in straightening a section of Broadway on which this property abutted, commissioners, acting under the foregoing statute, erroneously conceiving that L., the owner of the lots, was also the owner of the reversionary interest in the roadbed opposite, made no award therefor, and consequently nothing was ever paid therefor by L. as required by said statute. Plaintiff derived his title to these lots from L. It was held that, there having been no award by the commissioners as to the reversionary interest in said roadbed, and no payment therefor by plaintiff's grantor, L., as required by the foregoing statute, L. did not acquire title thereto, and therefore plaintiff could not convey to defendant a marketable title under his contract of sale.

Also in Priessenger v. Sharp, 59 N. Y. Super. Ct. 315, 14 N. Y. Supp. 372, where plaintiff sought to recover back a cash payment made on a purchase of real estate on the ground of failure of defendant's title, it appeared that a prior owner of the property, under whom the defendants claimed, had purchased the same at a foreclosure sale in a suit wherein the purchaser was himself trustee in the mortgage and plaintiff in the suit. It was held that the title thus obtained was voidable at the instance of the beneficiaries of the trust, that the defendants were chargeable with notice thereof, and failing to show that there was in fact no breach of trust by said trustees, the title offered to the plaintiff was not marketable, and that he was entitled to recover his deposit and expenses.

And in Fitzpatrick v. Sweeny, 56 Hun, 159, 9 N. Y. Supp. 219, where premises sold at foreclosure sale were described in the deed to the mortgagor, the mortgage, the decree, and notices of sale, as

247 West Sixteenth street, and as commencing two hundred and sixty-six feet east of Eighth avenue, while in the deed to the mortgagor's grantor the premises were described as commencing two hundred and twenty-six feet east of the avenue, it was held that the title was not a marketable one, and that the purchaser was entitled to be relieved of his purchase. "The title," said the court, "depending upon the conveyance mentioned, with its attendant defects, ... cannot be regarded as a marketable one. It should be free from all reasonable objection, and should not be such an one as upon examination appears to be unsupported, showing the title to a part of the premises conveyed to be in another. No purchaser should be placed in such a position of jeopardy, with litigation of some kind not only possible, but probable, and particularly at a time when the spirit of the age seems to be litigious."

In Kursheedt v. Union Dime Sav. Inst., 118 N. Y. 358, 23 N. E. 473, 7 L. R. A. 229, plaintiffs sought to recover back purchase money paid by them to defendant under a contract whereby the latter agreed to sell and convey to them certain land. It appeared that in a foreclosure suit against a former owner of the land such owner and mortgagor had conveyed the land by an unrecorded deed of which the mortgagee had no notice. The mortgagor, though a party defendant to the suit, was not served and made no appearance in the action, but his grantee in the unrecorded deed, who was a married man and who was also made a party defendant, contested the suit. The wife of the grantee was not made a party defendant in the foreclosure proceedings. It was held that since the mortgagor was not served, the wife of the grantee was not barred by the foreclosure decree of her inchoate right of dower, and therefore the title derived through the foreclosure proceedings was not free from reasonable doubt, and therefore not marketable.

In Simis v. McElroy, 60 Hun, 583, 15 N. Y. Supp. 19, a testator, in 1777, devised a share of certain real estate to his granddaughter C. in fee, with remainder to testator's children in case she should die without issue. C. sold her share of the estate to J. and S., and it was conveyed to them in a deed of partition between testator's devisees, in which C. united, subject to determination by C.'s death without issue. J. and S. subsequently conveyed the same property, with a like limitation, to K., and through mesne conveyance it finally came to plaintiff after the death of C. in 1824 unmarried and without issue. It was held that plaintiff did not have such a marketable title as defendant, purchasing the property from him, could be required to accept.

In Vought v. Williams, 120 N. Y. 253, 17 Am. St. Rep. 634, 24 N. E. 195, 8 L. R. A. 591, which was a suit to compel the defendant to specifically perform his contract for the purchase of land, the defense was that the title was not marketable. The defect in the title was that in the year 1853 the property in question descended to a mother and her two sons, W. and G. G. was born in 1840 and lived with his mother until 1863, at which time he left home un-

married, in poor health, out of business, and very dissipated. A week afterward he was seen in another city in a destitute condition and in want of clothing, and he had then stated that he was going to another city to procure work. He was never afterward seen or heard of and at the date of this action had been unheard of for upward of twenty-four years. In 1875 his mother and brother conveyed the premises in question to the plaintiff's grantor, claiming to have succeeded to the interest of G. upon the assumption of his death. It was held that the title was not marketable, and a judgment in favor of the defendant was affirmed. Judge Brown, in delivering the opinion of the court, referred to the case of Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387, which we have heretofore reviewed, and admitted that if the reasoning of the opinion in that case was applied in this case, it would lead to a reversal of the judgment, as the two cases differed only in respect to the length of time that had elapsed since the absent owner was heard from, but said that Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387, was not an authority for anything further than that forty years' absence, under the circumstances there proven, raised a presumption of death—and then continued: "But I am not prepared to decide that a purchaser of real estate should be compelled to take title, where there is an outstanding right in a man who, if living, would be only forty-seven years of age, and of whose death there is no evidence, except the presumption arising from an absence from his friends of twenty-four years and his failure to communicate with them and to claim property which he left behind him upon his departure from home. It is very probable that the man is dead. The chances are very largely in favor of that conclusion. But his death is not proven, and the plaintiff's title to the real estate, which necessarily depends upon his death, cannot be said to be free from a reasonable doubt. No decision made in this action can bind Richardson or his descendants, if he left any. The cloud on the title would still remain, whatever decision the court might make upon the question whether Richardson was or was not living, and the title cannot be made marketable by determining that fact in this action": Vought v. Williams, 120 N. Y. 253, 17 Am. St. Rep. 634, 20 N. E. 195, 8 L. R. A. 591.

In Emens v. St. John, 79 Hun, 99, 29 N. Y. Supp. 655, the question whether the title which a purchaser refused to accept was or was not marketable arose in a suit by the real estate agent who negotiated the sale, to recover his commissions. It appeared that a former owner of a tract which embraced the land in question by his will directed the land to be divided into eleven equal parts, and devised one of such parts to each one of that number of devisees named in the will. By a subsequent provision of the will he gave his executors power to sell and convey his real estate. Three of the devisees conveyed their interests in the land, and afterward the surviving executor conveyed the land to the present owner. It was held that the question whether the devisees by the three conveyances

had elected to dispense with the power of sale was sufficiently doubtful to render the title conveyed by the executor unmarketable. The court said that while the devisees took under the will subject to the power of sale given to the executors, and as a general rule the executor's power of sale could only be defeated by all of the devisees in some manner electing to retain the land, and the case was not therefore free from doubt, still, "We think as the situation of the title was presented to the defendant, she was justified in the conclusion that it was doubtful, and not 'marketable,' in the sense applicable to that term, and therefore she was not required to accept it."

Also, in Reynolds v. Strong, 82 Hun, 202, 31 N. Y. Supp. 329, where plaintiff sought to recover from defendant the purchase price of land, a deed to which defendant refused to accept upon the ground that the title thereto was not marketable, it appeared that an executor, under a power in the will, contracted for the sale of the land which was formerely owned in entireties by testatrix and her deceased husband, and which the husband had undertaken to dispose of by his will. The legatees under the will of the husband claimed that testatrix, by accepting benefits under the will of the husband, ratified his attempted disposal of the land. There was also on record an unsatisfied mortgage on the land, though a decision had been rendered declaring the mortgage void, in an action to foreclose it, but no judgment had been rendered on such decision. It was held that the title was not marketable, and a judgment in favor of the plaintiff was reversed.

Likewise in Taylor v. Chamberlain, 6 App. Div. 38, 39 N. Y. Supp. 737, it was held that whether the probate court has power under section 600, General Statutes of Connecticut of 1888, providing that the court of probate, on the application of an executor or administrator, may order the sale of decedent's real estate, taking a sufficient probate bond, "and if, of the amount realized, after the payment of all debts and charges and incidental charges of sale, a surplus remains, the same shall be divided and distributed if the same had not been sold," to sell merely for the purpose of partition among the heirs, and not for the payment of debts, is a question of such doubt as to render unmarketable the title to real estate sold in such proceedings for the purposes of partition.

It was also held in this case that where land was sold under the foregoing statute, but the record did not show that any bond was ever executed by the executor or administrator, such omission was sufficient to make the title unmarketable.

In Brokaw v. Duffy, 36 App. Div. 147, 55 N. Y. Supp. 469, the action was brought to recover the amount paid by plaintiff to defendant under a contract for the purchase of a lot of land in New York City, together with the expenses incurred in the examination of the title. The plaintiff rejected the title upon the ground that it was not marketable. It appeared that the plaintiff had actual knowledge of a record showing that a commission to take testimony

was issued by the supreme court on a petition to inquire into the sanity of defendant's grantor, made by his niece, alleging his insanity before, when, and since he conveyed to the defendant; and that a jury's finding in support of the petitioner was set aside solely because of error in the commissioner's charge to the jury, the judge observing that the "testimony presented" by the witnesses examined on the commission "certainly is such as to make out a case, if it were to be considered alone." He further had notice that, under a leave reserved to apply for a new commission, an application was denied on the ground that the grantor's domicile was in Ireland, and his sanity should be determined there. The lis pendens filed in the lunacy proceeding was canceled, but plaintiff had been notified by the attorneys for the niece that, on her uncle's death, they would sue to set aside his deed on the ground of his insanity, and that the purchaser would buy at his own risk. It was held that plaintiff was justified in rejecting the title as doubtful and unmarketable, the court saying in reply to defendant's contention that the cancellation of the lis pendens perfected the defendant's title, that this had nothing to do with the defect, but that the fact of the probable lunacy of the defendant's grantor, of which plaintiff had actual notice, rendered the title unmarketable.

The judgment in this case was afterward affirmed by the court of appeals (165 N. Y. 391, 59 N. E. 196), where this court said that the title was not marketable because it was subject to a serious question of fact which might be decided in different ways by different tribunals, and then quoted from Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905: "A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication, and could raise the same question in a new proceeding. The cloud on the purchaser's title would remain, although the court undertook to decide the fact or the law, whatever moral weight the decision might have. It would especially be unjust to compel a purchaser to take a title the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing inferences."

In Gardner v. Dembinsky, 52 App. Div. 473, 65 N. Y. Supp. 183, defendant's grantor, under a devise to her of a life estate with the option of selling the same and dividing the proceeds among several persons as directed by the will, sold the property at public auction and herself became the purchaser. Subsequently she conveyed to defendant, who entered into a contract for the sale thereof with the plaintiff. It was held that specific performance of this contract will not be enforced, because, as under the terms of the will defendant's grantor occupied a position of trust, and the purchase by

her at her own sale being voidable, the defendant's title under her was not marketable; the court saying that while title conveyed by a trustee vested with a power of sale, or a title acquired by a trustee upon a sale pursuant to the terms of a trust in a particular case, is not void and will stand unless attacked, yet the defendant's title in this case was unmarketable because it was open to attack by the beneficiaries under the will who were to take in the event of the death of defendant's grantor, and this judgment was affirmed by the court of appeals in 170 N. Y. 593, 63 N. E. 1117.

In Marks v. Halligan, 61 App. Div. 179, 70 N. Y. Supp. 444, plaintiff sought to recover money paid under a contract made with defendant for the purchase, upon the ground that the title was not marketable, and defendant in his answer demanded judgment against the plaintiff for specific performance of the contract of purchase. The case was submitted upon an agreed statement of facts. A former owner of the land by his will devised all his estate to his wife for life or during her widowhood, and remainder to his son W. for his "use, benefit and behoof, in trust for his children." The marketability of the title depended upon what construction should be placed upon this provision of the will. It was contended by the plaintiff that an estate in trust was intended, with no power of sale, or, if not, an estate for life in the son, with remainder over to his children; that, if a trust was created, the trust term had not expired, and the court had no power to direct a sale contrary to the provisions of the will; that if an estate for the life of W., with remainder over to his children, was intended, W. being still alive, the remainder was vested in the children of W., of whom there were two at the death of the testator, subject to open and let in after-born children, in which event the title of defendant was open to the possible attack of such after-born child or children. Defendant claimed that the effect of this provision in the will was to vest in the son W. an estate in fee simple absolute, that the clause "in trust for his children" was void, and vested no estate in the children, and did not cut down the estate vested in W.

The court said that while the words of limitation above quoted were clearly insufficient to create an estate of any character, either in trust or otherwise, and might be said insufficient to cut down the estate of W., still since the language might be said to express an intent to limit the estate of W., a case of grave doubt, difficulty and perplexity was presented, and therefore held that the title was not free from reasonable doubt and was unmarketable.

And in Downey v. Seib, 102 App. Div. 317, 92 N. Y. Supp. 431 (affirmed in 185 N. Y. 427, 113 Am. St. Rep. 926, 78 N. E. 66, 8 L. R. A., N. S., 49), a former owner of the land, a contract for the purchase of which by defendant. plaintiff sought to enforce, conveyed it to his daughter and his sons during the life of the daughter, and after her death to her surviving children, or the issue of her children, if there should be any, and, if none, to the sons or the survivors of them, and the issue of deceased sons. Subsequently the

sons, who then had living issue, executed to the daughter, who was still childless, a deed purporting to convey to her the premises in fee. After the death of the father and the conveyance by the sons, the daughter sued the sons, joining the widow and the executor of the father (the original grantor), and procured a decree reforming the original deed, so that it purported to convey the premises to the daughter in fee simple absolute. It was held that the daughter did not acquire a marketable title by virtue of the conveyances from the sons, and that as the rights of the daughter in the action to reform the original deed were adverse to the children of the sons, and her own possible unborn children, neither of such classes of children being represented in the action, she did not thereby acquire a marketable title. "To entitle a vendor to specific performance," said the court, "he must be able to tender such a title as will enable the vendee to hold his land free from probable claim by another, and such that, if he wishes to sell, will be reasonably free from any doubt which would interfere with or affect its market value."

In Fink v. Wallach, 47 Misc. Rep. 247, 95 N. Y. Supp. 872, the plaintiff sought to rescind a contract to purchase real estate and to recover the earnest-money, on the ground that the title was not marketable. The defendant's title was derived from a referee's deed upon foreclosure. The owners of the equity of redemption were nonresidents, and an order directing service upon them by publication was duly made by the judge and service by publication upon such defendants was duly had. It appeared, however, that the judge's order directing the service had been left with the clerk of the court, and that subsequently an order was obtained from another judge sitting in that court, directing that the former order directing service by publication be filed nunc pro tunc as of the date of the original order. It was held that section 442 of the Civil Code, which provides that when service is made by publication, the papers upon which the order was made must be filed with the clerk on or before the day of the first publication, is jurisdictional, that leaving the order with the clerk of the court is not "filing with the clerk," and that a "nunc pro tunc" order cannot cure a jurisdictional defect; and therefore the judgment based thereon was void, "or, at least, that so grave a question is raised that from either point of view the title is unmarketable."

In Feller v. Mitchell, 53 Misc. Rep. 486, 103 N. Y. Supp. 269, the defect which it was claimed rendered the title unmarketable arose in connection with proceedings to sell an infant's interest in the premises. The mother of the infant instituted the proceedings for leave to sell the infant's share of the property. The property was sold by a special guardian appointed for the infant to one C., who a few days afterward conveyed the premises to the mother of the infant. The infant had no father, and under section 50 of the domestic relation laws (Laws 1896, p. 223, c. 272), in such case the mother is the guardian in socage. It was held that, though no

fraud was alleged, the infant's proceedings were of such a nature as to cast suspicion upon and create a reasonable doubt as to the market value of the property, and the vendee in a contract of sale was accordingly adjudged entitled to recover back the deposit and also the expenses of examining the title.

In Hilton v. Sowenfeld, 53 Misc. Rep. 152, 104 N. Y. Supp. 942, a former owner of the premises in controversy had devised it to his executors and executrix, the latter being his wife, in trust to apply the net income to the support of his wife, and authorized his executors and executrix, with the wife's consent, to sell and convey the real estate, and required that such consent be set forth and appear before any sale should be valid; and declared that no sale should be valid without her signature to the conveyance and acknowledgment of the execution of the same, as executrix. The wife alone qualified. It was held that the power of sale could not be exercised by the wife alone, and a title depending upon her attempted exercise of such power was not marketable; and it was further held that a deed from the remaindermen could not make the title marketable, since the wife's interest was inalienable, and would not pass by her deed as executrix or otherwise.

In Lese v. Metzinger, 54 Misc. Rep. 156, 105 N. Y. Supp. 888, the vendee in a contract of purchase sought to compel specific performance, or, if the title was unmarketable, to recover the amount of the deposit. The defendant asserted title through an unrecorded deed which had been lost, and in an action to quiet title sued the heirs and devisees of the vendor therein named. There was no proof offered in this action to quiet title that the plaintiff had been in possession of the property for one year, and that the defendants unjustly claimed an interest therein, which was at that time (1898) required by sections 1638 and 1639, subdivision 3, Code of Civil Procedure. It was held that a judgment for plaintiff by default was without effect, and the title depending thereon was unmarketable.

In Weintraub v. Siegel, 57 Misc. Rep. 246, 109 N. Y. Supp. 215, it was held that where executors sold real estate under a power of sale in a will, and the grantee on the same day conveyed it to one of the executors, the title was not marketable, since the taking of title by a person charged with the duties of a trustee, through an intermediary, even though the trustee has a beneficial interest in the property to protect, is voidable at the election of any person interested in the trust estate.

In Dixon v. Cozine, 114 N. Y. Supp. 615, the title which defendant claimed to be unmarketable was derived through the will of a former owner, by the terms of which it was devised to the testatrix's son for life, remainder to an infant. The surrogate refused probate of the will. The court appointed a guardian ad litem for the infant to sue to establish the will. Subsequently the court entered an order permitting the guardian to compromise the infant's claim for a specified sum, and his action to establish the will was discontinued. It was held the jurisdiction of the court to act so as

to cut off the rights of the infant by the settlement was so doubtful that the title to the real estate was not marketable; and this ruling of the supreme court was later affirmed in the appellate division, 118 N. Y. Supp. 1103.

In Re Clarke, 131 App. Div. 688, 116 N. Y. Supp. 101, the question of the marketability of the title arose on defendant's appeal from an order requiring him to complete his purchase at a guardian's sale of land, and which he had refused to do on the ground that the title was not marketable.

The title was derived through one C., who died leaving a husband and an alleged adopted daughter. The alleged adopted daughter instituted proceedings to prove herself decedent's sole heir, alleging that, if decedent left any other heirs, they were unknown. After due publication of citation to unknown heirs, a surrogate's decree was rendered declaring that the petitioner was decedent's sole heir. Thereafter the adopted daughter brought suit in ejectment against the husband of C., who had obtained a release of the state's title to the land by escheat, but who was not a party to the said daughter's heirship proceedings. A judgment for the petitioner in the ejectment suit was reversed because the heirship proceedings were not binding on the husband, the appellate division also indicating its opinion that the proof of heirship was insufficient. It was held that one claiming under C. had not a marketable title to the land, and the order compelling defendant to complete his purchase was reversed (affirmed in 195 N. Y. 613, 89 N. E. 1098).

In List v. Rodney, 83 Pa. 483, the title to land which the defendant refused to accept as unmarketable was derived by plaintiffs from one who devised it to his daughter S., to be held by her husband in trust for her and her children. By a codicil the testator provided that by the devise to his daughter and to her children he intended to give to her children living at her death, and to the lawful issue of any of them if dead, and to their heirs forever, the real estate so devised, and for want of such issue living, then that the real estate so devised to S. should go to her husband for life. The daughter S. had two children at the date of the will, one of whom afterward died without issue, and two children were born after that date, one of whom also died without issue. S. and her husband, both then past seventy-five years of age, and the surviving children, both of age and unmarried, contracted to sell the premises to defendant. It was held that the law would not consider the physical impossibility of S. bearing children after she had reached the age of seventy-five years, and therefore the title tendered to defendant was not marketable. This decision is in striking contrast with that rendered by the appellate division of the supreme court of New York in the case of Bacot v. Fessenden, 130 App. Div. 819, 115 N. Y. Supp. 698, which we have already noted, and where it was held that the possibility of a woman sixty-nine years of age bearing children was too remote a possibility to render

a title to land devised to her for life with remainder in her children unmarketable.

Likewise, in Holmes v. Woods, 168 Pa. 530, 32 Atl. 54, plaintiff had two undivided eighth interests in land, subject to a life estate in his mother, which were liable to open to let in after-born children; and under the will by which his mother took, certain others had contingent interests in the land. Upon a conveyance to him by the mother of her life estate in one of the eighth interests, plaintiff instituted proceedings for partition of all of the land, wherein two of the defendants, being minors, appeared by guardian, and in which the interests of the unborn parties in interest were not submitted to the court for protection, and to which persons having contingent interests were not made parties. In determining the question whether plaintiff had a marketable title under those circumstances the court said the pivotal point in the case depended upon whether the persons living and others yet unborn who had a contingent interest in the land were barred or devested by the partition proceedings, and that this question was not free from difficulty, and was one upon which the court would not indicate an opinion, but that it was a question of such doubt as to render plaintiff's title unmarketable.

IV. Sufficiency of Title by Adverse Possession, Prescription or the Bar of the Statute of Limitations.

a. General Rule.—Whether title by adverse possession, prescription or limitation is a marketable title is a question not unattended with difficulty, but according to the great weight of authority, under a contract requiring the vendor to give a good and sufficient title, so as to convey the land in fee simple, title by adverse possession is a marketable title which the purchaser is bound to accept. "It has been held both in England and America," said Judge Knowlton of the supreme court of Massachusetts, "that a title by adverse possession may be so clearly proved and be so free from doubt as to be a proper foundation for a decree for specific performance against the purchaser": Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; and the supreme court of South Carolina in holding that a title by adverse possession was marketable, and affirming a decree in a suit for specific performance, compelling a purchaser to accept such a title, said: "It is now settled law in this state that adverse possession is not only a shield of defense, but also a sword of offense": Miller v. Cramer, 48 S. C. 282, 26 S. E. 657.

Other authorities upholding the doctrine that a title by adverse possession is marketable are numerous, and among them are Beste v. McGaugh, 5 Penne. (Del.) 258, 63 Atl. 28; Cherry v. Davis, 59 Ga. 454; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340; Thacker v. Booth (Ky.), 6 S. W. 460; Gaines v. Jones, 86 Ky. 527, 7 S. W. 25; Cannon v. Female Orphan Soc., 24 La. Ann. 452; Meibaum v. Brennan, 49 La.

Ann. 580, 21 South. 853; Foreman v. Wolf (Md.), 29 Atl. 837; Dickerson v. Trustees of Franklin St. Presbyterian Church, 105 Md. 638, 66 Atl. 494; Safe Deposit & Trust Co. of Baltimore v. Marburg, 110 Md. 410, 72 Atl. 830; Conely v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; Barnard v. Brown, 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038; Scannell v. American Soda-Fountain Co., 161 Mo. 606, 61 S. W. 889; Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131; Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 991; Ocean City Assn. v. Creswell, 71 N. J. Eq. 292, 65 Atl. 454; Grady v. Ward, 20 Barb. (N. Y.) 543; O'Connor v. Huggins, 48 Hun, 620, 1 N. Y. Supp. 377, affirmed in 113 N. Y. 511, 21 N. E. 184; Ford v. Schlosser, 13 Misc. Rep. 205, 34 N. Y. Supp. 12; Ruess v. Ewen, 34 App. Div. 484, 54 N. Y. Supp. 357, affirmed in 165 N. Y. 633, 59 N. E. 1130; Kahn v. Mount, 46 App. Div. 84, 61 N. Y. Supp. 358; Hammerschlag v. Duryea, 31 Misc. Rep. 678, 66 N. Y. Supp. 87; Forsyth v. Leslie, 74 App. Div. 517, 77 N. Y. Supp. 826; Wormser v. Gehri, 55 Misc. Rep. 147, 106 N. Y. Supp. 295; Freedman v. Oppenheim, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841, 12 L. R. A., N. S., 707; Clark v. Wollpert, 128 App. Div. 203, 112 N. Y. Supp. 547; Dallmyer v. Ferguson, 198 Pa. 288, 47 Atl. 962; Maccaw v. Crowley, 59 S. C. 342, 37 S. E. 934; Nelson v. Jacobs, 99 Wis. 547, 75 N. W. 406; Levi v. Mathews, 145 Fed. 152, 76 C. C. A. 122.

But while a title by adverse possession may be marketable and one which a purchaser under a contract for a good and sufficient title in fee simple will be bound to accept, it is also generally held that where a vendor agrees to give a valid record title, a purchaser will not be compelled to accept a title based on adverse possession, though such title is in fact good: Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981; Constantino v. East, 8 Ind. App. 291, 35 N. E. 844; Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767; Bruce v. Wolf, 102 Mo. App. 384, 76 S. W. 723; Zunker v. Kuehn, 113 Wis. 421, 88 N. W. 605.

And there are some cases which seem to hold that even in the absence of a stipulation for a valid record title, a title based on adverse possession or the statute of limitations is not such a marketable title as a purchaser will be compelled to accept: McCroskey v. Ladd (Cal.), 28 Pac. 216; Schult v. Rose, 65 How. Pr. (N. Y.) 75; Watson v. Boyle (Wash.), 104 Pac. 147.

Thus in McCrosky v. Ladd (Cal.), 28 Pac. 216, the vendor had agreed to furnish a "good and sufficient title," and the court said: "A title, to be good, must be one which is 'free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles; and should be fairly deducible of record': Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262. The question as to whether or not the vendor has acquired a perfect title by adverse possession is not to be considered. The purchaser is entitled to a good paper title, sufficient in law, and was not.

bound to accept a title resting upon the statute of limitations, or take the risk of determining from facts which he might learn dehors the record whether or not the statute of limitations could be successfully pleaded against the adverse claim."

And in Watson v. Boyle (Wash.), 104 Pac. 147, which was decided only last fall, the contract of sale, as in the California case of McCroskey v. Ladd (Cal.), 28 Pac. 216, only called for a "good and sufficient title," and it appeared, as the court admitted, that the vendor and his predecessors in title "had been in the open, notorious, adverse, and exclusive possession of the property for a period equaling many times the statute of limitations," but it was held that the contract called for a marketable title, and the title shown by adverse possession was not such a title. "It may be," said the court, "that the appellant showed with reasonable certainty that his title was one capable of being successfully defended. But this was not enough. Few persons care for that form of title which requires a resort to parol evidence to establish a link in its chain. And there is a well-founded reason for such dislike. Other conditions being equal, property so held is always passed by when offered for sale in competition with property held by title deducible of record. Such a title is more subject to attack by speculators in defective titles than is a record title, and, when attacked, more difficulty is experienced in establishing it than is in establishing the latter form of title. Land so held cannot be left vacant with the same safety as land held by title of record, and it seems that no matter how incontestable the parol proofs of title may be, a constant resort to the courts is necessary to enforce rights and contracts in connection therewith which pass unquestioned with other forms of title."

But whatever force there may be in the reasons thus set forth by the supreme court of Washington, the many cases we have cited establish beyond question that title by adverse possession may be marketable, and therefore one which a purchaser will be bound to accept in the absence of a stipulation for a valid title of record. The cases which establish this rule, however, presuppose that the title by adverse possession is clearly made out, and fully approve the general doctrine that a title to be marketable must be free from reasonable doubt. What is a sufficient ground for judicial doubt cannot be reduced, as we have already seen, to any fixed or determinate principles, but depends to some extent on the discretion of the court, so we give a few instances showing how the rule as to reasonable doubt has been applied with reference to the marketability of titles by adverse possession.

b. Illustrations.

1. Where Title was Held Marketable.—In Beste v. McGaugh, 5 Penne. (Del.) 258, 63 Atl. 28, a husband conveyed the land in controversy to his wife in 1877. In 1882 the wife conveyed it to a third person, who occupied it and paid taxes on it until his death in 1902. The husband died prior to the wife's conveyance in 1882.

His heirs, at full age at the time of his death, never claimed any interest in the premises. It was held that there was vested in the heirs of the wife's grantee a fee simple title by adverse possession which a purchaser from such heirs was bound to accept.

Also, in Gaines v. Jones, 86 Ky. 527, 7 S. W. 25, it was held that one who by himself and his grantors has been in exclusive possession of land described by marked boundaries for more than fifteen years, can convey a good title thereto, although owing to a mistake in the original deed he has no title of record.

And in Cannon v. Female Orphan Soc., 24 La. Ann. 452, it was held that a vendor who has had undisturbed possession for over thirty years can convey a perfect title, whether or not such possession was in good faith.

In Regents of University of Maryland v. Trustees of Calvary M. E. Church etc., 104 Md. 635, 65 Atl. 398, twenty years' undisturbed possession of land by a religious corporation, though holding in contravention of the Bill of Rights, was held to vest a marketable title in such corporation which a purchaser was bound to accept.

And in the still later case of Safe Deposit & Trust Co. of Baltimore v. Marburg, 110 Md. 410, 72 Atl. 839, the question was whether under Acts of 1884, page 670, chapter 502 (Code Pub. Gen. Laws 1904, art. 53, sec. 26), providing that, if no demand for a ground rent is made for twenty years, such rent shall conclusively be presumed to have been extinguished, and the landlord shall not thereafter set up any claim thereto, or to the reversion of the lot out of which it issued, extinguished the reversionary interest of the lessor and vested a marketable title in the tenant in possession, when no ground rent had been demanded for twenty years, and it was held that it did.

In Scannell v. American Soda-Fountain Co., 161 Mo. 606, 61 S. W. 889, plaintiff sought to compel specific performance by defendant of a contract for an exchange of land which required that "if any defect should be found in the title," the contract was to be void. Plaintiff showed title by adverse possession for fifty-two years. It was held that the fact that the record title showed a transfer of the property by the French government in 1769, which was recorded in 1841, and a devise of the property by a subsequent grantee in 1878, did not justify defendant in refusing to perform the contract, since plaintiff's title was unassailable under Revised Statutes of 1899, section 4265, providing that no action shall be maintained for the recovery of real property after twenty-four years after the cause of action or right of entry shall have accrued, and section 4268, making the lawful possession of property and the payment of taxes thereon for thirty years a bar to any claim therefor emanating from the government.

"A title acquired by adverse possession, under our statute," said the court, "is in every respect as good, for purposes of attack or defense, as a title by deeds running back to the government. A

court of equity would not force upon a defendant a title in which there was any real defect, but it will not hesitate to require him to stand up to his contract when the title offered him is good beyond all reasonable apprehension."

In Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 99, defendant refused to perform his contract for the purchase of land from plaintiff upon the ground that the title was not marketable. Plaintiff claimed under a decree of partition between "surviving heirs" entitled under a will. The record showed that two heirs had more than thirty years previous departed, and had not since been heard from; and there was evidence therein that one of them had died young and without children, and that a third had gone away more than fifty years before. These three heirs were not made parties to the partition suit, but the bill alleged their death without issue before the estate vested, and that a named defendant was the only heir to their interest. And the decree in partition found that the three heirs who were not parties were deceased without issue. It appeared that plaintiff had with his privies held possession of the land adversely for forty years. It was held that the possibility that under 2 General Statutes, page 1792, section 2, making the limitation of action of trespass six years, and 2 General Statutes, page 1977, sections 16, 17, establishing that of other actions concerning real estate at twenty years, and suspending the same as to persons non compos and infants, the possibility that there were persons who could assert claims to the land was too remote to cast a doubt on the marketability of plaintiff's title, and specific performance was decreed.

Likewise in Kahn v. Mount, 46 App. Div. 84, 61 N. Y. Supp. 358, it was held that a purchaser of real estate cannot refuse to perform his contract on the ground that the title is unmarketable, in that the interest of an heir of a former owner, who died intestate, is still outstanding, when the premises have been occupied for more than twenty years adversely to all claims of such heir or his heirs at law, none of them being infants or insane during that period.

And in Pope v. Thrall, 33 Misc. Rep. 44, 68 N. Y. Supp. 137, four tenants in common of four lots of land joined in deeds so that a lot was conveyed to each of three of them under an agreement for partition, but no deed of the other lot to the other tenant appeared of record, though he took possession and deeded it to grantors of plaintiff, who have been in continuous possession for more than thirty years. It was held that plaintiff, who had contracted to convey such lot, had a marketable title thereto by adverse possession, even as against a cotenant in common, and could compel performance of the contract.

Also, in Hamerschlag v. Duryea, 58 App. Div. 288, 68 N. Y. Supp. 1061, affirmed in 172 N. Y. 622, 65 N. E. 1117, a cotenant conveyed land to defendant's grantor by a deed which purported to convey the entire property. Defendant's grantor entered in 1834 and inclosed the premises with a substantial fence, and used and improved the same for sixty years, when it conveyed the same to defendant

in 1889. In 1897 defendant contracted to convey the property to plaintiffs, the cotenant of the original grantor or his privies never having made any claim to the property. The title of defendant's grantor had been recognized on public maps, and its possession by public acts and occupation was shown to have been exclusive, hostile and notorious.

It was held that the defendant's grantor had acquired title to the premises by adverse possession as against the rights of the cotenant of the original grantor and that defendant's title was marketable.

In Ruff v. Gerhardt, 73 App. Div. 245, 76 N. Y. Supp. 743, a deed made in 1848 described the premises by street number, and also by metes and bounds, but the measurements did not include a small triangular piece at the rear of the premises, and for this reason defendant claimed the title was unmarketable. It appeared that at the time the deed was executed the premises, including the triangular piece, were inclosed within a fence, which was maintained until 1897, and the grantee in such deed immediately entered into occupation, and he and his successors thereafter remained in undisturbed possession. No adverse claim had been made to the triangular piece, and there was no evidence of any living person who could make one. It was held that plaintiff's title was marketable, and judgment against defendant for specific performance of his contract of purchase was awarded, the court saying: "It is true that under ordinary circumstances, when there is a defect in the record title which can only be cured by a resort to parol evidence, and the disputed title may depend upon a question of fact, specific performance will not be enforced," but that here a case was presented "where the contingency of the title ever being attacked is so remote as to be a matter of pure speculation and conjecture."

And so, too, in Forsyth v. Leslie, 74 App. Div. 517, 77 N. Y. Supp. 826, there was no record title or proof of any conveyance to a portion of the premises, which plaintiff sought to compel defendant to accept under a contract for its purchase. The court said, however, that as it did appear beyond all question that those from whom plaintiff by mesne conveyances had been in the quiet and undisturbed possession of the premises for upward of eighty years, during which time their title had never been questioned, this was sufficient to exclude to a moral certainty any right or claim to the heirs of the mesne owner from whom plaintiff's title was derived, and that plaintiff's title was therefore marketable.

In Freedman v. Oppenheim, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841, 12 L. R. A., N. S., 707, the action was brought to compel the specific performance of a contract to exchange real estate. The defendant refused to accept plaintiff's title as marketable, because of an alleged outstanding interest in one of the daughters of a former owner who had died intestate, and also because of an alleged defective acknowledgment of a power of attorney, under which the interest of another owner of the property had been conveyed. It appeared that plaintiff and his predecessors in title had been in the

undisturbed possession of the premises under claim of right for thirty-eight years, and that no other persons had made any claim to ownership during that time. The trial court found that plaintiff had a marketable title by adverse possession, but this was reversed by the appellate division of the supreme court (80 App. Div. 487, 81 N. Y. Supp. 110). But the order of the appellate division was reversed and the judgment of the trial court affirmed, the court of appeals saying that while it was true titles by adverse possession are not looked upon with favor by persons contemplating the purchase of property, the adverse possession in this case was sufficient to make the plaintiff's title marketable.

In Taub v. Spector, 124 App. Div. 158, 108 N. Y. Supp. 723, the agreed statement of facts upon which the case was submitted showed that defendant had agreed to convey to plaintiff a city lot twenty-four feet seven inches wide in front, and that the record title disclosed a lot only twenty-three feet seven inches wide in front, and plaintiff refused to accept the deed tendered on the ground that defendant could not convey a marketable title to the premises called for by the contract of sale. In 1822 a deed to one of the grantors in the chain of title conveyed to him "all that certain messuage or dwelling-house and lot" bounded and described as in the contract between plaintiff and defendant, except that the width of the lot in front was given as twenty-three feet seven inches. The building described in the deed as a dwelling-house occupied substantially the entire front of the lot, and was actually twenty-four feet seven inches in width, and was still standing on the lot at the date of this action. All the subsequent conveyances to the lot described it as twenty-three feet seven inches in front until 1905, subsequent to which time the mesne conveyances by which defendant acquired title gave the proper description. In holding that defendant had a marketable title to the property as described in the contract which plaintiff was compelled to accept, the court said: "The submission shows that for over fifty years the defendants and their predecessors in title have been in actual, peaceable occupation and possession of the entire premises, with the building thereon, as described in the contract, and that no person, during that time, has made claim of having any interest in the premises or the strip of land in dispute; nor to the knowledge of the parties, is there any person in existence who has, or can have, any claim of title thereto as against the defendants. Under such facts and circumstances, I am of the opinion that the defendants have a good and marketable title to the premises in question, and are able to convey the same to the plaintiff."

And, likewise, in Clark v. Wollport, 128 App. Div. 203, 112 N. Y. Supp. 547, a grantor of land who had no record title to the same had been in possession of the premises for some twenty-five years before conveying them to his son. By mesne conveyances plaintiffs acquired a perfect record title from the son, and plaintiffs and their grantors had been in undisturbed possession for more than fifty years. The wife of the original grantor did not unite with her hus-

band in the deed to the son, but she died before the grantee in such original deed took possession. It was held that plaintiffs had a valid title by adverse possession under the rule declared in Freedman v. Oppenheim, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841, 12 L. R. A., N. S., 707.

In Pratt v. Eby, 67 Pa. 396, the land was sold in 1840, under an order of the orphans' court in partition, and the purchaser at such sale then went into possession. Plaintiff's title came through divers mesne conveyances from this purchaser. Defendant claimed the title was not marketable because of defects in the proceedings leading to the sale. It was held that thirty years having expired plaintiffs had a marketable title by adverse possession, whether the heirs of the original owner were under disability or not, since all right of entry in them or any person claiming under them was barred, unless there had been an entry, followed by an action of ejectment, or an action within that period.

And in Dallmyer v. Ferguson, 198 Pa. 288, 47 Atl. 962, it appeared that title was vested in L. by perpetual ground lease of F. and deed of I. L. conveyed by perpetual lease to R., and later by sheriff's deed the interest of L. was conveyed to M. Subsequently the widow of F. granted to P. a ground rent reserved in the perpetual lease of F. to L. Thereafter, by sheriff's deed, all interest of P. was conveyed to A., and A. conveyed the land in fee simple to S., and he and those claiming under him had adverse possession for seventy-two years. The record showed no disposition of the interests of R. or M., but the court said that the possible outstanding title under R. or M. was "a bare, and rather remote, possibility, not sufficient to make a title under possession for seventy-two years so doubtful as to be unmarketable." And a decree for specific performance in favor of plaintiff was affirmed.

And in Westfall v. Washlogel, 200 Pa. 181, 49 Atl. 941, the alleged defect in the title which defendant claimed rendered it unmarketable arose over a deed to the premises from F. to D. dated in 1853 and recorded in 1873. F. died in 1857, and by the provisions of his will dated in that year the land in question was devised to his wife and son. Plaintiff's title came through the widow and son of F., who conveyed it to B. in 1872, the deed to B. being recorded the same year. There was no proof that B. took the deed from the widow and son of F. without notice of the prior unrecorded deed to D., and was therefore an innocent purchaser. The land was vacant and unimproved, but it appeared that for over forty years plaintiff and his predecessors in title had continuously exercised the right of ownership, paying taxes and assessments and filling the lots to grade level, and that D., the grantee in the prior unrecorded deed, had never claimed any right in or to the land. It was held that plaintiff's title was marketable.

The case of Maccaw v. Crowley, 59 S. C. 342, 37 S. E. 934, affords an excellent instance of when a title by adverse possession may be marketable, and therefore one which a purchase may be bound to accept, notwithstanding it falls far short of being an absolutely

perfect title. Plaintiff in this case sought to enforce specific performance of a contract for the sale of a lot in the city of Charleston. One T. W. acquired title to the lot in 1855, and put it in possession of his brother W. W. and his brother's wife, M. W. W. W. died in 1863, and his wife M. W. moved to another state. T. W. collected the rent and sent it to M. W. until his death in 1880. From that time until the death of M. W. in 1897 the rent was collected and sent to her, and the property looked after by either the son or brother in law of T. W. In 1878 T. W. went through bankruptcy without listing the lot in question on his assets, and in 1880 the lot was sold for taxes and bought by M. W. Plaintiff acquired the lot as devisee under the will of M. W., and it was held that plaintiff had a marketable title by adverse possession, which defendant was bound to accept.

2. **Where Title was Held not Marketable.**—In Trustees of Sharp Street Station of M. E. Church etc. v. Rother, 83 Md. 289, 34 Atl. 843, defendant had agreed in writing to make plaintiff a loan of twenty-seven thousand dollars on a city lot in Baltimore, provided plaintiff's title to the lot was merchantable. Subsequently defendant refused to make the loan upon the ground that plaintiff did not have a marketable title to the lot, and plaintiff filed this bill to compel defendant to accept the mortgage tendered and make the loan. The only paper title to the lot consisted of three old deeds, executed in the years 1802, 1811 and 1833, all of which conveyed the property to eight persons called "'Trustees of the African Church in the city of Baltimore," in trust for the education of black children. It did not appear how plaintiff came into possession of the lot, but it had been in actual possession for over fifty years and claimed that its possession had been continuous, adverse and uninterrupted during that period; that it had improved the property, had exclusive use and ownership over it. The deeds above mentioned were placed in the hands of the secretary of the board of the plaintiff church corporation in 1866, but it did not appear that any deed had ever been made to the plaintiff. It did not appear under what circumstances the plaintiff corporation, as such, entered upon the use of the property, or when any of the trustees in the deeds named died, whether any successors were ever appointed, or what relation, if any, they bore to the corporation or to the property. There was testimony, however, to the effect that plaintiff had never paid any rent, and that its possession and occupation of the lot was not under permission of anybody, but under a claim of right, but there was no testimony as to how plaintiff originally got possession. In holding that plaintiff did not have such a marketable title to the lot as to compel specific performance by defendant of the contract, the court said that it might be true that the appellant had a perfectly good title by adverse possession to this lot, but there was not sufficient evidence to show that its possession had been adverse, and if it went into possession by permission of the trustees who held the legal title, the presumption was that its possession continued in

that way unless there was some evidence of such adverse holding as would amount to an ouster. "To give the character of adverse to a holding, there must be some positive act, and not merely a failure to recognize the rights of trustee."

And the case of Shriver v. Shriver, 86 N. Y. 575, affords another excellent illustration showing that a title based on adverse possession, even under color of title, will not be deemed marketable if there is a possibility that it might not be adverse. It was established by the evidence in this case that the vendor and his predecessors in title had been in the continuous, uninterrupted, actual possession of the premises for over twenty years, beginning with an entry in 1856 under claim of exclusive title. But it also appeared that at some time prior to that date the owner of an undivided moiety of the equity of redemption in the premises was not made a defendant in an action to foreclose the mortgage, and that in 1857 the owner of the equity of redemption assigned all of his property to his creditors, J. and B., to be applied toward his indebtedness to them. The creditors executed an assignment in trust to T. and H. It was shown by affidavits that the owner of the equity of redemption died "some years ago" in Australia, and that his heirs at law were residents of Scotland, in the kingdom of Great Britain, and that T. and H. died before fully executing the trust and no successor had been appointed. In opposing affidavits it was averred on information and belief that T. and H., prior to their decease, settled with and satisfied all the claims of the creditors of J. and B. without making any disposition of the equity of redemption, and that the same reverted to J. and B., and that they and their wives had quitclaimed all their interest. It was insisted on behalf of the vendor that any right in the owner of the equity of redemption was barred by the statute of limitations, and, secondly, that the vendor had a marketable title by adverse possession. In denying both of these contentions the court said that though a clear, adverse possession for over twenty years made a title which a purchaser could not refuse, there might be circumstances which would prevent its becoming adverse; that if the heirs at law of the owner of the equity of redemption in Scotland were aliens, then any interest left in the land by such owner escheated to the state, against which the statute did not run, and if they were not aliens, then there was the possibility that some of them have been during the lapse of years since the death of such owner under the disability of infancy or some other disability; and, in reply to the contention that this was a "mere suspicion, ending in a suspicion, a possibility based upon a possibility, a bare possibility," the court said: "As a general rule, a title which is open to judicial doubt is not a marketable title. A title may be doubtful, which is to say unmarketable, because of the uncertainty of some matter of fact appearing in the course of the deduction of it. It seems that a rational doubt may be said to exist when a court of law would not feel called upon to instruct a jury to find that the fact existed, on the existence of which the

vendor's title depends. Where the title depends upon a matter of fact, such as is not capable of satisfactory proof, as in Lowes v. Lush, 14 Ves. 548, a purchaser cannot be compelled to take it; or where the fact is capable of that proof, yet is not so proved. As between vendor and purchaser, the court ought not to presume, unless it believes on circumstances strong enough to induce belief, that the fact is actually so. Can we say that a court would make no error if it directed a jury to find that there did not exist any person who could still question the possession held under the mortgage sale, or that there was not an escheat to the state and a right there? Could a judge sitting in equity believe that the possessory title is entirely free from such liability to successful assault? Are the circumstances so strong as to induce that belief? A jury might find so, and the verdict would be good if the issue was left to them. But the facts that have been shown and not rebutted, or explained away or softened, are too strong not to create a reasonable doubt that ought to be solved, before a bidder at a judicial sale, now unwilling to complete his purchase, should be compelled to take the title." While this seems to be a rather close decision, the court concluded its opinion by saying that, "It must not be taken, from anything that we have said, that we do not regard a title good that rests alone upon a clear, adverse possession of twenty years; nor that we pronounce the title of the vendors in the case before us as defective."

And in Simis v. McElroy, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 671, it was held that a vendor's possession of land for thirty years did not make his title marketable, unless it was further shown that the vendee could not thereafter be called upon to litigate with strangers the question whether such possession had been adverse. But this was an action for damages brought by a vendor against his vendee for the breach of an executory contract of sale, and the opinion of the court delivered by Justice O'Brien clearly points out that there is an obvious difference between regarding a title as marketable and enforceable against a vendee in a proceeding in which the holder of an outstanding title, if such there be, is not a party, and holding it valid so as to constitute a defense to an action of ejectment. "It is admitted that, as to a material part of the premises embraced in the contract, the plaintiff had no record title, but she claimed to have good title by adverse possession, and the question presented by this appeal is whether the plaintiff established title in that way so conclusively as to warrant the court in directing a verdict in her favor. It is important to bear in mind that the controversy is not between the party holding or claiming under the record title and the plaintiff claiming by adverse possession, but between the latter and a purchaser by executory contract to recover damages for his refusal to accept a title based entirely on such adverse possession. The holders of the outstanding record title, if any, are not parties to this action, and cannot be bound by the judgment, and hence the defendant, if compelled to accept the deed

tendered, might still be obliged to litigate with the true owners the question of title as against them. When the controversy assumes the form of an action for ejectment against the party in possession by one claiming under title by record, the former is in a stronger position to assert his right than when he is litigating with a stranger who refuses to accept his title. In the former case, adverse possession is evidence of title in the party asserting it. It might well be held to have the same effect in every case but for the difficulty, if not impossibility, of establishing the fact as against those who are not parties to the action or bound by the judgment. In such cases it is frequently very difficult for courts to anticipate what the owner of the outstanding title may be able to prove in a litigation with a party who has taken a title by adverse possession. The former may be able to prove facts tending to show that what appeared to be an adverse possession, in a litigation in which he was not heard, is quite otherwise, and hence this court has frequently refused to compel a purchaser to take a title which he may be called upon to defend by parol proof of adverse possession."

It is well to observe the difference thus pointed out between enforcing a title by adverse possession as marketable, against a vendee in an action where the holder of an outstanding title is not a party, and holding it valid so as to constitute a defense to an action in ejectment, for the opinion just quoted has sometimes been cited as authority for the doctrine that a title by adverse possession is not marketable. But it is hardly to be presumed that the comment made in the last clause of the opinion quoted was intended to justify any such conclusion, for in the later case of Freedman v. Oppenheim, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841, 12 L. R. A., N. S., 707, which we have previously cited as holding that title by adverse possession may be marketable, the court referred to Simis v. McElroy, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674, and the comment contained in the opinion that a party ought not to be compelled to take title to premises which he would have to defend by parol evidence, and said: "But in no place in the opinion does it appear that title by adverse possession clearly established does not in some instances furnish a marketable title."

In Ruess v. Ewen, 34 App. Div. 484, 54 N. Y. Supp. 357, affirmed in 165 N. Y. 633, 59 N. E. 1130, the defendant's title was derived through mesne conveyances from one E., who entered into possession of the land in 1822 under a tax lease given by the city of New York for the nonpayment of taxes, and remained in possession for thirty-five years under this lease till it expired in 1857. E. continued to remain in possession and collect the rents of the premises after the expiration of the lease until his death in 1865. The sons of E. remainded in possession of the premises as devisees under his will until 1877, when they conveyed to defendant's grantor, who in the same year conveyed to defendant. It was held that as title by adverse possession could not be acquired while E. was in possession under the lease, it was not established by proof of undisturbed pos-

session for twenty years after the expiration of the lease. "The proof must go beyond that," said the court, "and show that the possession has been in hostility to the true owner." And to same effect is Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527.

And marketable title to real estate is not shown by adverse possession alone for the required time without proof that such possession ripened into title: Wilhelm v. Federgreen, 2 App. Div. 483, 38 N. Y. Supp. 8.

Nor does a vendor who has been in uninterrupted possession for twenty years show a marketable title, without showing that the legal owners of the property during that period were not under a disability so that the statute would run against them: Carolyn v. Goran, 104 App. Div. 488, 93 N. Y. Supp. 935, affirmed in 186 N. Y. 575, 79 N. E. 1102; Lalor v. Tucker, 130 App. Div. 11, 114 N. Y. Supp. 403.

And in Hamershlag v. Duryea, 38 App. Div. 130, 56 N. Y. Supp. 615, it was held that, under Code of Civil Procedure, section 370, providing that one claiming title under a written instrument by adverse possession must show either cultivation or improvement or protection by a substantial inclosure, possession under a deed by one of two cotenants and an inclosure of the property for more than thirty-one years are insufficient to show that the persons in whom is vested the title of the other cotenant are barred from insisting on it, so as to render the title marketable.

Also, in Fuhr v. Cronin, 82 App. Div. 210, 81 N. Y. Supp. 536, it was held that proof of uninterrupted possession for thirty years does not show a marketable title by adverse possession, since in order to make a title by adverse possession, the vendor must negative the possibility of any outstanding claim to the land by the heirs of a former owner, and to show that such title is not open to contingencies of remaindership or infancy, or either.

In Greer v. International Stock Yards Co., 43 Tex. Civ. App. 370, 96 S. W. 79, it was held that under a contract for the sale of land where the vendor agrees to convey a good and sufficient title, where the record title is defective, a title by limitation, to be sufficient, must be so clearly established as to make it matter of law as distinguished from a question of fact. "While the principle," said the court, "that a title perfected by limitation is a good and sufficient title may be abstractly correct, yet if it does not appear as a matter of law that appellees had such a title, but if the state of the evidence is such as to make the question of title depend upon facts to be determined by a jury, or the court sitting as a jury, it would not follow that a good and sufficient title, such as was contemplated by the parties under the contract, had been tendered the plaintiff."

V. Sufficiency of Record Title.

a. In General.—We have seen that, as a general rule, when a vendor agrees to furnish a valid title of record, a purchaser will

not be compelled to accept as marketable a title based on adverse possession, though in fact such title be good; and we have also seen that in some jurisdictions it is held that even where there is no agreement by a vendor to furnish a record title, but only a "good and sufficient" title, the title will not be considered marketable unless it is one which is fairly deducible of record. It is seldom that an owner of real estate can furnish an abstract of his title from the records, which does not disclose some defects; especially is this true with reference to city property where the premises have often changed hands, and perhaps often involved in litigation.

In attempting to apply the universal rule that a title to be marketable must be one which is free from reasonable doubt to record titles, we are met with no less difficulty than in applying the rule to titles based on adverse possession, and can only solve the difficulty by seeing how the rule has been applied by the courts in the cases which have arisen. The following instances will serve to show where defects in record titles have been held sufficient or insufficient to render the title unmarketable.

b. Illustrations.

1. Where Title was Held Marketable.—In McPherson v. Gordon, 29 Ky. Law Rep. 826, 96 S. W. 791, defendant refused to complete his contract of purchaser of land upon the ground that the title was not marketable because the records showed that the deed from plaintiff's grantor did not state or refer to the next immediate source from which such grantor derived its title. The Kentucky statute (Acts 1904, p. 148, c. 67) in substance makes it unlawful for any clerk to admit to record any deed unless it specifies the next immediate source from which the grantor derived title. It was held that the deed having been in fact recorded, the title was marketable, and the judgment of the lower court in favor of defendant was reversed.

And the right of a proprietor of real property evidenced by the registry of the conveyance thereof in the proper book and the proper office, in the parish in which it is situated at the time, is not affected by the incorporation of it into a new parish; and no additional registry in the new parish is necessary in order to preserve its effect: Parish Board of School Directors v. Edrington, 40 La. Ann. 633, 4 South. 574.

In Curran v. Rogers, 35 Mich. 221, plaintiff sought to recover for the nonfulfillment of a contract whereby defendant agreed to purchase certain land. The defense was that the title was not marketable because the record disclosed certain outstanding mortgages. The evidence showed that the mortgages had been paid. It was held that since in Michigan mortgagees have no right of entry until the property is sold on a foreclosure beyond redemption, evidence that the mortgages had been paid was sufficient to make the title marketable, notwithstanding the mortgages were not discharged of record.

In Womack v. Coleman, 89 Minn. 17, 93 N. W. 663, defendant objected to the record title as unmarketable (1) because it appeared from the records of the county clerk's office that in 1899 one M. began an action against the then owner of the land to quiet title, and filed a lis pendens, and that said action had never been dismissed, (2) that a tax deed for the year 1865 from the state to one of the grantors in the chain of title did not show the signature of the proper officer, and (3) that a deed from a corporation who owned the land did not recite facts to show that the corporation grantor was in fact a corporation, and the authority of the officers who purported to execute it.

It appeared from the abstract, however, that after the suit to quiet title was begun, the plaintiff in such suit executed and delivered to the defendant a quitclaim deed to the premises involved in the action. It also appeared that the owner of the property at the time it was sold for taxes had subsequently deeded it to the grantee in the defective tax deed. It was held that none of the objections were tenable, that the lis pendens filed in the suit to quiet title became futile by reason of the subsequent deed from the plaintiff in the action, and the subsequent deed from the original owner at the time of the tax sale to the grantee in the tax deed made the defect in the tax deed immaterial; and that it was not necessary that a deed purporting to be executed by a corporation should recite facts to show that it was in fact a corporation, and the authority of the officers purporting to execute it.

In Mitchner v. Holmes, 117 Mo. 185, 22 S. W. 1070, the title was objected to as unmarketable upon the ground that the records failed to show that a notary before whom the acknowledgment of a deed in the chain was attested, as "given under hand," had affixed his seal to the same. It was held that since the deed had been admitted to record as duly acknowledged and certified, the objection was not well taken, as the fact that the record was simply silent as to the affixing of the seal would not rebut the presumption that the notary had done his duty, or that the recorder would not have admitted to record a deed which had not been acknowledged and certified in the manner prescribed by law.

In Calder v. Jenkins, 16 N. Y. Supp. 797, the owner of the land in question executed two mortgages thereon at different times, his wife joining only in the second mortgage. The second mortgage was first foreclosed, and the purchaser thereunder was made a party to an action to foreclose the first mortgage. It was held that a vendee from one claiming title under a purchaser at the sale under the first mortgage could not object to the marketability of the title upon the ground that the deed executed by the referee in the proceedings to foreclose the second mortgage was not recorded.

In Wessel v. Cramer, 56 App. Div. 30, 67 N. Y. Supp. 425, the defendant in a suit for specific performance of a contract for the purchase of land claimed the title was unmarketable because of a recorded judgment against the plaintiff. It appeared that in an

action against plaintiff and others as joint defendants, plaintiff was not served with summons, and the judgment was not rendered against him, though his name appeared on the record as a judgment defendant. It was held that this did not render plaintiff's title to the land unmarketable; and it was further held that since the judgment was recovered more than ten years prior to the execution of the contract of sale involved in this case, by express provision of the statute (Code Civ. Proc., sec. 1251), such judgment ceased to be a lien on the lot contracted to be conveyed, and was therefore no defense to the present action.

In Weissberger v. Wallach, 124 App. Div. 382, 108 N. Y. Supp. 387, the title was objected to as unmarketable upon the ground that there was on file a notice of the pendency of an action in the supreme court to foreclose a mortgage on the property in question. The contract of sale which this action was brought to have enforced provided that the property was to be taken subject to the mortgage sought to be foreclosed, and it appeared that consent to a discontinuance of the foreclosure suit had been delivered to the vendor and an order of discontinuance entered. It was held that the notice of lis pendens did not render the owner's title unmarketable.

In Hellreigel v. Manning, 97 N. Y. 56, the records showed a deed in plaintiff's chain of title to one Electa Wilds, dated in 1861, and a conveyance of the same land in 1867 by Electa Wilder, but did not show any conveyance by Electa Wilds. It was insisted that the records did not show a marketable title which a purchaser could be compelled to accept. But this contention was not sustained, the court saying: "It is probably true that, looking at the records alone, there was such a defect in plaintiff's title that he could not compel the defendant to accept it. The two names are so dissimilar that they do not present a case of idem sonans. But yet the inference from the records is quite strong that the two names stand for the same person. They show title in Electa Wilds and not in Electa Wilder. The Christian name, not a very common one, and all the letters of the surname but two are the same, and there is no conveyance in the name of Electa Wilds. If the two names do not stand for the same person, we have the case of an entire stranger to the title with a name quite similar conveying the title and passing it on through the chain to the plaintiff. But if we add to all this what must, in the absence of any proof by the defendant to the contrary, be presumed that the title was held and the land occupied without dispute under the deed from Electa Wilder from April, 1867, to the trial of this action in 1881, the inference that the two names stand for the same person becomes almost conclusive."

And in the late case of Coleman v. Bruch, 132 App. Div. 716, 117 N. Y. Supp. 582, a case in many respects quite similar to the one just cited, was up before the appellate division of the supreme court of New York. In this case the purchaser's refusal to take the title was based upon the fact that in 1855 one M. conveyed the premises

to T. E. June by deed duly recorded. It was shown by the vendor that in 1856 this deed, with the exception that the grantee named was T. E. Jayne, instead of T. E. June, was again recorded, with a memorandum on the deed, signed by the subscribing witness, who was also the officer who took the acknowledgment, stating that the word "Jayne" had been written over an erasure before execution. There was a perfect record title from T. E. Jayne to the vendor. It was held that the vendor's title was marketable, and a contrary judgment by the lower court was reversed.

In Alpern v. Farrell, 133 App. Div. 278, 117 N. Y. Supp. 706, it was held that a notice that an action or proceeding has been commenced affecting the title to property does not necessarily make the title defective. If the cause of action has been settled before judgment, and it so appears from public records, or by satisfactory evidence, or if the action or proceeding is abated, or if judgment has been entered in the action adverse to plaintiff's claim, the existence of an uncanceled lis pendens is of no consequence.

2. **Where Title was Held not Marketable.**—In Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262, the action was brought by the plaintiff to recover back from defendant a deposit paid under a contract for the sale by defendant to plaintiff of a lot in San Francisco, upon the ground that the title was not marketable. It appeared that one S., who owned the lot in 1855, mortgaged the same by a deed absolute in form to one T.; that T. by power of attorney gave one A. power to sell any land which he then owned or was interested in the state of California; that T. afterward foreclosed his mortgage and bought the property at the foreclosure sale; that then T. by A., his attorney, made a quitclaim deed of the property to defendant's grantor; subsequently T. received his sheriff's deed and died in another state leaving all his property to his wife; that the wife of T. then conveyed by quitclaim to defendant's grantor; that T.'s will was proved in the state where he died, but not in the state of California, and there was nothing to show whether there were any debts in California against the estate or not. It was held that it was not beyond doubt whether the deed from the attorney of T. conveyed any title, nor whether the wife of T. could convey by quitclaim a good title before the will was proved in California, and therefore defendant's title was not "fairly deducible of record."

And in Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851, it was held that where persons in possession of city lands under an alcalde grant on January 1, 1855, and confirmed by the Van Ness ordinance, failed to obtain a transfer of the city's interest as authorized by act of March 14, 1870 (Stats. 1869–70, p. 353, c. 249), subsequent holders of such title did not have a title deducible of record, which they could compel a purchaser to accept under a contract to furnish a "perfect and satisfactory title." It is true the holding in this case was based upon a contract which called for a

"perfect and satisfactory title," but we have already seen that under the decisions of this state a title is not marketable unless it is "fairly deducible of record," and as it is held in this case that a title to lots under the Van Ness ordinance is not fairly deducible of record, without the vendor procures a transfer of the city's interest, or a "city deed" as it is here called, the decision would seem to fully hold that a title to such lots is not marketable without such city deed has been obtained.

In Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315, the action was brought to recover the deposit made by plaintiff with defendant on a contract for the purchase of land, upon the ground that defendant could not convey a marketable title. It appeared in the chain of title to defendant that a former owner, F., conveyed the property to George F. T., and that the deed was only acknowledged and recorded. There was no conveyance of record from George F. T. Subsequently, however, F. made another conveyance to Gerhard F. T., which was also duly acknowledged and placed on record. This latter deed recited that it was made to correct an error in the grantee's name in the former deed from F. to George F. T. It also appeared that defendant and Gerhard F. T., as coplaintiffs, had brought an action to perfect the title in the superior court of the city and county of San Francisco against the administrator of F., deceased, and that the administrator had filed an answer denying the allegations in the complaint; that the plaintiffs obtained a decree in this suit finding that the deed made by F. to George F. T. was made to such grantee by mistake; that the true name of the grantee was Gerhard and not George, and that there was no such person as George F. T., and reforming the deed as prayed for. It was held that neither the corrected deed made by F. during his life nor the decree reforming the deed, made the title marketable. Speaking of the attempt of F. to correct the deed during his lifetime, the court said: "It is evident that after the title passed out of Robert Faessler to George F. Terschuren no subsequent deed of Faessler could convey anything or convey to any different grantee. If the true name of the grantee was George F. Terschuren, the title passed to said George F., and, if the true name was not George, but Gerhard, and the name George was inserted by mistake, instead of Gerhard, Faessler could not correct the mistake." And in replying to the contention that the decree reforming the deed cured the defect, the court said: "It was not a proceeding in rem. George F. Terschuren was not made a party, and therefore the suit did not affect him. If he had been made a party, and the proceeding had been in rem, and due publication of summons made after failure to find him, there would be force in appellant's contention; but it is plain that, if Faessler in his lifetime could not correct the first conveyance made by him, his administrator could not do so. Nor did the decree of the court aid the matter in the least. It was only conclusive upon Hynes as administrator, but he never claimed the property as administrator.

His intestate never claimed it after he made the deed conveying it. The fact that in any litigation concerning the title parol evidence would be admissible to show that the grantee, George F. Terschuren, was identically the same person as Gerhard F. Terschuren does not, as to plaintiff, change the result. The plaintiff had the right to a title fairly deducible of record, free from reasonable doubt or litigation. He was not required to accept a title depending upon matters which rest in parol."

The ruling in this case is in striking contrast to that in the two New York cases we have cited of Hellreigel v. Manning, 97 N. Y. 56, and Coleman v. Bruch, 132 App. Div. 716, 117 N. Y. Supp. 582, where the titles were held to be marketable where a misnomer of the grantee was corrected by a subsequent deed, though there had been no attempt even to have the original deed reformed by any judicial proceedings.

In Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132, it was held that, although upon the face of the record the right to foreclose an unsatisfied mortgage appearing in a vendor's chain of title may have been barred by the statute of limitations, a purchaser of the real property covered by such mortgage will not obtain a marketable title, since the statutory period within which a foreclosure may be made may have been prolonged by some act of the parties which has operated to prevent the running of the statute against the debt itself.

And where it appears from an admission in the pleadings and testimony introduced that a notice of lis pendens concerning the land involved in an executory contract of sale which it is sought to enforce has been filed, the action described in it has been commenced and is pending, and the complainant in that action attacked the validity of the vendor's title, the title is prima facie unmarketable: Moulton v. Kolodzik, 97 Minn. 423, 107 N. W. 154, 7 Ann. Cas. 1090.

In Howe v. Coates, 97 Minn. 385, 114 Am. St. Rep. 723, 107 N. W. 397, 4 L. R. A., N. S., 1170, the defects which it was claimed rendered the title unmarketable grew out of the existence of two previous leases. It appeared from the abstract that a former owner of the premises executed a fifty year lease of the premises to F., with an option to purchase; that F. assigned this lease to certain others, who afterward assigned it to the Foley Mining Company. No wives joined with any of the assignors in making the assignments, though such assignors were married. The records did not show any surrender or termination of the estate or rights of the Foley Mining Company, except what purported to be a certified copy of a judgment in an action to determine adverse claims brought by some of the defendants herein against the Foley Mining Company as sole defendant. The certified copy of this judgment was recorded, but the copy bore a date different from the date of the judgment itself, and the records in the clerk's office showed that the judgment was not entered in any form until twelve days after

the record of the certified copy, and that no judgment was ever entered in the judgment-book. The abstract also showed that defendants had agreed to sell and convey the premises to one S., provided S. should within a given time expend a certain amount in exploring for ore on the premises; and also showed a notice as provided in the agreement that S. had defaulted. But there also appeared of record a new agreement in writing between defendants and the Arcturas Iron Company, reciting the former agreements and alleged default, by which for a valuable consideration the alleged forfeiture and dissolution was withdrawn and canceled, and the time for the making of the various payments by S. extended. The record further showed a notice without date which recited defaults by the Arcturas Iron Company, and specified that the contract should be canceled on a certain date, unless the agreements as to which default had been made should be complied with on or before that date. Accompanying this notice was proof that it had been published. It was held that the title was not marketable, and the judgment of the lower court compelling plaintiff to accept the title was reversed. "Without determining," said the court, "whether the respondents had a title to the land in question which was good in fact, we are satisfied that the record did not disclose a title which was marketable, 'merchantable' and unencumbered. There was a serious and reasonable doubt as to whether the interests of the Foley Mining Company, the Arcturas Mining Company, and the inchoate interests of the wives of the assignees of the Haywood contract had been determined and extinguished. These questions were fairly debatable, and cast such a doubt upon the title as to render it unmarketable. Under the evidence as disclosed by this record no prudent business man could be expected to accept the title, and no court should require him to do so. The risk of litigation and embarrassment of title should not be cast upon the purchaser." The questions involved in this case seem to have been presented to the court with great vigor by opposing counsel, and the opinion presents a very full review of the authorities bearing upon the subject under consideration.

In Meiggs v. Hoagland, 41 Misc. Rep. 4, 83 N. Y. Supp. 603, plaintiff sought to compel specific performance of a contract of sale of real estate dated in 1900, the defendant refusing to complete the purchase upon the ground that the title was not marketable. Plaintiff claimed title through the will of one C., who died seised of the land in 1866 by deed from his widow and devisee under his will. Plaintiff introduced the record, in the surrogate's court of the county where the land was situated, of an exemplified copy of the record of the will of C., and proofs thereof from the register of wills in Pennsylvania, showing the record of the will in that state in 1866, but the record did not show either in the attestation clause or in the proofs that the attesting witnesses became such at the testator's request, as required by the statutes of New York. The

record did show, however, that six years later these witnesses came back and made oath anew before another deputy register, showing that the testator requested them to act, and this was added to the record; but there was no new probate. It was held that title in the devisee (plaintiff's grantor) was not shown; and it was further held that when a devisee contracts to sell the realty devised, but does not tender in the contract day a marketable title by failing to show execution of the will, in a subsequent action for specific performance she cannot invoke Code of Civil Procedure, section 2632, as amended in 1901 (Laws 1901, p. 1330, c. 540), making the record of a proven foreign will, exemplified by its custodian, admissible in evidence as if the original will was produced and proven, "where thirty years have elapsed since the will was proven," as such section can have no application, the question being as to the title presented in the contract day in 1900, and not of the title which plaintiff is able to present under the act of the legislature passed in 1901.

In Moran v. Stader, 52 Misc. Rep. 385, 103 N. Y. Supp. 175, plaintiff having refused to accept a deed from defendant, upon the ground that the title tendered was not marketable, brought this action to recover from defendant a deposit he had made on a contract for purchase. It appeared that the record of a deed given by a former owner of the land, recorded in 1869 (thirty-two years before the contract of sale), under which defendant by mesne conveyances claimed title, did not show that the certificate of acknowledgment set forth that the grantor in the deed was personally known to the officer who took the acknowledgment. The original deed was lost. It was held that the title was not marketable, and plaintiff was entitled to recover his deposit. "It will be conceded," said the court, "that a purchaser of real estate is entitled to a title free from reasonable doubt. If the defect claimed goes to the value of the land or would interfere with its sale to a reasonable purchaser, he is not compelled to take it. Nor will a purchaser be compelled to take a title which can be cured only by a resort to parol evidence. Plaintiff should not be compelled to accept title dependable only by parol proof, which the changes and mutations of time may render unavailable." This decision is based entirely on the ground that as the record did not disclose a proper acknowledgment of the deed, the deed was improperly admitted to record, and therefore a marketable title of record was not shown. But this doctrine is opposed, as we have seen by other cases, notably that of Mitchner v. Holmes, 117 Mo. 185, 22 S. W. 1070, where failure of the record of a deed to show that the notary before whom it was acknowledged had attached his seal to the acknowledgment was held not sufficient to overcome the presumption that the recording officer had performed his duty, and would not have recorded an instrument which was not entitled to record.

VI. Tax Titles.

Whether a tax title is marketable is a question in respect to which there is an almost entire want of authority. It was said in Harding v. Tibbills, 15 Wis. 232, that a tax deed conveys to the grantee "as good a title as any other conveyance, provided the statute under which it was given had been in all respects complied with." And, indeed, there seems to be no reason why a tax title when lawfully established is not marketable, otherwise, as was said by the supreme court of Pennsylvania in Reeves v. Alter (Pa.), 12 Atl. 551, "The acts of assembly which provide for the sale of real estate for unpaid taxes would be rendered abortive." And it was held in this case that, a purchaser of realty at a tax sale is protected in the irregularities in the assessment by the judgment; and if the lot has been described sufficiently to give notice to the owner had he made search, and the sale is otherwise regular, a marketable title in fee passes by it.

Likewise, in Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739, it was held that under Revised Statutes, section 1176, providing that a tax deed shall vest in the grantee title in fee simple, and making it evidence of the regularity of all proceedings under which it is issued, such a deed, if fair upon its face, is prima facie marketable title, which a vendee is bound to accept as such unless specific objection is made, and on hearing it is found not free from reasonable doubt. And to same effect is Kramer v. Ricke, 70 Iowa, 535, 25 N. W. 278.

But while these cases are authority for the proposition that a tax title may be marketable, the marketability of such a title manifestly depends upon the regularity of the proceedings under which the sale was made; and it was held by the supreme court of Illinois only a few years ago that an abstract which showed two tax deeds in the vendor's chain of title, but did not show any judgment, precept, or affidavit upon which said tax deeds were based did not show anything more than mere color of title: Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072.

VII. Marketability of Title as Depending on Opinion of Attorneys.

Whether a title is marketable or not within the meaning of the law could not, it would seem, be settled by the opinion of an attorney on that question, but since the question of whether a title is or is not marketable seldom arises except in connection with a contemplated transfer of the property, and as a purchaser is generally guided by the advice of his attorney or that of the attorney for some abstract or title insurance company with reference to the validity of the title, it is important to know whether an adverse opinion by a purchaser's attorney as to the title raises such doubt as to its validity as to justify a purchaser in declining to perform his contract of purchase upon the ground that the title is not marketable. There is not perfect harmony of judicial opinion on this question.

In some cases it is held that the fact that the purchaser's lawyer may not approve the title does not necessarily affect the right

of the vendor to enforce the contract, if the title is in fact good: Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640; Vought v. Williams, 120 N. Y. 253, 17 Am. St. Rep. 634, 24 N. E. 195, 8 L. R. A. 591; and the same principle is sustained in Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315, where it was held that a purchaser could not be compelled to accept a defective title because his attorney had advised that it was marketable.

There are other cases, however, which hold that while the opinion of counsel that a title is unmarketable may or may not in itself be sufficient to create a doubt which would justify the vendee in refusing to accept it, still such adverse opinion is a material fact, the importance and value of which in a particular case depends upon the counsel and the circumstances under which he is acting: Howe v. Coates, 97 Minn. 385, 114 Am. St. Rep. 723, 107 N. W. 397, 4 L. R. A., N. S., 1170; and it was held in Walker v. Gilman, 127 Mich. 269, 86 N. W. 830, that a purchaser is justified in rejecting a title as unmarketable if such objection is based on the good faith opinion of his attorney, and if any of the questions involved are doubtful questions of law.

In Miller v. Bronson, 26 R. I. 62, 58 Atl. 257, it was held that a title is not marketable where a loan company refuses to take a mortgage on the property because its counsel will not certify the title.

And in Greer v. International Stock Yards Co., 43 Tex. Civ. App. 370, 96 S. W. 79, it was held that where a contract for the purchase of property is subject to the approval or acceptance of the purchaser's attorney, if the latter disapproves of the title or refuses to accept it, the vendor, in the absence of bad faith or unreasonableness on the part of the purchaser or his attorney, cannot enforce specific performance of the contract.

WILSON v. PUGET SOUND ELECTRIC RAILWAY.

[52 Wash. 522, 101 Pac. 50.]

AUTOMOBILES—Imputing Negligence of Chauffeur to Passenger.—The negligence of a chauffeur who is driving an automobile for hire cannot be imputed to a passenger therein. (p. 1048.)

AUTOMOBILES—Duty of Passenger to Warn Driver.—A passenger in an automobile for hire is not required, in the presence of railway tracks, to warn, advise, or direct the chauffeur, nor is he bound by the doctrine of "stop, look and listen." (pp. 1051, 1052.)

STREET RAILWAYS.—For an Electric Car to Exceed the Speed Limit prescribed by ordinance is negligence per se. (p. 1052.)

James B. Howe and Hugh A. Tait, for the appellant.

Blaine, Tucker & Hyland and Robert C. Saunders, for the respondent.

524 GOSE, J. The respondent, plaintiff below, brought this suit against the appellant, to recover damages for personal injuries received by her husband, resulting in his death. The case was tried to a jury, terminating in a verdict and judgment against the appellant. From such judgment this appeal is prosecuted.

The complaint, in substance, charges that on the fourteenth day of September, 1907, the respondent's husband became a passenger in an automobile, run for hire, and was being conveyed therein from the city of Seattle to a point known as "The Meadows," some distance south of the city; that a car of the appellant, operated by electricity, through the negligence of the appellant's servants, ran into the automobile, overthrowing the same, and throwing the husband of the respondent out of the automobile, and upon the planking in the street at the point of contact, with such force and violence as to produce injuries from which he died on the twenty-seventh day of October, following. The appellant joined issue upon the question of its negligence, and pleaded affirmatively that the negligence of the respondent's husband contributed to his injury and was the proximate cause thereof. This was denied by the reply.

The undisputed evidence showed that the accident occurred on a planked street known as First Avenue South. The street at this point was about thirty-six feet in width. On either side of the street was a walk for pedestrians, about four feet in width. On the outside of each walk there was a railing about three feet in height, and on the inside a riser, about eight inches square, was spiked to the plank. This riser was the only barrier between the street and the 525 walk. The appellant was operating a double tracked electric railway over the street. The street was used generally by the public. There was not sufficient space for an ordinary vehicle to pass between cars on the tracks, or to pass between a car and the barrier. The street was practically level and straight for a fourth to a half a mile south from the point where the accident occurred.

On the day of the accident a friend of the deceased invited him and others to go to The Meadows, and procured an automobile which was operated for hire to convey them thither.

The route taken by the automobile was south along what is known as First Avenue South, the narrow planked street heretofore mentioned. The deceased sat on the front seat beside the driver. The machine followed the street-car for some distance, when, owing to the dust and splinters thrown up by the car, the driver turned the machine on to the east track, and ran parallel with the car for about one-fourth of a mile. The outgoing car took the west track, and the incoming car the east track. When running parallel with the car, the machine ran along the east track.

There was a sharp conflict in the evidence as to the speed at which the machine and car were running. It was variously estimated by the witnesses at from eight to forty miles an hour. The driver of the machine, who was also its owner, testified that, before turning on to the east track, he asked the deceased "if the road was clear, ... and he looked over and said it was; that there was not a car or anything in sight"; and he further said: "I could also see that it was; that there was nothing there in sight anywhere that I could see, and I drew out." He further said that he ran alongside the car for a fourth of a mile; that he then saw the north-bound car approaching him about three hundred or three hundred and fifty yards distant; that he could have seen the north-bound car a fourth of a mile; that he was then thirty feet in the lead of the south-bound car; that upon seeing the approaching car, he increased the speed of the machine about twenty per cent, and [526] took a diagonal course about one hundred and fifty feet; that he was then running in front of the south-bound car, about fifteen to twenty-five feet in advance of it; that he ran on that track "a little distance" before he was struck; that he increased his speed and ran in front of the south-bound car because he did not think that he had time to drop behind it and avoid a collision with the north-bound car; that the north-bound car passed before his machine was struck by the south-bound car; that his machine was carried eighty feet by the car.

It is conceded that the speed limit was twelve miles an hour. A passenger in the machine testified that the south-bound car was running thirty-five miles an hour; that the north-bound car was running about thirty miles an hour; that when the driver started to turn in front of the south-bound car, the north-bound car was about three hundred yards distant; that the driver turned in twelve or fifteen feet ahead of the north-bound car; that the machine was fully straightened out in

front of the car before it was struck; that the north-bound car could have been seen for a distance of a half mile. A witness on the south-bound car testified that the car was running very fast; that the car carried the machine sixty yards after striking it. Another witness said the car ran seventy-five or one hundred yards after striking the machine; that the machine got in the car track fifteen or twenty feet in front of the car. Still another witness said: "When I saw him [the driver] he was straightened out, and then the street-car came on him so fast that it just crashed right into him"; that the machine was traveling at the rate of twenty miles an hour, and the car at the rate of thirty miles an hour; that the car ran one hundred or one hundred and fifty feet after it turned the machine over; that it dragged the machine two hundred feet, and carried it some thirty feet before the machine turned over. A witness for the appellant said the car "stopped in about one hundred to one hundred and twenty-five feet from where the automobile had stopped and turned over."

The appellant offered evidence tending to show that the [527] car was running at from eight to twenty-five miles an hour; that the machine turned in front of the car on a sharp curve from two to thirty-five feet ahead of the car; that the machine ran against the riser or guard-rail, slackened speed, and was then struck by the car. The only evidence as to anything the deceased said or did was that, in response to an inquiry of the driver as to whether the north-bound track was clear, "he looked over and said that it was that there was not a car or anything in sight." The only instruction given the driver was the statement of one Van De Vanter, who hired him, to the effect that the party wanted to go to The Meadows, and that they had "plenty" of time. Under all the evidence, the east track was clear when the machine took it. Assuming that the north-bound car could have been seen for half a mile if it was traveling at the same speed as the machine, it was not in sight when deceased looked. As we have said, the machine ran on the east track for a quarter of a mile, and then the north-bound car was from three hundred to three hundred and fifty yards distant.

Three errors are assigned: (1) That the court erred in denying appellant's motion for judgment at the close of the evidence; (2) that the court erred in refusing to direct a verdict for the appellant; (3) that the court erred in denying appellant's motion for a verdict notwithstanding the verdict. In legal effect the three assignments challenged the sufficiency

of the evidence to support the verdict. The appellant argues (1) that the respondent's decedent was guilty of contributory negligence which precluded her recovery. Under this head it urges: (1) The chauffeur was grossly negligent; (2) under the circumstances the negligence of the chauffeur was imputable to respondent's decedent; and (3) that the evidence does not disclose any negligence on the part of the appellant. Whether the chauffeur was negligent we will not consider, except as it may appear to touch the question of the independent negligence of the deceased. The doctrine of imputable negligence has been rejected by this court.

528 "Where one is simply an invited guest of a voluntary driver, we do not believe the latter should be held to be such an agent of the former that the driver's negligence should be imputed to the passenger, when the passenger is without fault and has no control over the driver or his team. Especially does this seem to be right when considered in relation to one innocent of negligence, where it appears that the accident would not have happened, even with the negligence of the driver contributing, but for the primary neglect of the defendant": Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76. We are content with the rule announced in this case. The question of imputable negligence was not pressed in the oral argument.

Touching the question of contributory negligence of the deceased, the general rule has been announced by this court in Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76, where it said: "Whether he was negligent and contributed to the injury was a question concerning which the minds of men might reasonably differ, and was for the jury to determine: McQuillan v. Seattle, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119; Steele v. Northern Pacific Ry. Co., 21 Wash. 287, 57 Pac. 820; Traver v. Spokane St. Ry. Co., 25 Wash. 225, 65 Pac. 284; Jordan v. Seattle, 26 Wash. 61, 66 Pac. 114; Burian v. Seattle Electric Co., 26 Wash. 606, 67 Pac. 214." The appellant urges, however, that there was an advisory or supervisory duty on the deceased, under the rule announced in Cable v. Spokane & Inland Empire R. Co., 50 Wash. 619, 97 Pac. 744, 23 L. R. A., N. S., 1224. In this case Rufus Cable received injuries from which he died, and his daughter, a young woman seventeen years of age, was seriously injured. The injury occurred at a crossing of an interurban electric railway. The father and daughter were attempting to cross the track with a horse and buggy. The doc-

trine of "stop, look and listen" was applied to both father and daughter. It appears from the opinion that the father was driving the horse. We think the true general rule is announced in this case in the following language: [529] "Ordinarily where one rides in a vehicle with the driver thereof and is injured by the negligence of a third person, to which negligence that of the driver contributes, this contributory negligence is not imputable to the passenger, unless said passenger has, or is in a position to have and exercise, some control over the driver with reference to the matter wherein he was negligent."

We think that it may be stated with the utmost safety that ordinarily two persons cannot drive or control the same horse, team or vehicle, at the same time. But however the rule may be as to the duty of one who is not the driver, when riding in a conveyance drawn by horses, the reason for the rule has no application to the instant case. No negligent act of the deceased, either of omission or commission, is disclosed by the evidence. He did nothing and said nothing except to answer a question asked him by the driver. It is a well-known fact that an automobile is an intricate machine and one which requires skill to operate. The deceased had a right to assume that the driver was competent, that he knew the capacity of his machine, and that he would not put it in a perilous position. If the machine was running at twelve or fifteen miles an hour, as testified by the driver, and the car at eight miles an hour, as testified by the motorman, when the driver started to go on to the west track, the act would not have appeared hazardous to a reasonable man. If, however, the south-bound car was traveling at a speed of forty miles an hour, and the north-bound car at thirty miles an hour, the situation was serious when the north-bound car was observed, and it would not appear to one who is not skilled in the operation of a machine how any advice from a passenger to the driver under such circumstances could aid the latter in any way. It would seem that any interference, or attempted assistance, on the part of the passenger would have tended to disconcert rather than to aid the driver. The facts are, therefore, distinguishable from those in the Cable case (50 Wash. 619, 97 Pac. 744, 23 L. R. A., N. S., 1224).

A case very similar to this is Chadbourne v. Springfield St. [530] R. Co., 199 Mass. 574, 85 N. E. 737. In that case the plaintiff was riding as the invited guest of the driver of an automobile on a narrow bridge. Two street-car tracks crossed

the bridge in the center of the roadway, so that a vehicle could not pass between the car on either track and the guard-rail of the bridge. The driver of the automobile, after following the car for a distance, turned to pass it on the left, it being impossible to pass it on the right. The machine was struck by the approaching car. At page 738 the court say: "The question of the plaintiff's due care was for the jury. She seems to have conducted herself as an invited guest of the driver of an automobile or other vehicle naturally would do. She trusted him as to the running of the machine; that is, she did not attempt to interfere with his management of the automobile. In view of her inexperience and of what might have been found to be the skill and experience of the driver, the jury might well have thought that this was a wise course on her part. Nor was there any relation of agency between her and the driver such as of itself would affect her with negligence on his part. She had no right to control him. There was no mutuality in a common enterprise between them. It cannot be said as matter of law that she ought to have warned the driver against turning out from behind the car which he had been following, especially in view of the fact that he was turning both in the direction required by statute (Rev. Laws, c. 54, sec. 2), and in the only direction in which the width of the bridge afforded room for him to pass that car. And she had a right to rely somewhat on the acquaintance with the road which she might presume that he had. Accordingly we need not consider whether it can be said that Reed's conduct was, as a matter of law, negligent. Even if this were so, the plaintiff's own due care was for the jury."

Speaking to this question in State v. Boston etc. R. Co., 80 Me. 430, 15 Atl. 36, it is said: "The plaintiff's case is fortified by another consideration. He neither drove, nor, as far as appears, had any control of the team on which he was riding. It is reasonable to suppose that the owner carried him either for hire or gratuitously as a neighborly kindness. His position was not of the same degree of responsibility to the railroad as was that of the driver. [531] He was a comparatively passive party. Not that he had no duty to perform. He could have asked the driver to stop the team, or he could have left it. But it would be natural, even though his fears were excited, that he should defer to some extent to the experience and discretion of the driver who was in the control of his own team; and before he had time to assert his own judgment against the driver's, or perhaps fully appreciate

the situation, the inevitable event was upon him. We think this fact has considerable force in the combination of circumstances which weigh against the charge of contributory negligence."

In Louisville & N. R. Co. v. Molloy's Admx., 28 Ky. Law Rep. 1113, 91 S. W. 685, one Molloy hired one Oller, a liveryman, to take him to Brownsville with a team. Molloy was killed while the team was crossing a railroad track. At page 687 the court said: "Oller was a common carrier of passengers, and Molloy was no more chargeable with his negligence than he would have been for the negligence of the motorman if riding on an electric car."

In Carr v. Easton, 142 Pa. 139, 21 Atl. 822, a woman was injured by the upsetting of a sleigh in which she was riding, caused by high embankments of snow and ice and by gutters on the track. At pages 143, 144, it is said: "She was a woman, not shown to have any special knowledge of driving or horses or sleighs, who had trusted herself to the guidance of her brother in law and his friend; and we cannot say, as matter of law, that the danger was so apparent or so serious that she was called upon to exercise her own judgment in opposition to theirs. All these matters are for the jury to decide, upon their view of reasonable care and prudent conduct, under the circumstances shown by the evidence": See, also, Louisville etc. R. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Board of Commrs. of Boone County v. Mutchler, 137 Ind. 140, 36 N. E. 534; Lake Shore etc. R. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 532 763; Denis v. Lewiston etc. R. Co., 104 Me. 39, 70 Atl. 1047; Roedler v. Chicago etc. R. Co., 129 Wis. 270, 109 N. W. 88; Galveston etc. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127.

The applicable rule was very clearly stated to the jury by the learned trial judge in the following terms: "Now, briefly, you are to understand from these general charges that the husband of the plaintiff would not be liable for the negligence of the automobile driver if there was any, unless by his own failure to exercise ordinary care at the time he contributed to his injury by doing or failing to do something that he ought to have done or should not have done at the time as an ordinarily prudent person."

It would certainly be an extreme case where the court would be warranted in announcing, as a rule of law, that a passenger in an automobile was required to warn, advise, or

direct its driver, or to apply to such passenger the doctrine of "stop, look and listen." We are impressed with the statement of the learned counsel of the respondent, that ordinarily the only obligation on such passenger is to "sit tight."

There is abundant evidence tending to show that the appellant was running at a dangerous speed, much in excess of the speed limit prescribed by ordinance. Speaking upon this question, we said, in Engelker v. Seattle Elec. Co., 50 Wash. 196, 96 Pac. 1039: "To the doctrine that exceeding the lawful speed limit constitutes negligence, this court has already subscribed in the Traver case [Traver v. Spokane Street R. Co., 25 Wash. 225, 65 Pac. 284]. We prefer to adhere to the doctrine that a thing which is done in violation of positive law is in itself negligence."

We have no difficulty in arriving at the conclusion that there was abundant evidence to be submitted to the jury upon all the questions raised by the appellant. The verdict being for two thousand five hundred dollars was singularly modest, and the judgment will be affirmed.

Fullerton, Dunbar, Mount, Crow, and Chadwick, JJ., concur.

Imputed Negligence is the subject of a note to Hampel v. Detroit etc. R. R. Co., 110 Am. St. Rep. 278. The rule is now generally recognized that the negligence of the driver of a vehicle cannot be imputed to a passenger or guest riding therein: Duval v. Atlantic Coast Line R. R. Co., 134 N. C. 331, 101 Am. St. Rep. 830; Hampel v. Detroit etc. R. R. Co., 110 Am. St. Rep. 275; Cotton v. Willmar etc. Ry. Co., 99 Minn. 366, 116 Am. St. Rep. 422; Shulz v. Old Colony Street Ry. Co., 193 Mass. 309, 118 Am. St. Rep. 502; Louisville Ry. Co. v. McCarthy, 129 Ky. 814, 130 Am. St. Rep. 494, and see cases cited in the cross-reference note thereto.

The Law of the Automobile is the subject of a note to Christy v. Elliott, 108 Am. St. Rep. 212.

RYDER-GOUGAR CO. v. GARRETSON.

[53 Wash. 71, 101 Pac. 498.]

INSURANCE AGENT—Refunding Commission upon Cancellation of Policy.—When an insurance company, in accordance with its right to do so, cancels a policy and directs its agent to return the premium which has not yet been remitted to the company, and the agent does as directed, he may recover from another agent who procured the insurance that portion of the premium paid the latter as commission. (pp. 1054, 1057.)

PLEADING — Amendment of Complaint. — When There is Neither Surprise nor a Request for a continuance on account of an amendment of the complaint by leave of court at the beginning of the trial, error cannot be assigned thereon. (p. 1056.)

CUSTOM—Necessity of Pleading.—A General Custom Need not be Pleaded in order to admit evidence thereof to throw light upon a contract which is obscure and dependent upon such evidence to make it plain. (p. 1056.)

PARTIES.—A Contract of Partnership Between the Plaintiff and a Third Person is not admissible to show want of proper parties plaintiff, and to show a necessity for pleading compliance with the statute requiring the names of partners to be filed with the county clerk, if the contract is dated after the cause of action arose. (p. 1057.)

A. H. Denman and Ellis Lewis Garretson, for the appellants.

Ellis, Fletcher & Evans, for the respondent.

[72] PARKER, J. This cause was tried by the court without a jury, at the conclusion of which it made findings showing the following main facts: The plaintiff is a corporation engaged in the insurance business at Tacoma, and at the time the facts occurred upon which this action is based represented the "General Accident, Fire and Life Assurance Company." The defendants are partners, and also engaged in the insurance business at Tacoma. In August, 1907, the defendants, through the plaintiff, caused to be issued to Wilkeson Coal and Coke Company an employer's liability insurance policy in said assurance company, under an agreement between plaintiff and defendants that the defendants should receive the customary commission, in this case amounting to two hundred and sixteen dollars, and if the policy should be canceled by the assurance company, thus rendering necessary the return of the premium to the insured, the defendants should return that portion of the premium retained by them for commission. The defendants caused the policy to be delivered to the insured, collected the entire premium thereon, and paid the same to the plaintiff for the assurance com-

pany, less the two hundred and sixteen dollars commission retained by them as agreed. Having obtained an adverse report upon the risk, the assurance company canceled the policy and demanded that the plaintiff immediately pay back to the insured the entire premium and take up the policy. Thereupon plaintiff endeavored to have the company reconsider its action and continue said policy in force, but without avail. Plaintiff then demanded of the defendants the two hundred and sixteen dollars commission retained by them, so the same could be returned to the insured with the portion of the premium in its hands. This the defendants neglected to pay. This all occurred before the premium had been remitted to the assurance company by the plaintiff. Thereupon, plaintiff being required by the assurance company so to do, repaid to the insured the whole of the premium and took up the policy, and again made demand on defendants for the two hundred and sixteen dollars, which has not been paid, and this action is prosecuted to collect the [73] same. Trial was had resulting in findings and judgment against the defendants, from which they appeal to this court.

The first and principal contention of defendants is based upon their exceptions taken to the findings of the trial court as not being supported by the evidence. We have reviewed all the evidence with considerable care, and find ourselves quite in accord with the trial court's findings of the ultimate facts.

It is contended by defendants that "What plaintiff did, was to make a purely voluntary payment of an amount which plaintiff assumed was owing by the defendants to their customer," and therefore they urge that no obligation arose in favor of plaintiff as against them to pay back the commission. This argument assumes that this was in no event more than a debt from defendants to the insured, which, if true, might give their argument some force. But it is plain from the findings, and also we think from the evidence, that the assurance company had the right to cancel this policy as of the date of its issuance, if it desired. If so, it had the right to make the cancellation effective by return of the whole premium, and to do so immediately without waiting the convenience of the defendants to return the portion they had retained as commission.

For the purpose of showing the complete agreement between the plaintiff and defendants, undisputed evidence of a general custom requiring the broker to return his commission upon cancellation of the policy he procures from the insured

was introduced. And in this connection there was some evidence tending to show that it was also customary for the premium to be returned to the insured through the broker who procured the insurance, by the company or the agent above him returning the premium to him, and then he returning it to the insured with the commission he had retained. This, it is claimed, plaintiff violated, and thereby waived its claim for the return of the commission. Even if this can be regarded as part of the custom, it was not the part which legally affected the obligation on the part of the defendants to repay [74] the commission. It seems too plain for argument that the policy could only be effectually canceled by return of the entire premium to the insured, and, until this was done, there was no obligation created as against the defendants. It was the cancellation of the policy which legally created this obligation. It was not a debt due from the defendants to the insured, but to the plaintiff which represented the assurance company, it having actually paid back to the insured the two hundred and sixteen dollars commission, in addition to the portion of the premium it had received. It stands in the shoes of the assurance company so far as its rights against defendants are concerned. Defendants are not urging that the company should here be plaintiff. Even if the return premium had taken the course defendants claim the custom required, they would have been paying it back for the plaintiff to effect the cancellation of the policy. The authorities cited by defendants' counsel relate to the voluntary payment of the debt of another where the one paying it was under no obligation to do so, and where he had no legal rights depending upon the payment of it, and hence are not applicable here.

It is contended that the evidence clearly shows the plaintiff was not the agent of the assurance company, but that one Hussey is the regular local agent, and that this insurance was attempted to be consummated through his agency. There is some evidence tending to show this state of affairs, but there is also evidence showing that Hussey was then, by some sort of employment arrangement the nature of which is not plain, connected with the general insurance business of plaintiff, and that this insurance was a part of that general business. Besides, it is practically undisputed that the premium less the two hundred and sixteen dollars was paid by the defendants to plaintiff by a check made payable to plaintiff, that Hussey has never claimed this money for himself, and

that he demanded it from the defendants for the plaintiff. We think the evidence amply sufficient to warrant the court in finding plaintiff the representative of the assurance company. We deem it unnecessary [75] to discuss other evidence touching the correctness of the court's findings.

At the beginning of the trial, counsel for plaintiff, having some doubts as to the admissibility of evidence of custom under the complaint, orally asked the court for permission to amend the complaint, which was granted over the objection of defendants' counsel, which is now assigned as error. The words inserted by the amendment at that time are shown by the italics in the following quotation from the complaint. After alleging the contract for retaining commission by defendants, the complaint as amended proceeds: "It being understood and agreed, *that under the general and usual custom known to the defendants in such cases,* that if said policy was thereafter canceled by the General Accident Company, that the premium including the share of the defendants should be returned," etc. It is plain from the admission of defendants' attorneys in the record they were not surprised, and they did not ask to have any continuance of the trial on that account. We think this is sufficient reason for holding that it was not error under the liberal rules of amendment permitted by our statutes. There is, however, another reason which to our minds makes it clear that this was not prejudicial. It will be noticed by the language of the amendment that it is a general custom which is here attempted to be pleaded. We understand the rule to be that a general usage or custom need not be pleaded in order to admit evidence thereof to throw light upon a contract, the terms of which are obscure, and which is dependent upon evidence of such general custom to make it plain: 12 Cyc. 1097; Hewitt v. Week Lumber Co., 77 Wis. 548, 46 N. W. 822; Connolly v. Bruner, 48 W. Va. 71, 35 S. E. 927; Fish v. Crawford Mfg. Co., 120 Mich. 500, 79 N. W. 793.

In this case the custom was not depended upon to prove the entire contract, only that portion of it which related to the return of the commission with the balance of the premium upon cancellation of the policy—that is, the only part of the [76] contract which needs evidence of custom for its support. The evidence which followed showed conclusively that such was the general and usual custom, though there was some slight conflict as to the course such return premium and commission should take in reaching the insured. This, however,

we think has nothing to do with the legal obligation on the part of the broker to return his commission upon cancellation. What the courtesies of the situation might require as between insurance agents we are not called upon to determine. We think it plain that all the evidence which was introduced as to general custom would have been admissible without this amendment as well as with it; hence, this allowing of it by the court was in no event prejudicial. This also disposes of defendants' contention that the custom was not sufficiently pleaded.

Error is assigned based upon the court's refusal to admit in evidence a written contract of partnership between Hussey and the plaintiff. This was offered by defendants' counsel for the purpose of showing want of proper parties plaintiff, and also to show the necessity of pleading compliance with chapter 145, Laws of 1907, page 288, as to filing partner's names with the county clerk, but this contract was dated a considerable time after the matters arose, as is plainly shown by Hussey's testimony, and therefore was properly rejected by the court.

We are of the opinion that the lower court arrived at correct conclusions both as to the facts and law, and that its judgment should be affirmed. It is so ordered.

Rudkin, C. J., Crow, Gose, Chadwick, Mount, Morris, and Dunbar, JJ., concur.

Evidence of a Custom to Explain the Meaning of a Contract is not admissible unless the terms of the agreement are ambiguous: Byrd v. Beall, 150 Ala. 122, 124 Am. St. Rep. 60; Vogt v. Schienebeck, 122 Wis. 491, 106 Am. St. Rep. 989; notes to Kentucky etc. Co. v. People's etc. Co., 122 Am. St. Rep. 548; Fleet v. Hertz, 94 Am. St. Rep. 255. As to the necessity of pleading a general custom, see State v. Morton, 27 Vt. 310, 65 Am. Dec. 201; Governor for Liggatt v. Withers, 5 Gratt. 24, 50 Am. Dec. 95; Stultz v. Dickey, 5 Binn. 285, 6 Am. Dec. 411; Cortelyou v. Van Brundt, 2 Johns. 357, 2 Am. Dec. 439.

Insurance Premiums may be Recovered Back if the insurer wrongfully canceled or rejected the policy: Metropolitan Life Ins. Co. v. McCormick, 19 Ind. App. 49, 65 Am. St. Rep. 392; Summers v. Mutual Life Ins. Co., 12 Wyo. 369, 109 Am. St. Rep. 992.

SPENCER v. ALKI POINT TRANSPORTATION COMPANY.

[53 Wash. 77, 101 Pac. 509.]

RECEIVER—Authority to Bind Stockholders by Stipulation.—Where the receiver of a corporation and a number of stockholders intervene in an action against it, a stipulation entered into by him with the sanction of the court, in the nature of a compromise, binds the shareholders, and their appeal will not be considered. (p. 1063.)

BILLS AND NOTES—Parol to Explain Indorsement.—Parol Evidence is admissible to show that an indorser signed as surety, although the note recites that all the parties signing or indorsing it bind themselves as principals and not as sureties. (p. 1063.)

BILLS AND NOTES—Want of Consideration.—The Maker of a Note may show that there was no consideration for the instrument. (pp. 1063, 1064.)

CORPORATION—Authority to Become Surety on Note.—Unless the Power is expressly conferred by its charter, a corporation has no authority to become surety on a note. (p. 1064.)

CORPORATION—Estoppel to Urge Ultra Vires.—A Corporation is not estopped to urge the defense of ultra vires on the ground that it has received the benefit of the contract if the evidence of such receipt is vague and uncertain. (p. 1064.)

TRIAL—Reopening Case for Evidence—Discretion.—An Application to reopen a case to admit evidence is analogous to a motion for a new trial, and so much within the discretion of the trial court that the appellate court will not interfere except in case of a clear abuse of such discretionary power. (p. 1064.)

MORTGAGE—Default in Payment as Maturing Whole Debt.—Where a mortgage provides that on failure to pay one of the secured notes all of them shall become due, a default in payment does not ipso facto mature the whole debt. (p. 1066.)

MORTGAGE—Effect of Assignment of Notes.—A Mortgage is a Mere Incident to the notes which it secures, and an assignment of the notes ipso facto passes the security. (p. 1068.)

CORPORATION—Transfer of Note Payable to Officer.—Where a corporation executes a note to its president and manager, this throws no suspicion on his title and does not affect the bona fides of a purchaser from him. (p. 1068.)

BILLS AND NOTES—Transfer After Maturity of One Note.—Where four notes arising out of the same transaction are transferred with the mortgage securing them, the fact that the first note is due at the time of the transfer is not notice of an infirmity in the three unmatured notes, especially when the overdue note bears indorsement of a payment made after maturity, and the statute defines notice of an infirmity as actual knowledge of the defect or of such facts as to show bad faith. (pp. 1068, 1069.)

CORPORATION—Estoppel to Repudiate Act of Officer.—A corporation of necessity acts through its officers and agents, and where it has named a president and general manager, neither it nor its creditors will be heard to dispute his acts, which are not ultra vires, when a person has dealt with him with every appearance of good faith. (p. 1070.)

BILLS AND NOTES.—A Transferee of Notes After Dishonor as security for the payment of an antecedent debt is not a bona fide holder. (p. 1070.)

R. P. Oldham, H. R. Clise, Farrell, Kane & Stratton and James A. Snoddy, for the appellants.

George W. Salusberry, for the respondent Spencer.

[78] GOSE, J. The respondent Alki Point Transportation Company is a Washington corporation, and during the times hereinafter stated was engaged in equipping and operating a pleasure resort at Alki Point, near Seattle. The respondent C. H. Spencer, at the times the several liabilities hereafter considered arose, was its president and general manager. The American Savings Bank and Trust Company and the Washington [79] Trust Company are corporations engaged in the banking business at Seattle. Pending the litigation, Josiah Thomas was appointed receiver for the Alki company. Anderson and Coleman are stockholders in the last-named company. On September 12, 1905, the appellant the Washington Trust Company made a loan of $5,000, and received as evidence thereof a note of that date for such sum, signed by the said C. H. Spencer, and indorsed on the back thereof: "Alki Point Transportation Company, by C. H. Spencer, Pres., George V. Wilkes, Secy." Such note recited: "For value received, each and every party signing or indorsing this note hereby waives presentment, demand, protest and notice of nonpayment thereof, binds himself thereon as a principal, not as a surety." On such date the bank credited the account of the Alki company with $5,000, at the request of either Spencer, Wilkes, or the bookkeeper of the Alki company. On the same date the Alki company, by its president and secretary, drew a check to such bank for $5,000, and the same was thereupon placed to the credit of C. H. Spencer. At the time of the execution and delivery of such note, Spencer pledged to such bank, as security for such loan, fifteen hundred and forty-three shares of stock of the Alki company, then standing in his name. On February 24, 1906, the stockholders and directors of the Alki company, by a unanimous vote, adopted the following resolution:

"Resolved, that for the purpose of obtaining money to pay off the present indebtedness of the company, and for the purpose of further improving, developing and equipping the property as may be necessary in the conduct of its business, that we borrow the sum of $10,000, and, in order to raise such sum and to evidence said indebtedness, we hereby authorize the president and secretary of this company to sign, seal and issue its four promissory notes, each for the

sum of $2,500, each to bear interest at the rate of eight per cent per annum, payable semi-annually, and said notes to be payable respectively six months, one year, eighteen months and two years after date, and that to secure the payment of the principal and interest of said notes, it is further resolved, [80] that the president and secretary of this company sign, seal, acknowledge, execute and deliver a mortgage covering all the present and in the future to be acquired property of this company, real, personal and mixed, of whatever kind or nature, and all its rights, privileges and franchises which may be hereafter acquired."

On the same day the Alki company, by its president and secretary, executed and delivered to I. N. Just, four promissory notes, each drawn for the sum of $2,500, due respectively in six, twelve, eighteen and twenty-four months. The four notes were fair upon their face, and identical except as to the date of maturity. There was no reference on either note to any other note, or to any mortgage. At the same time, and to secure the payment of the indebtedness evidenced by such notes, the Alki company, by its president and secretary, made, executed and acknowledged and delivered to such payee a mortgage upon all of its property, in conformity to such resolution. The mortgage recited that its execution was authorized by its articles of incorporation, the laws of the state, and its stockholders and trustees, "for the purpose of further improving, developing and equipping" its property. It further recited: "But in case default be made in the payment of the principal or interest of said promissory notes or any part of, or either of them, when the same shall become due and payable according to the terms and conditions thereof, or if default be made in any other of the covenants and conditions hereof, then the party of the second part, his heirs, executors, administrators and assigns, are hereby empowered to sell the said premises and property with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the whole of said principal and interest whether the same shall be then due or not."

The notes also provided that a failure to pay interest as it became due should mature both principal and interest at the option of the holder. There is no evidence that Just gave any [81] value for the mortgage. The mortgage was recorded March 14, 1906. On March 29th, Just assigned the notes and mortgage to Spencer and the assignment was recorded March

31st, following. On September 20, 1906, the appellant the American Savings Bank and Trust Company loaned to C. H. Spencer the sum of $6,000. At such time Spencer assigned and delivered to it the notes and mortgage of the Alki company, as security for such sum and for such further advances as it should make. This assignment was recorded January 5, 1907. October 2, 1906, it advanced to Spencer on such security a further sum of $1,500. At the time it made the loan of $6,000, the note first maturing was overdue and had the following indorsement: "Paid $1,000, August 23, 1906. Paid $40 interest, August 23-06. Paid $400 September 10, 1906."

November 14th, following, Spencer commenced a suit for the foreclosure of the mortgage, alleged its provisions in case of default, and that all of the notes were due. He also alleged that he was the owner and holder of the mortgage. December 12th, the appellants Coleman and Anderson, as stockholders of the Alki company, filed their complaint in intervention wherein they affirmatively pleaded that the notes and mortgage were in fact made in the name of Just, but for the benefit of Spencer; that the actual amount due to Spencer from the Alki company at the time of the execution of the notes and mortgage was about $3,247.15; that at such time the company was unable to pay its obligations in the regular course of business. February 21, 1907, the appellant the American Savings Bank and Trust Company, by leave of court, filed its complaint in intervention, and alleged the making of the loan and the assignment of the notes and mortgage to it as security as heretofore stated. It further alleged that it recognized the interest of the plaintiff in the mortgage subject to the assignment, and that it desired the foreclosure of the mortgage. These matters were affirmatively pleaded. Through inadvertence, it would seem, it admitted the paragraph [82] of the complaint which alleged that the plaintiff was the owner of the notes and mortgage. February 27th, following, the appellant the Washington Trust Company filed its complaint in intervention. It pleaded that the $5,000 note, to which reference has been made, was a loan to the Alki company and Spencer; that subsequent to the assignment of Spencer to the American Savings Bank and Trust Company, and on January 6, 1907, the former assigned to it his right, title, and interest in the notes and mortgage subject to the former assignment. Josiah Thomas, as receiver of the Alki company, filed his complaint in intervention. He pleaded af-

firmatively, in substance, that Spencer was largely indebted to the Alki company on unpaid subscriptions to its capital stock, and for money that he had received and not accounted for; that Just took the notes and mortgage as an accommodation to Spencer; that the Alki company was insolvent. Issues were then joined by the several parties, and the case wherein the receiver was appointed was consolidated with this cause, and they thereafter proceeded as one action. Thereupon said cause was tried and submitted to the court for its decision, and all the parties to the action, except the appellants Coleman and Anderson, stipulated that for the purpose of "this judgment," the court should find that, before the commencement of the suit, Spencer had advanced and paid for the Alki company, and that there was due to him from such company on such advances the sum of $7,000, and the court so found and entered judgment accordingly.

The court also found that there was no consideration for the notes and mortgage; that the appellant the American Savings Bank and Trust Company took the assignments for the note and mortgage as collateral security after the first of such notes was due; that at the time of the assignment the Alki company was not indebted to Spencer thereon; that such notes and mortgage were fraudulent and void; that the assignment of Spencer carried with it his indebtedness against the Alki company in favor of the American Savings Bank and [88] Trust Company and Washington Trust Company, as security for their loans, first to the American bank, and, second, to the Washington company; that there was due to the former company from Spencer $7,500 and interest, and to the last-named company $4,465 and interest, at the time of the commencement of the action; that the note of the Washington Trust Company did not create an indebtedness against the Alki company; that the latter's name was placed on the back of such note without authority, and that it received no consideration for such indorsement, as the Washington Trust Company well knew. The court then found that certain claims had been proved against the estate of the Alki company; whereupon the court drew and filed its conclusions of law and entered a decree according to such findings and conclusions.

As we have stated, all the parties to the appeal except Coleman and Anderson, who appeared as stockholders of the Alki company, stipulated in the court below, for the purpose of the judgment, that the indebtedness owing from the Alki com-

pany to Spencer was $7,000, and the decree was entered for his assignees in this amount. The appellants Coleman and Anderson are undertaking to assign error as to this item. The appellants, other than the receiver, urge that they are bound by the stipulation of the receiver, and that they have no appealable interest. We think that this view must obtain.

"The receiver of an insolvent corporation represents not only the corporation, but also the stockholders and creditors, and it is his duty to assert and protect the rights of each of these several classes of persons": Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.

"The court appointing a receiver may authorize him to compromise claims and suits against the estate if best for the interest of all parties concerned": 23 Am. & Eng. Ency. of Law, 2d ed., sec. 1080.

This stipulation was entered into with the sanction of the court, to avoid the expense and delay of a reference, and is 84 in the nature of a compromise. For these reasons the appeal of Coleman and Anderson will not be considered.

We will next consider the appeal of the Washington Trust Company. We have noticed that its note was signed by Spencer, and indorsed on its back by the Alki company. Later there were two or three renewals, in one of which the note was signed by Spencer only. In the last renewal the note was signed the same as the first note. The fact that the Alki company indorsed the note, and the further fact that in a renewal it did not sign at all, creates a strong inference that it signed only as surety. In addition to this, both the president and secretary of the Alki company testified that it indorsed the name of the company on the note as surety at the request of the bank. The evidence that it so signed strongly preponderates. The negotiable instruments act (Laws 1899, p. 345, sec. 16, subd. 6), provides: "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

It is argued that the note recites that all the parties signing or indorsing it bind themselves as principals and not as sureties, and therefore that parol evidence will not be heard to dispute it. It might as well be urged that the recital in an instrument to the effect that it was given for a valuable consideration foreclosed the parties to it from pleading either that it was conceived in fraud or that it was given without any value or consideration.

"It has been frequently held that a person signing a note on its face may show that he signed it as a surety and not as a principal": Tacoma Mill Co. v. Sherwood, 11 Wash. 492, 39 Pac. 977. See, also, Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724. The maker may also show there was no consideration for the instrument sued on.

The appellant has directed our attention to the case of Donohoe-Kelly Banking Co. v. Puget Sound Sav. Bank, 13 [85] Wash. 407, 52 Am. St. Rep. 57, 43 Pac. 359, 942. This case merely holds that one who writes his name on the back of a promissory note before delivery is prima facie a joint maker.

"A corporation has no power to enter into a contract of suretyship or guaranty, or otherwise lend its credit to another, unless the power is expressly conferred by its charter, or unless such a contract is reasonably necessary or is usual in the conduct of its business. Ordinarily the simple act of becoming surety or guarantor for the contract or debt of another person or corporation is not within the implied powers of a corporation": 7 Am. & Eng. Ency. of Law, 2d ed., p. 788. See, also, Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.

There is no evidence that the Alki company derived any power from its charter to engage to pay the debt of another, nor is there any evidence that it had theretofore entered into such engagements. It is also urged that a corporation, having received the benefit of such a contract, will not be heard to urge that it was ultra vires. This rule may be conceded in proper cases. It is unavailing to appellant. The evidence that it received a benefit, and, if so, to what extent, is too vague and uncertain to become the foundation of any right.

It is further urged that the court abused its discretion in refusing to reopen the case to admit evidence upon the part of the appellant. The case was commenced in November, 1906, the trial was had in December, 1907, and the decree entered June 27, 1908. The affidavit of counsel to reopen the case states that, after the trial of the case and on December 22, 1907, the president of the appellant returned from Europe, after an absence of about two months; that he did not know that the president knew anything about the facts prior to the close of the trial. It is the duty of a litigant to advise his attorney as to the facts of his case. Such an application is analogous to a motion for a new trial, and is so much within the discretion of the trial court that we

will not interfere except in cases where there has been a clear [86] abuse of such discretionary power. In view of the record as stated, we cannot say that there was such abuse of discretion: Kreielsheimer v. Nelson, 31 Wash. 406, 72 Pac. 72. We conclude, therefore, that the Alki company indorsed the note as surety only, and without authority, and that the Washington company knew this fact.

We will next consider the appeal of the American Savings Bank and Trust Company. We have seen that the notes and mortgage were held to be void, for the reasons (1) that they were made to Just for the accommodation of Spencer, without any value or consideration; (2) that the first note was due at the time of their negotiation, and that the notes and mortgage, read together, show that the four notes arose out of one transaction, and that notice of the dishonor of the first note was constructive notice of any infirmity attaching to the notes not due. We have seen that the overdue note, at the time the notes were negotiated to the appellant, had an indorsement of the interest and $1,000 as paid on the principal on August 23, 1906, and $400 as paid September 10, 1906, which was ten days before they were negotiated to this appellant. That these payments had been made as of such dates has not been denied. The fact that the appellant took the notes and mortgage in the utmost good faith and advanced Spencer $7,500, relying upon their being a valid and subsisting obligation of the Alki company, is not questioned in any way other than to invoke the rule that, under all the circumstances of the case, the notice that the first note was overdue was notice of whatever vice existed in the consideration for the other notes. Our negotiable instruments act (Laws 1899, p. 350, sec. 56), defines what constitutes notice, as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts as his action in taking the instrument amounted to bad faith."

[87] The receiver relied on the following authorities for an affirmance of the case as to this appellant: Harrington v. Claflin & Co., 91 Tex. 294, 42 S. W. 1055; Lybrand v. Fuller, 30 Tex. Civ. App. 116, 69 S. W. 1005; Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907. The Harrington case (91 Tex. 294, 42 S. W. 1055) was a suit upon five promissory notes, one of which was overdue when they were negotiated. On the face of each note it was stated that it was given for a

part payment for a certain parcel of land consisting of two hundred acres, which was described in the indorsement. The language of the statement was the same on each note. At page 301, the court said: "What we decide upon this point is that, all of the notes being together and acquired at the same time by the assignee, it appearing in each note that they were parts of one consideration and constitute one contract, the dishonor of the first note, being overdue and unpaid, charged Claflin & Co. with notice that the same defense existed in favor of the makers against the notes not due as against the overdue note."

In the Lybrand case (30 Tex. Civ. App. 116, 69 S. W. 1005), the notes showed upon their face that they were given as a part consideration for the conveyance of certain land, and each note stipulated that the failure to pay any one of the notes when due should mature the others. They were negotiated after the first two notes were past due, and the court said the third note had "matured by contract, making the failure to pay any of the notes when due mature the others. Thus all of the notes, under their very terms, were past due when they were conveyed to the appellee." The court concluded that the indorsee under such circumstances was not an innocent purchaser of the notes, "he having acquired them after maturity." In the Stoy case (31 Ind. App. 643, 68 N. E. 907), at page 909, the court, speaking upon this question, observed: "The mortgage contained a clause to the effect that a failure to pay any one of said notes at maturity then all of them were due and collectible. Appellant took an assignment of the notes and mortgage chargeable with a knowledge of that provision of the mortgage, and he was bound to know [88] that by the terms of the mortgage both of the notes were past due."

We have adopted the view that such a provision in a mortgage does not mature the whole debt: Coman v. Peters, 52 Wash. 574, 100 Pac. 1002. In Boss v. Hewitt, 15 Wis. 285, four notes had been given, due respectively in one, two, three, and four years. They were fair on their face and secured by one mortgage, and negotiated when the first note and interest on each of the others were past due and unpaid. The court said: "And we do not think that a purchaser of negotiable notes before maturity can be held chargeable with notice of any defect in their consideration, from the mere fact that another note, secured by the same mortgage, was overdue and had not been paid."

It inferentially appeared that these notes were made upon the same date. In Patterson v. Wright, 64 Wis. 289, 25 N. W. 10, three notes had been given. Two of the notes, not due, were negotiated after one of the notes and the interest on the others were past due. The purchaser knew of the existence of the overdue note. At page 291 the court said: " Whether the plaintiff had knowledge of any infirmity in the notes, by having in his hands for collection the $500 note which was overdue, or by the failure to pay interest on the notes when due. This question is, in effect, already answered by the fact that the answer alleges no fraud which could affect the notes, but only alleges a setoff. But, conceding that there was fraud in the transaction, the fact that another note given for the same consideration was due, or that interest on the notes remained unpaid, is no such notice as to affect the bona fides of the plaintiff's purchase of the notes in suit."

In Bank of Edgefield v. Farmers' Co-operative Mfg. Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201, the court quoted approvingly from Daniel on Negotiable Instruments, section 787, as follows: "Where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored where one is overdue and unpaid."

[89] In Noyes v. Landon, 59 Vt. 569, 10 Atl. 342, the court, at page 346, treats this question in the following language: "But in view of the general rules that prevail, and are applicable for the protection of the bona fide holders of current negotiable paper, we conclude that Noyes obtained a title discharged of all equities to the eleven notes that were transferred to him while current, and that Landon's defense is only applicable to the note that was past due." This view is approved in an opinion by Mr. Justice Cooley, in Hull v. Swarthout, 29 Mich. 249.

Where bonds are negotiated to an innocent purchaser for value, with the unpaid interest coupons attached, the purchaser takes them discharged from all equities existing in favor of the maker: Long Island Loan & Trust Co. v. Columbus etc. R. Co., 65 Fed. 455; Cromwell v. County of Sac, 96 U. S. 51, 24 L. ed. 681; Indiana etc. R. Co. v. Sprague, 103 U. S. 756, 26 L. ed. 554; Bank of Edgefield v. Farmers' Co-operative Mfg. Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201. In the Long Island case (65 Fed. 455), thirty-six bonds, regularly issued, each of the denomination of $1,000, each having two unpaid interest coupons attached, fraudulently pledged by the president of the road to an innocent purchaser

for value to secure a personal debt, were held to have passed to the purchaser free from the equities of the maker of the bonds. Speaking to this question, in the Cromwell case (96 U. S. 51, 24 L. ed. 681), the court, through Mr. Justice Field, at pages 57, 58, say: "The nonpayment of an installment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity, a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities. The nonpayment of the installment of interest represented by the coupons due at the commencement of the month in which the purchase was made by Clark was a slight circumstance, and, taken in connection with the fact that previous coupons had been paid, was entirely insufficient to excite suspicion even of any illegality or irregularity in the issue of the bonds."

[90] If nonpayment of interest is insufficient to admit evidence of antecedent equities, the same rule would seem applicable to a failure to pay a part of the principal of one of the notes at maturity. The court observed in the last case that the payment had only been delayed from cause of a temporary nature. It would seem to follow that a payment of the interest and a part of the principal on the past due note at its maturity, and the payment of a part of the principal after its maturity, would strongly suggest that the maker was regarding it as a binding obligation. Moreover, the mortgage is a mere incident to the note. The assignment of the notes ipso facto passes the security. Had Spencer only assigned the notes, it could not be successfully urged that the bank had notice of dishonor, under any of the authorities to which our attention has been directed. If overdue interest, because the interest is only an incident, does not import notice of dishonor, how can the mortgage, under the circumstances in this case, be given any greater force? Again, Spencer, the holder, was the president and manager of the maker of the notes. As was said in Indiana etc. R. Co. v. Sprague, 103 U. S. 756, 26 L. ed. 554, at page 760: "The fact that he was an officer of the company did not of itself preclude him from dealing in them, or throw the slightest suspicion on his title."

Indeed, it would seem as the accredited agent of the maker, his acts amounted to an implied representation on its part that the notes were a valid and subsisting obligation to the full amount of the three notes that had not matured. Nor

can the maker complain that the bank relied upon the assurance of such manager. It was holding him out to the world as a man worthy of trust and confidence.

"Part payment of the bill or note after its maturity, by the drawer or indorser, is an acknowledgment of liability, and therefore, alone and unexplained, is presumptive evidence that the liability was duly fixed according to law": 2 Daniel on Negotiable Instruments, 4th ed., p. 203.

[91] Looking at the question from the standpoint of reason, we are strongly impressed with the view that the payment indorsed on the note after its maturity would allay whatever apprehension might have arisen in the minds of the officers of the bank from the fact that the one note had matured and was not paid. Moreover, the evidence shows that the Alki company intended to have the notes and mortgage made to Just notwithstanding the fact that such course was not in strict accord with the resolution. When Spencer was on the witness-stand, he was inquired of and answered as follows: "Q. At the time that this mortgage was made to Mr. Just, it was the understanding and agreement between the incorporators that it was to be assigned by Mr. Just to you, was it not? A. Between the incorporators, the stockholders, the members of the corporation."

Counsel for the receiver urges that this answer of the witness was intended by him as a question. We do not so understand it, nor do we think that such an inference can be fairly drawn from the question and answer. It is reasonable to conclude that the notes and mortgage were made to Just and assigned to Spencer with the knowledge of the maker, and with the intention upon its part that he should negotiate them for its benefit. As against an innocent third party, it should not be heard to complain that he used them for his own advantage. But, aside from the status of the obligation as between the makers of the note and Just and Spencer, we think that the better rule is that, under all the surrounding circumstances, the bank took the three notes that were not due in good faith and for value and without notice. Indeed, it would seem that no other conclusion could reasonably be reached, if any effect is to be given to the section which we have quoted from our negotiable instruments act. A corporation of necessity must act through its officers and agents, and where it has named a president and general manager, neither it nor its creditors will be heard to dispute his acts when a party has dealt with him as in this case, with every

appearance of good [92] faith, and where such act is not ultra vires to the purpose of its incorporation.

The receiver is now urging that we should review the finding and decree as to the amount the Alki company was indebted to Spencer, and that his stipulation was only intended to be effective in the trial court as shown by the words "for the purpose of this judgment." In such cases this is not a court of original jurisdiction. We cannot say that the court committed an error in entering a decree for an amount which had been agreed upon by the interested parties.

The Washington Trust Company took its assignment from Spencer after the commencement of the suit and after the dishonor of all the notes, as security for the payment of an antecedent debt. It cannot, therefore, claim under the assignment. The disposition we have made of the case extinguishes the claim of Spencer against the Alki company.

The judgment will be affirmed as to Coleman and Anderson and the receiver, and as to the Washington Trust Company, except that it will take nothing through Spencer. The judgment will be reversed as to the American Savings Bank and Trust Company, with directions to the trial court to enter a decree for the full amount of its notes, principal and interest, together with one reasonable attorney's fee in its behalf.

In view of the fact that all the mortgaged property has been converted into money and is in the hands of the receiver, the court will direct him to pay such demand as a first preferred claim. The other claims will be paid in the order fixed in the original judgment. The American Savings Bank and Trust Company will recover its costs on appeal.

Rudkin, C. J., Fullerton, Chadwick, Crow, Mount and Dunbar, JJ., concur.

Morris and Parker, JJ., took no part.

Intervention by Receivers and persons interested in the receivership is discussed in the note to Walker v. Sanders, 123 Am. St. Rep. 303.

The Effect of Writing One's Name on the Back of a Note before delivery is discussed in the note to Cadwallader v. Hirshfeld, 72 Am. St. Rep. 676. In some jurisdictions a person so signing is regarded, at least prima facie, as a maker: Dow Law Bank v. Godfrey, 126 Mich. 521, 86 Am. St. Rep. 559; Camp v. First Nat. Bank, 44 Fla. 497, 103 Am. St. Rep. 173; Nashua Sav. Bank v. Sayles, 184 Mass. 520, 100 Am. St. Rep. 573; Cherry v. Sprague, 187 Mass. 113, 105 Am. St. Rep. 381; Camp v. First Nat. Bank of Ocala, 44 Fla. 497, 103 Am. St. Rep. 173; Lyndon Sav. Bank v. International Co., 78 Vt. 169, 112 Am. St. Rep. 900. But according to Harnett v. Holdredge, 73 Neb. 570, 119 Am. St. Rep. 905, one who puts his name

in blank on the back of a note, payable to the maker or order, before it is negotiated, and before it is indorsed by the maker, is an indorser and not a joint maker, if, when negotiated, the maker's name appears first on the back of the note, and his liability cannot be varied by parol evidence.

The Purchaser of an Overdue Negotiable Instrument is ordinarily not regarded as a bona fide holder, but there may be exceptions to this rule: See Gardner v. Beacon Trust Co., 190 Mass. 27, 112 Am. St. Rep. 303, and cases cited in the cross-reference note thereto.

NORTHCRAFT v. BLUMAUER.

[53 Wash. 243, 101 Pac. 871.]

LEASE OF RIGHT OF WAY — Cancellation on Ground of Waste.—To gravel a leased right of way for a logging road when the agreement is to timber it is not such waste as will authorize a cancellation of the lease, if the rental value of the land has not been impaired thereby nor the fee materially affected, and the lessee has benefited the property by draining it, and can be compelled to remove the gravel or respond in damages at the expiration of the lease. (p. 1074.)

PAROL LEASE — Right of Lessor to Repudiate. — A Parol Lease of a logging right of way for more than one year is voidable only, and if the lessee has taken possession with the consent of the lessor, constructed a road at heavy expense, benefited the land by draining it, and purchased timber of the lessor primarily to secure the right of way, the latter cannot terminate the lease and recover possession. (p. 1074.)

Troy & Sturdevant and John M. Wilson, for the appellants.

T. M. Vance, for the respondents.

243 GOSE, J. The appellants commenced this action for the purpose of ejecting the respondents from a certain right of way across their land. The complaint charges, in substance, that Charlotte E. Northcraft is the owner of a life estate in a certain donation claim, with remainder in fee to her minor son, her coplaintiff, of whom she is guardian; that on August 1, 1906, she, acting for herself and her ward, but without permission from the court, made an oral lease to respondent I. Blumauer of a right of way across such land; that pursuant to the lease, the respondents entered into possession of such right of way; that more than thirty days prior to August 244 1, 1907, she served notice upon the respondents of the termination of the lease, and demanded possession of such right of way on August 1, 1907, and that they have refused to deliver such possession.

The respondents pleaded affirmatively (1) that about July 1, 1906, the respondent Isaac Blumauer, as president of the Blumauer Logging Company, for the purpose of procuring a right of way for a logging railroad across such land, agreed with the appellant C. E. Northcraft, and she with him, that, in consideration of $300, she would sell certain timber, and that for a yearly rental of $25 she would permit the respondents to construct and operate a railroad logging road across such premises for a period of ten years, such way to be selected off the cultivated land; that the respondents slashed their right of way in accordance with such agreement; that after such right of way had been slashed, the said Blumauer and C. E. Northcraft viewed the same, and that she then consented to the right of way thus chosen; that thereafter and about August 1, 1906, in pursuance of the contract, the respondents paid her the sum of $325, being payment for the timber and the first year's rental for the right of way; that thereafter at large expense the respondents constructed their logging road across such premises and along the route which she had examined and agreed to; that in so doing, the land being a marsh, they were compelled to place a part of the road upon a trestle and a part thereof upon a gravel-bed; that they constructed a spur to the timber purchased from the appellants, for the purpose of removing such timber; that in the building of the road they constructed and opened ditches along the right of way and laterals about one mile in length for drainage purposes; that such ditches reclaimed a large part of such land and constitute a permanent improvement of the same; that the cost of such ditches was $200; that thereafter the appellants objected to a continuation of such right of way at a point two thousand eight hundred and fifty feet from the north side of their land, and the [245] placing of gravel thereon, and it was then agreed between appellants and respondents that appellants would ratify all the work theretofore done and let the respondents have the right of way as constructed for the period of fifteen years, at the yearly rental of $50, and that the respondents could at such point continue their line through the remainder of appellants' property so that the logging road could be used for the removal of other timber which they owned, and that, relying thereon, they constructed such road prior to the commencement of this suit; that it was also a part of such agreement that respondents should remove all the gravel on the first six hundred foot spur, and all the gravel between such change

along the main line to the east line of appellants' premises, the first six hundred feet to be removed immediately after the respondents shall have removed the timber purchased from the appellants, and the other when directed by a decree of the court; that all the timber purchased from the appellants has been cut, but a part thereof has not been removed; that the respondents are engaged in the mill and logging business, have a large capital invested therein, and that a cancellation of such lease would cause them irreparable injury.

Issue was joined on the new matter pleaded in the answer. The cause was tried to the court; whereupon it entered a decree in favor of the respondents, which is in part as follows: "It is ordered, adjudged and decreed that the defendants are entitled to the use of the right of way used as a logging railway across the premises of plaintiffs according to the description thereof contained in the pleadings in the cause." From such decree, to which suitable exceptions were taken, this appeal is prosecuted. There were no findings of fact or conclusions of law other than the foregoing excerpt from the decree.

A careful reading of the evidence discloses that the respondents entered upon the land and constructed a standard gauge logging railroad some three thousand two hundred feet in [246] length, at an expense of $5,000, the greater part of which was upon the line agreed to by the appellants; that in the building of the road they constructed drainage ditches at an expense of about $200, which reclaimed several acres of land and augmented both its rental and permanent value; that they paid the appellants $300 for the timber and $25 for the first year's rental for the right of way, and at the proper time tendered them $50 as rental for the second year, in accordance with the alleged second agreement; that the appellants' land is situate between the respondents' sawmill and a large body of their timber; that, as the appellants knew, the respondents purchased the appellants' timber only as an incident to the procuring of the right of way. It may also be gathered from the evidence that the respondents agreed to timber the right of way, and that the graveling was done without appellants' consent. The evidence does not show that the graveling impaired the rental value of the land, or that it materially affected the fee. We do not think it is such waste as would authorize a cancellation of the lease: 30 Am. & Eng. Ency. of Law, 2d ed., 239.

The appellants urge that they can terminate the lease and recover possession of the right of way under the rule announced in Watkins v. Balch, 41 Wash. 310, 83 Pac. 321, 3 L. R. A., N. S., 852, Richards v. Redelsheimer, 36 Wash. 325, 78 Pac. 934, Dorman v. Plowman, 41 Wash. 477, 83 Pac. 322, and Snyder v. Harding, 38 Wash. 666, 80 Pac. 789. A parol lease for a longer period than one year, where the lessee has taken possession with the consent of the lessor, is only voidable, and it will not be terminated at the instance of the landlord when such course would be inequitable: Watkins v. Balch, 41 Wash. 310, 83 Pac. 321, 3 L. R. A., N. S., 852. As was said in that case: "This on the principle that it would be permitting the statute to perpetrate, rather than prevent, frauds."

A strict application of the statute would in this case be a manifest injustice to the respondents. They purchased the appellants' timber primarily for the purpose of securing the [247] right of way. With the consent of the appellants they have expended a large sum of money in the construction of a logging railroad. The evidence leaves it exceedingly doubtful whether the drainage has not benefited the land in excess of the damage sustained by the graveling of which complaint is made. If timely application had been made, the graveling would have been enjoined: 30 Am. & Eng. Ency. of Law, 2d ed., 293. The respondents can be required in a proper action to remove the gravel or respond in damages at the expiration of the lease. This will afford a sufficient remedy to the appellants, and will not deny the respondents the benefit of either their contract or the money which they have expended pursuant to it. The trial court had the benefit of the presence of the witnesses, and presumably adopted the evidence most favorable to the respondents. However, the decree should have been in favor of the respondents for the leasehold period only. It was not so limited, and, in the absence of a finding, we are not advised as to the court's view as to the life of the lease. We do not think the respondents have established the second contract by a preponderance of the evidence. In view of the fact that the minor was fourteen years of age at the time of the making of the lease, we are impressed with the appellants' testimony that the lease was for seven years only.

The judgment will therefore be modified so as to give the respondents the benefit of the right of way until August 1,

1913, at the yearly rental of $25. The appellants will recover their costs.

Rudkin, C. J., Fullerton, Chadwick and Morris, JJ., concur.

Waste is Whatever Tends to the Destruction of the inheritance or to its depreciation in value, and may be committed of land as well as in houses and timber: Wilds v. Layton, 1 Del. Ch. 226, 12 Am. Dec. 91; Smith v. Sharpe, Busb. 91, 57 Am. Dec. 574. It is the abuse or destructive use of property by him who is not the absolute owner: Duvall v. Waters, 1 Bland Ch. 569, 18 Am. Dec. 350; Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891.

Parol Leases are discussed in the note to Wallace v. Scoggins, 17 Am. St. Rep. 752. According to Goodman v. Clover, 91 Minn. 438, 103 Am. St. Rep. 517, if a lease is invalid under the statute of frauds, but the tenant takes possession and raises crops, he becomes a tenant at will, and the tenancy can be terminated only in the manner prescribed by law. For other authorities on the force and effect of parol leases, see Laroussini v. Werlein, 52 La. Ann. 424, 78 Am. St. Rep. 350; Huntington v. Parkhurst, 87 Mich. 38, 24 Am. St. Rep. 146; Coudert v. Cohn, 118 N. Y. 309, 16 Am. St. Rep. 761.

WETZLER v. NICHOLS.

[53 Wash. 285, 101 Pac. 867.]

DEEDS — Sufficiency of Description — Extrinsic Evidence. — Where an addition to a city contains twelve blocks, each having sixteen lots numbered from 1 to 16 consecutively, a deed to lots 7 and 8 in such addition without specifying the block is not void for uncertainty, when the grantor has never had any interest in but one of the blocks, for the defect is latent and subject to parol explanation. (p. 1077.)

NOTICE — Facts Putting upon Inquiry. — Whatever is Notice Enough to excite attention, put a person on guard, and call for inquiry is notice of everything to which an inquiry might lead. When one has sufficient information to lead him to a fact, he is deemed conversant of it. (p. 1079.)

VENDOR AND VENDEE—Defective Description in Record as Notice.—The record of a deed of lots 7 and 8 in an addition without naming the block puts a subsequent purchaser on notice if the grantor owned lots of that number only in one block of the addition. (p. 1079.)

Charles M. Fouts and Kitt Gould, for the appellants.

Roberts & Hulbert, for the respondent.

285 MOUNT, J. This action was brought by the plaintiff to remove a cloud from the alleged title to lot 8, in block 5,

Cove addition to Seattle. The defendants, E. D. Nichols and wife, allege the title in themselves to an undivided one-half interest in this lot, and pray for a partition thereof. After a trial, the court found that the plaintiff was the owner in fee, and that defendants were not innocent purchasers and had no interest in the lot. A decree was entered quieting the plaintiff's title. The defendants have appealed from that decree.

The facts are as follows: It is conceded that the respondent [286] is the owner of an undivided one-half interest in the lot, acquired by mesne conveyances from the heirs of the Noah Flickinger estate. The other half of the lot was conveyed by the heirs of said estate to J. W. Rayburn, and by Rayburn, without consideration, to his stepson, W. G. Alexander. Thereafter, on June 4, 1907, J. W. Rayburn and wife and W. G. Alexander intended to convey lots 7 and 8, in block 5, Cove addition to Seattle, to one M. M. Gleason, but the scrivener who prepared the deed, when writing the description in the blank form of the deed, described the lots as follows: "Lots seven (7) and eight (8) in Cove addition to the city of Seattle, Washington." This deed was executed, delivered and filed for record on the same day. Respondent, by mesne conveyance, acquired the whole interest of M. M. Gleason in the lot. In the month of July following the execution of the deed of June 4th, it was discovered that the description in the deed of June 4th was deficient because the block number was not stated. The scrivener who prepared the deed thereupon prepared another one, properly describing the property, and then requested Mr. Rayburn to execute the same for the purpose of correcting the former deed. Mr. Rayburn refused to do so unless he was paid the sum of $200. He afterward contended that lot 8 should not have been included in the deed, and finally prepared a deed himself, describing the property as follows: "Lot seven (7) in block 5, in Cove addition to the city of Seattle in said county and state. This deed is made for the purpose of correcting a mistake in that certain deed made by said first parties to said second party on the fourth day of June, 1907, and recorded on the fourth day of June, 1907." This deed was executed, delivered and recorded on August 21, 1907, with the understanding when it was delivered that the owners of lot 8 would "fight it out" with him as to that lot. Thereafter, on September 19, 1907, W. G. Alexander, for a consideration of five hundred dollars, conveyed an undivided one-half interest in

lot 8, in block 5, to the appellant E. D. Nichols, who now claims to be an [287] innocent purchaser without notice of the claim of the respondent.

Cove addition to Seattle contains twelve blocks, numbered from 1 to 12 consecutively, and each block contains sixteen lots, numbered from 1 to 16 consecutively. It is conceded that all conveyances with reference to lots 7 and 8 in Cove addition, in which either Mr. Rayburn or Mr. Alexander was interested, referred to block 5 of that addition, and that they never had any interest in any block in this addition except block 5. The conveyances above referred to were all of record when appellant Nichols purchased the undivided one-half interest in the lot in question. The controlling questions in the case are: Was the deed of June 4, 1907, above referred to, void for uncertainty? If not void, was that deed sufficient to put the appellant Nichols upon notice? The deed of June 4, 1907, executed by Rayburn and wife and Alexander, describes the property as "lots seven (7) and eight (8) in Cove addition to the city of Seattle." There appears to be no fatal defect upon the face of this deed, or of the description. If Cove addition consisted wholly of lots or wholly of numbered tracts, this description is clearly sufficient to convey the lots 7 and 8 therein mentioned. We must, therefore, look outside of the deed itself to find any uncertainty or irregularity or infirmity. It follows that the infirmity in the deed, if any at all existed, is a latent and not a patent one, and subject to explanation by parol evidence: 1 Ency. of Ev. 844.

In Newman v. Buzard, 24 Wash. 225, 64 Pac. 139, this court said: "Parol evidence is, and must of necessity be always, admissible to identify the property described in and conveyed by a deed, to ascertain to what property the particulars of description in the deed apply."

Looking outside of the deed, the facts appear that Cove addition to Seattle consists of twelve blocks; that each block contains sixteen lots, numbered from 1 to 16, inclusive. There [288] were therefore twelve lots in that addition numbered 7 and 8. If the grantors in the deed had owned other lots numbered 7 and 8 in other blocks, it would then be impossible to tell which lots were intended to be conveyed. But it appeared in this case that the grantors in the deed owned an undivided interest in lots 7 and 8, in block 5, and that they owned no interest in any other lots 7 and 8 except those of block 5 of Cove addition.

In Dougherty v. Purdy, 18 Ill. 206, it was said, at page 208: "When an ambiguity is duly made to appear by the introduction of proof outside the deed, it is a latent ambiguity, and may be explained in the same way that it is shown. If the deed purport to convey black acre, and it is shown that there are two tracts of land known by that designation, the mind is sufficiently satisfied as to which is meant, by showing that the grantor owned one of those tracts, for the presumption then is that he intended to convey the tract which he owned, rather than the one which he did not own."

In Smith v. Crawford, 81 Ill. 296, it was said: "A devise or grant will only be held void for uncertainty, where, after resort to oral proof, it still remains a matter of mere conjecture what was intended by the instrument": See, also, Langert v. Ross, 1 Wash. 250, 24 Pac. 443; Carson v. Railsback, 3 Wash. Ter. 168, 13 Pac. 618; Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250.

Considering the facts above stated in the light of this rule, it appears certain that the grantors intended to convey lots 7 and 8, in block 5, Cove addition to Seattle, and that as between the grantors and the grantee in the deed of June 4, 1907, the whole interest of the grantors was conveyed to the respondent.

The question remains, Was this deed sufficient to put a subsequent purchaser upon notice? We think it was. The record showed that Rayburn and Alexander owned no interest in any other lots numbered 7 and 8 in this addition. [289] They had deeded these lots away and the deed was of record. An inquiry of Rayburn would have revealed the fact, or an inquiry of his grantee would have disclosed, that the grantee or her successors in interest were claiming the lots by virtue of the deed of June 4, 1907, and intended to "fight it out" with the grantor. In Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250, this court said, at page 379: "When an intending purchaser searches the records to ascertain the state of the title, and finds a deed of record, good on its face, made by a common grantor, he cannot with impunity ignore it simply because he fails to find of record any property to which the given description is applicable, but must inquire outside of the record whether or not there was at the time the deed was made property to which the description can be applied, and whether the deed conflicts with the title to the property he intends purchasing. If he fails to so inquire, and such deed afterward proves to affect property he has pur-

chased, he must be held to have purchased with constructive notice."

And in Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561, quoting from a decision of the supreme court of the United States, this court said: "Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it": See, also, Dormitzer v. German Savings & Loan Assn., 23 Wash. 132 (particularly on page 218), 62 Pac. 862; Bullock v. Wallace, 47 Wash. 690, 92 Pac. 675.

The deed of June 4th, above referred to, which was standing of record, even if it was not notice of itself, was alone sufficient to put the appellant upon inquiry as to whether Rayburn and Alexander had not parted with all their title. It follows that the appellants were not purchasers without notice, and therefore acquired no interest in the lots in question as against the respondent.

290 The judgment of the lower court must therefore be affirmed.

Rudkin, C. J., Crow, Gose, Fullerton and Chadwick, JJ., concur.

Dunbar, Morris and Parker, JJ., took no part.

If the Description in a Deed is Too Indefinite to Convey Anything, then the instrument lacks one of the essential elements of a conveyance: Barker v. Southern Ry. Co., 125 N. C. 596, 74 Am. St. Rep. 658. It is not essential to a valid deed, however, that the grant itself should contain such a description as without the aid of extrinsic testimony will show precisely what is conveyed: Holley's Exr. v. Curry, 58 W. Va. 70, 112 Am. St. Rep. 944; Davis v. Horne, 54 Fla. 563, 127 Am. St. Rep. 151; Osteen v. Wynn, 131 Ga. 209, 127 Am. St. Rep. 212; Johnson v. McKay, 119 Ga. 196, 100 Am. St. Rep. 166; Stromme v. Rieck, 107 Minn. 177, 131 Am. St. Rep. 452.

STATE v. PILLING.

[53 Wash. 464, 102 Pac. 230.]

CRIMINAL LAW—Drawing Check Without Funds—Evidence. In a prosecution for drawing a check without funds to meet it, the admissions or confession of the accused, coupled with the testimony of an officer of the bank, are sufficient to carry the case to the jury on the question of the existence of funds to pay the check. (p. 1081.)

CRIMINAL LAW — Drawing Check Without Funds — Ownership of Funds.—In a prosecution for drawing a check upon a bank in which are no funds to meet it, the technical ownership of the money paid out by the bank is immaterial; the material question is the intent to defraud. (p. 1081.)

CRIMINAL LAW—Drawing Check Without Funds.—The Naming in the Indictment of the person intended to be defrauded, in a prosecution for drawing a check without funds to meet it, is immaterial, and may be treated as surplusage so that evidence that a different person was defrauded does not constitute a variance. (p. 1082.)

CRIMINAL LAW—Drawing Check Without Funds—Imprisonment for Debt.—A statute making it a felony for a person to draw a check when he has no funds to meet it, with intent to defraud, does not violate the constitutional prohibition against imprisonment for debt. (p. 1082.)

CRIMINAL LAW—Drawing a Check Without Funds—Intent to Defraud.—It is error to instruct the jury that the law presumes an intent to defraud where a man issues a check on a bank in which he has no funds to meet it and obtains something of value therefor; and the error is not cured by a general instruction disassociated from the others. (p. 1083.)

Walter M. Harvey, for the appellant.

H. G. Rowland and Robert M. Davis, for the respondent.

465 RUDKIN, C. J. On the first day of August, 1908, the defendant, Pilling, drew a check on the Daly Bank and Trust Company of Butte, Montana, in favor of James R. Thompson for the sum of eighteen thousand dollars, and delivered the same to the payee therein named. Thompson indorsed and delivered the check to the Scandinavian-American Bank of Tacoma, Washington, and the latter institution cashed the check and delivered the proceeds to Pilling or Thompson, Pilling ultimately receiving the money. The check was not paid on presentation, and an information was thereupon filed against the defendant under section 1 of the act of March 2, 1905, Laws of 1905, page 78, which reads as follows: "Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet.

said check, in full upon its presentation, shall be guilty of a felony," etc.

Trial was had before a jury, and from a judgment pronounced upon a verdict of guilty, this appeal is prosecuted.

The denial of a challenge for cause, interposed to one of the jurors by the appellant, is assigned as error, but a new trial must be awarded on other grounds, and inasmuch as this question will not arise on a retrial, in the same form at least, we deem it unnecessary to discuss or consider it.

It is next contended that the court erred in denying a motion to dismiss, interposed at the close of the state's case, on the following grounds: (1) Because the state failed to prove that the appellant had not sufficient funds or credit in the bank to meet the check on its presentation; (2) because there was a variance between the allegations and the proofs in this: whereas the information charged that the appellant received
466 the money and property of the prosecuting witness Thompson with intent to defraud him, the proof showed that the money received was the money and property of the Scandinavian-American Bank, and that the bank was the party defrauded; (3) because the act under which the information was filed is unconstitutional.

1. The admissions or confessions of the appellant, coupled with the evidence of the officer of the bank upon which the check was drawn, was sufficient evidence to carry the case to the jury on the question of the existence of funds or credit to meet the check on its presentation.

2. The essential elements of the crime defined by the statute are three: First, the drawing of a check on a bank or other depository for the payment of money; second, knowledge at the time of drawing the check that the drawer has not sufficient funds in, or credit with, the bank or depository to meet the check in full upon its presentation; and third, an intent to defraud. Under this statute the technical ownership of the money paid out by the bank over its counter was not material. The material question was the intent to defraud. The proof showed that the prosecuting witness was compelled to, and did, repay the money to the bank by reason of his indorsement, and that he was the party in fact defrauded. But aside from this, Ballinger's Code, section 7132 (Pierce's Code, section 1665), provides that, "In any case where the intent to defraud is necessary to constitute the offense of forgery or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment or information an intent to

defraud without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment it shall be deemed sufficient, and shall not be deemed a variance if there appear to be an intent to defraud the United States, or any state, territory, county, city, town, or village, or any body corporate, or any public officer in his official capacity, or any copartnership, or any member thereof, or any particular person; and persons of skill shall be competent witnesses to prove a forgery."

[467] Under this section the naming of the person intended to be defrauded is immaterial, and may be treated as surplusage, and, if the appellant intended to defraud the Scandinavian-American Bank as claimed, such proof sustains the charge and does not constitute a variance.

3. The contention that the statute authorizes imprisonment for debt, in violation of section 17 of article 1 of the state constitution, is not well founded. The statute punishes the party for his fraud and not for his failure to redeem his check: In re Milecke, 52 Wash. 312, ante, p. 968, 100 Pac. 743, 21 L. R. A., N. S., 259.

After the jury had retired to consider of their verdict, they returned into court and asked the following question: "We wish to know a little more about the intent to defraud. If a man issues a check on a bank, knowing at the time of the issuance of the check that there is not sufficient funds or credit in the bank to meet the check, would that be considered intent to defraud?"

To this inquiry the court replied: "I think if a man issues a check upon a bank where he has no funds to meet the check, and no credit in the bank to meet the check, and obtains anything of value upon the check, the law would presume that an intent to defraud."

This instruction was excepted to and is assigned as error. The exception must be sustained. As already stated, there are three constituent elements in the statutory definition of the crime charged. The question propounded to the court would indicate that the jury had already resolved two of these against the appellant, and the court, by the charge complained of, determined the third and more important one against the appellant as a matter of law. There are two classes of legal presumptions, conclusive and rebuttable. Against the former no kind of testimony however strong will prevail, while presumptions of the second class are equally conclusive until overcome by proof. If this instruction did not withdraw the

question of intent from the consideration of the jury entirely, it at least cast the burden of proof upon [468] the appellant, and in either view the instruction was erroneous. To say that fraudulent intent is presumed and that innocence is likewise presumed is a legal solecism. Furthermore, fraud is never presumed, even in a civil action. The utmost that the court could have said under the circumstances would be to have informed the jury that they might infer the intent to defraud from all the facts and circumstances in the case. It will perhaps be argued that this was the legal effect of the court's language, but we cannot so construe it. The jury were given to understand that they must accept the law from the court, and when the court informed them that the law presumed guilt from the facts stated they might well conclude, and perhaps did conclude, that a verdict of guilty was the only alternative. The language of the court was free from ambiguity, and we must assume that the jury understood and construed it according to its plain and natural import. Nor was this error cured by anything contained in the general charge of the court. The instruction was disassociated from the rest, and the very fact that the jury desired further instructions would indicate that they did not understand or remember the charge already given.

For this error the judgment is reversed, with directions to grant a new trial.

Fullerton, Gose, Chadwick, Morris and Parker, JJ., concur.

Judge Mount Dissented, Judges Crow and Dunbar concurring with him, and delivered the following opinion: "I cannot agree that the answer of the court to the question of the jury was reversible error. The jury simply desired to know how they were to find the intention of defendant, and for that purpose asked the court: 'If a man issues a check on the bank, knowing at the time of the issue of the check that there was not sufficient funds or credit in the bank to meet the check, would that be considered intent to defraud?' If the court had simply answered this question in the affirmative, the answer would clearly have been correct, because the question covers all the essential elements of the crime as defined by statute, except the intent to defraud. Intent must necessarily be inferred from the facts stated. It is seldom that a man orally declares his intention, especially where it is a criminal one. Such intention must be presumed or found from the acts done. Otherwise few crimes could be proven. It is true the court did not answer the question directly in the affirmative. If the answer stood alone, it would be erroneous, because it omitted the essential element of knowledge that the drawer had no funds in the bank, but the answer was plainly given with

reference to the facts stated in the question, and in substance was an affirmative answer. The whole question and answer must be construed together and not independently. It will not do to eliminate the question which called forth the answer. It is plain that the jury had already determined the facts stated in the question, which included knowledge that appellant had no credit at the bank, and they desired to know if from those facts they might deduce an intention to defraud, and the effect of the answer, when considered in the light of the question, was that they might do so. The jury plainly could not have been misled to believe that the element of knowledge was not necessary to be found by them. The answer to the question was, therefore, not prejudicial error. The effect of the majority opinion is to place a technical construction upon the answer without reference to the question asked, and to assume that the jury was misled thereby when it plainly appears otherwise. In my opinion, the judgment should be affirmed."

The Crime of Drawing a Check Without Funds to Meet It, with intent to defraud, is discussed in State v. Hammelsey, 52 Or. 156, ante, p. 686, and cases cited in the cross-reference note thereto.

KATH v. BROWN.

[53 Wash. 480, 102 Pac. 424.]

APPEAL — Jurisdiction of Trial Court After Affirmation. — After a judgment has been affirmed on appeal the trial court has no jurisdiction, in the absence of permission first obtained from the appellate court, to entertain jurisdiction of an action to vacate it for fraud. (p. 1086.)

Bevington & Finch, for the appellant.

Jay C. Allen, for the intervener.

480 CHADWICK, J. On the seventeenth day of December, 1906, a judgment was rendered by Honorable William R. Bell, acting as judge pro tempore, in an action wherein appellant was plaintiff and S. L. Brown was defendant, and the Histogenetic Medicine Company, a corporation, was intervener. The decision of the judge pro tempore was adverse to plaintiff. A motion for a new trial supported by affidavits was introduced. We do not find the motion for a new trial or the affidavits in support thereof in the record, but the breadth of the motion can be measured by the order of the court entered on the twenty-ninth day of December, 1906, which is as follows: "Be it remembered that the above-entitled matter came on regularly for hearing on the twenty-

ninth day of December, 1906, upon the motion of the plaintiff for an order vacating the judgment and decree heretofore entered herein and for a new trial, plaintiff appearing by his attorneys, and intervener appearing by its attorney Jay C. Allen, and the court considering the affidavits filed in support of said motion, and after argument of counsel and being fully advised in the law and [481] the premises, does deny said motion, to which order and ruling plaintiff excepts and an exception is allowed."

An appeal was prosecuted from that judgment to this court. Thereafter a motion supported by affidavit, showing the appeal to have been abandoned, was entertained by this court, and a judgment affirming the judgment of the court below was entered. A remittitur went down on the eighth day of July, 1907. On the twentieth day of July following, appellant, who was plaintiff in the first instance, as he is now, filed his petition in the court below to vacate the judgment originally entered, upon grounds sounding in fraud and conspiracy between his attorney, the intervener, and others who had been connected with the transaction attending the transmission of title from appellant to the respondent. This petition came on regularly to be heard before the Honorable George E. Morris, then a superior judge of King county, who evidently tried the full merits of the original controversy between the parties, as well as the charges of fraud and conspiracy. We are aware that it is the contention of the appellant that this is not so, but the record hardly bears out his contention. Evidence upon every issue was tendered by the appellant and challenged by respondent, witnesses impeached, and characters assailed. All documents and records having any possible, even remote, bearing upon the differences existing between the parties were introduced, and the ruling of the court, which is made a part of the transcript, clearly shows that he decided the case as if upon the merits and finally.

While in Williams v. Breen, 25 Wash. 666, 66 Pac. 103, we held that it was not necessary or within the contemplation of the law for a court to try out the merits of a case upon petition to vacate a judgment, but rather to determine the probability of merit, we have deemed it not improper to make these observations to show that, were we to enter into a discussion of the facts, it would involve the repetition of a trial already twice had and twice determined. Admitting merely [482] for the sake of argument that the two learned judges who

have decided against appellant were wrong in their conclusions, he is nevertheless met by a proposition of law which not only bars us of our inclination to review the testimony in this opinion, but precludes his recovery. The trial judge had no jurisdiction to entertain the petition now before us. When the judgment of this court affirming the judgment of the judge pro tempore was remitted to the lower court, it became in legal effect conclusive upon all the parties to the action in that court, unless recalled or attacked by permission first obtained upon proper showing here. This was not done. Immediately following the remittitur, the petition was filed. In Post v. Spokane, 28 Wash. 701, 69 Pac. 371, 1104, the court said: "Upon satisfactory showing being made in this court, leave has been granted in some instances to attack judgments which have been affirmed here. We are not, however, aware of any published decision which shows such leave to have been granted. It is manifest that this court must reserve to itself the right to determine each particular case from the showing made, and no general rule can be announced as applicable to all cases. Certainly no permission can be granted to disturb the judgments affirmed or entered by this court unless it is made reasonably to appear that the ends of justice require it. But the precedent of entertaining and considering such applications has already been established. Since our published reports contain nothing upon this subject, as far as we are now informed, we have thought it proper to make these observations in this connection, in order that the precedent established may be more generally understood": See, also, State v. Superior Court, 31 Wash. 53, 71 Pac. 740, and Post v. Spokane, 35 Wash. 114, 76 Pac. 510. This rule, as will be conceded, is a rule of necessity. Otherwise the judgments of this court would not be final, but the objects of attack at will.

Appellant had his day in court, and cannot be heard further. While it is our boast that the courts of our country [483] are always open, it does not follow that they are open always. There must be an end of litigation over a given subject matter. The court below being without jurisdiction, it follows that there is no controversy before us of which we can take cognizance.

The judgment of the lower court is affirmed.

Rudkin, C. J., Fullerton and Gose, JJ., concur.

Morris, J., took no part.

The Affirmance on Appeal of a Void Judgment does not impart to it any validity nor deprive a party of the right to have it vacated on motion: Gille v. Emmons, 58 Kan. 118, 62 Am. St. Rep. 609; Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67.

GLEASON v. OWENS.

[53 Wash. 483, 102 Pac. 425.]

TAXES—Delinquency Due to Mistake of Officer.—Where one attempts in good faith to pay his taxes, but is told by the county treasurer that they have been paid, this is the legal equivalent of payment so far as to discharge the lien and bar a sale for nonpayment. (p. 1088.)

TAXES—Avoiding Illegal Sale—Tender to Purchasers.—In an action by the owner to recover land illegally sold for taxes, it is not necessary that he pay the purchasers the amount paid out by them, but it is enough that he pays the same into court before entry of judgment. (p. 1088.)

Richard Gowan, for the appellant.

Hastings & Stedman, for the respondents.

483 CHADWICK, J. This action was begun by plaintiff to quiet title to certain real property in the city of Seattle, Washington, alleged to have been acquired by his grantor 484 by virtue of certain tax foreclosure proceedings instituted by King county to recover delinquent taxes for the year 1890, and known as the "King County Omnibus Foreclosure Suit." Defendants acquired the property by purchase from the then owner in October, 1890. The lower court found that, on the twenty-second day of December, 1891, March 4, 1893, March 5, 1894, March 23, 1895, May 29, 1896, and November 13, 1897, defendants inquired at the office of the treasurer of King county what, if any, taxes were due and unpaid on the property, and on each of these occasions they were informed of an amount which they paid. It is also found that they paid the taxes for the years 1898, 1899, 1900 and 1901; that when they attempted to pay the taxes for the years 1902 and 1903, they were informed that the taxes had been paid, but they assumed that they had been paid by mistake. When they undertook to pay the taxes for the year 1904, they again inquired about the 1902 and 1903 taxes, and were informed that the land had been sold on November 15, 1902, to satisfy the 1890 taxes. The records did not disclose how much the land had been sold for, and defendants were unable to tender

the amount due, with penalties and interest, on account of the 1891 taxes. The court also found that defendants had since offered to pay plaintiff the amount which he had paid as taxes, with interest, penalties and costs, and that plaintiff had refused to accept payment thereof. Judgment was rendered in favor of defendants, and plaintiff appeals.

Error is assigned as follows: That the court erred in overruling appellant's demurrer to the amended answer and cross-complaint; that the court erred in holding the oral statement of the county treasurer to the effect that no taxes were due was equivalent in law to a payment of the taxes, and that the court erred in giving judgment without first requiring respondents to pay to appellant the amount paid out by him and his grantor with interest and costs. The first two assignments of error may be disposed of by a reference [485] to the case of Loving v. McPhail, 48 Wash. 113, 92 Pac. 944, wherein the court said: "The property holder made an effort in good faith to pay all taxes upon the property long before there was any delinquency, and was clearly prevented from doing so by the mistake or fault of the officer charged with the duty to collect the taxes. Such an effort by the property owner to pay taxes is the legal equivalent of payment, in so far as to discharge the lien and bar a sale for nonpayment."

This decision followed the case of Bullock v. Wallace, 47 Wash. 690, 92 Pac. 675, wherein the court quoted with approval from 27 American and English Encyclopedia of Law, second edition, page 775, as follows: "If the owner of land, or a party having an interest therein, in good faith applies to the proper officer for the purpose of paying the tax thereon, and payment is prevented by the mistake or fault of such officer, ... the attempt to pay is considered, in most jurisdictions, as the legal equivalent of payment in so far as to discharge the lien and bar a sale for nonpayment."

Reference to the judgment of the court discloses the fact that the amount found to have been paid out by appellant and his grantor had been paid into court prior to the entry of judgment. It follows that there is no merit in this assignment.

The judgment is affirmed.

Rudkin, C. J., Fullerton, Gose and Morris, JJ., concur.

Right to Sell Property for Taxes is founded on the nonpayment of the tax. If it is paid before the sale, the lien of the state is discharged, and the right to sell no longer exists: Wallace v. Brown, 22

Ala. 118, 76 Am. Dec. 421. And where the owner of property in good faith applies to the proper officer for the purpose of paying his taxes, but is prevented from doing so by the fault or mistake of the officer, the attempt to pay is regarded as a legal equivalent to payment, and the title to the land will not pass on a subsequent sale for the tax: Corning Town Co. v. Davis, 44 Iowa, 622; Edwards v. Upham, 93 Wis. 455, 67 N. W. 728; Atwood v. Weems, 99 U. S. 183, 25 L. ed. 471.

STATE v. McCOOL.

[53 Wash. 486, 102 Pac. 422.]

RAPE—Insufficient Corroboration of Prosecutrix.—In a prosecution for rape of a female under the age of consent, evidence that the accused was with her under suspicious circumstances at a time two months previous to the date of the alleged offense, at which prior time she testifies that there were no improper relations between them, is not corroborating evidence tending to prove the crime charged. (p. 1090.)

RAPE—The Pregnancy of a Female under the age of consent, while proof that rape has been committed, does not tend to establish the commission of the crime by any particular person, nor corroborate her testimony that the accused is the guilty one. (p. 1091.)

Buck & Roddy, for the appellant.

Kenneth Mackintosh and R. W. Prigmore, for the respondent.

486 DUNBAR, J. The appellant was tried and convicted on the charge of statutory rape; that is, of having carnally known Minnie Phillips, a girl fifteen years of age; and upon conviction, was sentenced to the penitentiary for a term of years. It is assigned upon appeal that the court erred (1) in admitting the testimony of the witness Mrs. Phillips; (2) in admitting the evidence of witness Dr. R. A. McClure; (3) in submitting the question of the defendant's guilt or innocence to the jury; (4) in refusing to instruct the jury as to the meaning of corroborating testimony as used by the court in his instructions; (5) in refusing to give the instructions requested by the defendant as to corroborative testimony.

It is not necessary to state the testimony of the prosecuting witness in this case ad nauseam. It may be conceded 487 that the testimony was sufficient to convict the appellant

of the crime charged, if such testimony was believed by the jury and if it was corroborated by other testimony. Section 1 of chapter 170, page 396, of the Laws of 1907, is as follows: "No conviction shall be had for the offense of rape, or seduction, in this state upon the testimony of the female raped, or seduced, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense."

The only contention in this case is that no corroborating testimony was given at the trial. The respondent introduced the mother of the prosecuting witness, who testified in substance that, about two months before the time at which the crime charged in the information is alleged to have been committed, she went over to McCool's (the appellant's) residence and knocked; that no one came to the door for quite a little time, and that she heard the back door open and some one rustling in the house; that McCool then came to the door, and it was locked; that he unlocked it, and she asked him if Minnie was there, and he said no; she had been there and was gone; that he was very nervous; that she turned away and went back and saw Minnie going up Twenty-fifth avenue; that she accosted the child and charged her with having been at McCool's, and she said that she had been there but Dolly, McCool's little girl, was not at home, and that she did not stay; that she told the child never to go there again. This testimony, it seems to us, was in no wise corroborative of the state's testimony, if for no other reason, because the prosecuting witness testified in the trial of this cause that there were no improper relations between her and the appellant on that date, her attention having been called to the time that her mother was there; and hence it could not be corroborative of any testimony of the girl tending to establish the crime charged.

Over the appellant's objection, the respondent introduced [488] one Dr. R. A. McClure, who testified that, from an examination made, he found the prosecuting witness to be in a state of pregnancy; that this examination was made in July, and the alleged rape was committed in April prior to that. It is difficult to see how such testimony as this would corroborate the testimony of the witness that any particular person had committed the act which was the cause of her condition at the time of the examination. It would, of course, under the laws governing statutory rape, be evidence that

the crime had been committed, but could not in any way tend to establish the commission of the crime by any particular one.

The respondent relies on the case of State v. Fetterly, 33 Wash. 599, 74 Pac. 810, and it is true that some things are said in that case—a case which was decided prior to the passage of the act above referred to—which lend color to the respondent's contention. But if the case intended to go as far as is claimed for it, it was certainly wrong, because it would shock the sense of justice to conclude that testimony that a rape had been committed was corroborative of testimony that the person accused or any other particular person had committed the crime; especially when it is shown, as it was shown in this case, that the prosecuting witness had associated with other men before and after and about the time at which this crime is alleged to have been committed. This question, however, has since been squarely passed upon by this court in State v. Jonas, 48 Wash. 133, 92 Pac. 899, where, referring to this particular class of testimony, it is said: "It is probably true, as contended by the appellant, that some of the testimony above alluded to, while generally referred to as corroborative in this class of cases, is not such within the meaning of this statute; or at least is not sufficient corroboration. It has often been held that mere proof of acquaintance and opportunity will not satisfy the requirements of such a law. The testimony of the physician tended in no way to connect the appellant with the crime

charged, and perhaps would not be sufficient corroboration under ordinary circumstances." The court, however, held in that case that there was other corroborative testimony sufficient to sustain the judgment.

Nor do the cases cited by respondent sustain its contention in this respect. For instance, in State v. Baker, 106 Iowa, 99, 76 N. W. 509, it is said: "If, considered in connection therewith, the other evidence tends to identify and single out the accused as the perpetrator of the crime, it is of that character contemplated by the statute, and its sufficiency is to be passed upon by the jury."

The other cases are to the same effect. But, as we have tried to show, there is nothing in the proof that a girl under the consenting age is pregnant, and that therefore necessarily a statutory rape has been committed, to point to any particular person as the perpetrator of the crime. With this view of the case, it is not necessary to pass upon the assignments in relation to instructions given and refused.

There being no testimony produced which would warrant a conviction, the judgment will be reversed and the cause dismissed.

Rudkin, C. J., Mount, Crow and Parker, JJ., concur.

The Crime of Rape, together with the law of evidence pertaining thereto, is the subject of a note to Smith v. State, 80 Am. Dec. 361. In case the prosecutrix is under the age of consent, it is no defense that the intercourse was not against her will: Taylor v. State, 50 Tex. Cr. 362, 123 Am. St. Rep. 844; Smith v. State, 44 Tex. Cr. 137, 100 Am. St. Rep. 849. As to the necessity and sufficiency of testimony corroborating the prosecutrix, see State v. Wheeler, 116 Iowa, 212, 93 Am. St. Rep. 236; State v. Tuttle, 67 Ohio St. 440, 93 Am. St. Rep. 689; State v. Knighten, 39 Or. 63, 87 Am. St. Rep. 647.

Evidence Corroborative of an accomplice is the subject of a note to Stone v. State, 98 Am. St. Rep. 158.

MEAD v. WHITE.

[53 Wash. 638, 102 Pac. 753.]

STATUTE OF FRAUDS.—An Undertaking to be Surety for a Building Contractor is collateral to the main contract and must be in writing. (p. 1094.)

STATUTE OF FRAUDS—Memorandum of Surety's Undertaking.—Persons who place their names under the word "sureties" at the bottom of a building contract which contains no provision tending to connect them with it are not bound as sureties of the contractor; their contract, if any, is not "in writing," and parol evidence is not admissible for the purpose of reforming it in equity. (p. 1095.)

STATUTE OF FRAUDS—Parol Evidence to Reform Contract. Parol evidence is not admissible in equity to reform a contract within the statute of frauds whose essential terms are not in writing. (p. 1096.)

E. L. Culver and B. A. Crowl, for the appellants.

H. G. & Dix H. Rowland, for the respondents.

638 GOSE, J. The appellants commenced this action for the purpose of reforming a written contract, and recovering a judgment thereon against the defendant and the respondents for its breach. The introductory part of the contract is as follows:

"BUILDING CONTRACT.

"This agreement made and entered into this 25th day of March, 1907, by and between J. R. Winslow, party of the first part, hereinafter designated the contractor, and George

H. Mead and Helen M. Mead, party of the second part, hereafter designated the owner.

"Witnesseth: That the contractor, in consideration of the [639] agreements herein made by the owner, agrees with said owner as follows:"

The contract, which is quite lengthy, then provides what shall be done by the contractor and the owner respectively. The attestation clause and the subscription are as follows:

"In witness whereof the parties of these presents have hereunto set their hands the day and year first above written.

"J. R. WINSLOW.
"GEORGE H. MEAD.
"H. M. MEAD.

"In presence of sureties:
"S. A. WHITE.
"W. F. BAILEY."

The words "in presence of" are printed, and the word "sureties" was written before the contract was signed. The complaint charges that the respondents "subscribed as sureties for the faithful performance of such contract on the part of J. R. Winslow," and prays that the contract be reformed as to the respondents so as to read: "Subscribed as sureties for the faithful performance of said contract on the part of J. R. Winslow," and for judgment against the defendant and the respondents. The case was tried to the court, resulting in a judgment for the respondents. From such judgment this appeal is prosecuted.

The answer, among other things, pleads that the contract is void under the provisions of Ballinger's Code, section 4576 (Pierce's Code, sec. 5343), which provides:

"In the following cases specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say:—

"(2) Every special promise to answer for the debt, default or misdoings of another person;"

The contract does not show the relation of the respondents to it, other than such as may be gathered from their signatures. Upon reading the contract the mind at once inquires, For whom and for what purpose did the respondents sign? The contract may be searched in vain for an answer to this [640] inquiry. It contains many requirements upon the part of

the contractor and the owner, but is silent as to any duty or obligation as to the respondents. The discussion takes broad ground in the briefs, but the view we take of the case narrows the scope of inquiry.

The appellants contend, first, that the contract of the respondents is an original undertaking rather than a collateral one, and as such that it is not within the statute. We will first notice this contention. When the object of the undertaking is to become surety for another, the promise is collateral and must be in writing: 20 Cyc. 163. In Nugent v. Wolfe, 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15, speaking to the question of the distinction between an original and a collateral promise, the court say:

"It is difficult, if not impossible, to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute."

"Courts must rely on the circumstances of each particular case, and its general features in order to ascertain the intent of the parties, and how they viewed it, when it is doubtful whether it was a contract of suretyship or guaranty or an original undertaking. Generally speaking, an oral undertaking by a person not previously liable, for the purpose of securing the debt or performing the same duty for which the person for whom the undertaking is made remains liable, is within the statute of frauds and must be in writing": 20 Cyc. 164.

Upon both principle and authority, we have no difficulty in reaching the conclusion that the undertaking of the respondents [641] was a collateral one. The contract, therefore, must be in writing, notwithstanding the fact that all the parties entered into it at the same time: Stearns on Suretyship, p. 42.

We will next consider whether the contract as it affects the respondents is in writing within the meaning of the statute.

In Foote v. Robbins, 50 Wash. 277, 97 Pac. 103, the court had under consideration a contract whereby the owner employed a broker to sell real estate. The terms and conditions of sale were complete, but the contract was silent as to the broker's compensation for his services. At pages 279, 280, the court said: "If by the written agreement the payment of a commission by respondents was contemplated, resort must now be had to oral evidence for the purpose of showing the amount of such commission, and that it was to be paid by the appellant as vendor and not by the purchaser as vendee. The unmistakable purpose of the statute was to avoid any such method of fixing the extent of the liability, or the liability itself, of either a vendor or a vendee for the payment of a commission."

In Allen v. Kitchen, 16 Idaho, 133, 100 Pac. 1052, a well-considered case, the court, speaking through Ailshie, Judge, at page 1056, say: "There is no contract until it is reduced to writing as provided by law. It is not a question as to what the contract was intended to be, but rather, was it consummated by being reduced to writing as prescribed by the statute of frauds. Admittedly an essential portion of the contract in this case was not reduced to writing and subscribed by the party to be bound. This case, therefore, presents the question of adding to and supplying an insufficient description, rather than that of reforming an untruthful description. If a court of equity can supply one requirement of a contract that is required by the statute of frauds to be in writing, it may supply another, and the logical conclusion would be that it might in the end supply all the requirements, and thereby contravene a positive statute. This cannot be done."

642 "In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them. Accordingly, if an oral contract falling within the scope of the statute has terms not stated in the memorandum, or if the memorandum contains a reference to such terms or imports their existence by fair inference without clearly stating them, or if the memorandum merely refers to the contract without stating its terms, the case falls within the statute": 20 Cyc. 258-260. See, also, Board of Commrs. Marion County v.

Shipley, 77 Ind. 553; Lee v. Hills, 66 Ind. 474; Grant v. Naylor, 4 Cranch, 224, 2 L. ed. 222.

The document, aside from the word "sureties" and the signatures of the respondents, states a complete contract between the appellants and the defendants, but contains no provision which even tends to connect the respondents with it. As between the appellants and the respondents, there is an entire absence of contract. In order to hold the respondents to any liability, the court would be required to create a contract, either by construction or by parol evidence. There is no language in the contract to warrant the former, and the latter is within the prohibition of the statute. Surely the mere subscription of the contract by the respondents under the word "sureties," without showing their relation to the contract or to the parties, cannot be said to create any contract relation. A cursory examination of the record in this case affords abundant evidence, if evidence were wanting, of the wisdom of the statute. One of the respondents testified that he only engaged to guarantee the integrity of the defendant, while the other said that he signed merely for the purpose of recommending him.

Finally, it is contended that a court of equity has power to reform the contract and to enforce it when so reformed. The contract being invalid under the statute, parol evidence will [643] not be admitted for the purpose of reforming it. To do so would result in permitting the parties to accomplish indirectly that which the statute forbids. Speaking to this question in Allen v. Kitchen, 16 Idaho, 133, 100 Pac. 1052, at page 1057, it is said: "After a very careful examination of the many authorities dealing with this question, we are clearly of the opinion that courts of equity have power and jurisdiction to so reform an executory contract that is valid and binding on its face as to relieve it of any statement, declaration or description that has been inserted therein through deception, fraud or mutual mistake, and to make the statements speak the truth as it was intended to insert them in the instrument. On the other hand, we are equally satisfied that a court of equity has no power or jurisdiction to construct an executory agreement for the parties, or to insert therein new and essential elements, or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding. In other words, reformation does not mean re-creation. The court will not, under the guise of reforming an instrument construct or re-

construct the instrument, so as to make it comply with the statute": See, also, Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418. The record does not present the question of reforming a contract so as to speak the truth, but rather of creating a contract in its entirety.

What we have said renders it unnecessary to consider the other assignments. The judgment will be affirmed and the respondents will recover their costs.

Rudkin, C. J., Chadwick, Fullerton and Morris, JJ., concur.

A Memorandum Does not Satisfy the Statute of Frauds unless it contains the material terms and conditions of the contract so that one reading can understand from it what the agreement is; it should be such that when produced in evidence it will inform the court or jury, without parol evidence, of the essential facts set forth in the pleading which go to make a valid contract: Mentz v. Newwitter, 122 N. Y. 491, 19 Am. St. Rep. 514; Kingsley v. Siebrecht, 92 Me. 23, 69 Am. St. Rep. 486; Hall v. Misenheimer, 137 N. C. 183, 107 Am. St. Rep. 474; Bogard v. Barnham, 52 Or. 121, ante, p. 676.

The Question Whether a Promise is Original or Collateral within the meaning of the statute of frauds is considered in the note to Sherman v. Alberts, 126 Am. St. Rep. 487.

The Effect of the Statute of Frauds on the Power of Equity to Reform an instrument is discussed in the notes to Williams v. Hamilton, 65 Am. St. Rep. 501; Hausbrandt v. Hofler, 94 Am. St. Rep. 292.

BELKNAP v. PLATTER.

[54 Wash. 1, 103 Pac. 432.]

WITNESS—Husband Testifying Against Wife.—The rule that a husband cannot be examined as a witness against his wife without her consent has no application in supplemental proceedings against them on a community deficiency judgment entered against both in an action of foreclosure. (pp. 1099, 1101.)

WITNESS—Husband Testifying Against Wife.—The statute forbidding one spouse to be examined as a witness against the other without the latter's consent must, if possible, be so construed as to promote justice and fair dealing, and not made an instrument for the promotion of dishonesty, injustice, and fraud. (p. 1102.)

EXECUTION—Order Directing Payment.—In Proceedings Supplemental to execution it is not prejudicial error, when money is disclosed, to order payment to the clerk instead of the sheriff. (p. 1102.)

Martin & Wilson, for the appellants.

Neal, Sessions & Myers, for the respondent.

[1] CROW, J. This action was originally commenced by James Belknap, against Perry E. Platter and Morva O. Platter, husband and wife, to foreclose a mortgage on land in Lincoln county. After foreclosure decree and sale the plaintiff still [2] held a deficiency judgment for eleven hundred and sixty-one dollars and thirty-five cents against both of the defendants. Upon this judgment he caused an execution to issue to the sheriff of Lincoln county, which was returned nulla bona. Thereupon he instituted proceedings supplemental to execution, against both defendants, in which he obtained an order directing the defendant Perry E. Platter to pay the clerk of the superior court a sufficient sum to satisfy the judgment. The defendants have appealed.

The appellants have presented numerous assignments of error, all of which we find to be devoid of merit, and none of which can be sustained. As a number of the questions discussed in their brief were not submitted to the trial court, we will consider only such as were presented there. The appellants were served in Chelan county with notice of the supplemental proceedings and citation to appear. They appeared specially and moved their discharge, for the reason that the Lincoln county court was without jurisdiction. In support of their motion they contended that they were residents of Chelan county, and that proceedings supplemental to execution could not be instituted or prosecuted against them in the superior court of Lincoln county. The evidence shows that they were residents of Lincoln county. The motion was properly denied.

When the cause came on for hearing upon the merits, the respondent called the appellant Perry E. Platter for examination, and was about to interrogate him as to property or money in his possession, which he unjustly refused to apply to the satisfaction of the judgment, when the appellant Morva O. Platter interposed an objection, contending that her husband could not be examined as a witness against her without her consent. The objection was overruled, and thereupon the appellant Perry E. Platter, in part, testified as follows:

"Q. What property have you, Mr. Platter, at the present time? A. That is, you mean in money or real estate?

"Q. Any property. A. I have no real estate.

"Q. What other [3] property? A. I have some money.

. . . .

"Q. How much money have you? A. Well, I have about four thousand dollars.

"Q. You had never intended to apply it on this judgment if you could avoid it? A. No, sir."

Other testimony given by him shows that the money mentioned was community property not exempt from execution. No other witness was called by either party, and the trial court thereupon entered an order requiring the appellant Perry E. Platter to pay to the clerk of the superior court of Lincoln county the entire amount due respondent upon his judgment.

Appellants' controlling assignment of error, and the one upon which they evidently rely for a reversal, is that the trial court erred in requiring the appellant Perry E. Platter to be examined as a witness against his wife and without her consent. In support thereof they cite Ballinger's Code, sec. 5994 (Pierce's Code, sec. 940), which reads as follows: "The following persons shall not be examined as witnesses: (1) A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterward, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

Appellants also cite Frankenthal v. Solomonson, 20 Wash. 460, 72 Am. St. Rep. 116, 55 Pac. 754, 41 L. R. A. 311, relying upon certain expressions appearing in the opinion. The facts in that case are not parallel or similar to those involved in this action. There judgment for a separate debt had been entered against the husband, and supplemental proceedings were prosecuted against the wife who was being examined as a garnishee. Here a community personal judgment has been entered against both spouses, parties to the action. If, under the facts shown in the Frankenthal case, the statute was not violated when the wife was required to testify without her husband's consent, we fail to understand how it was violated by requiring the appellant Perry E. Platter to testify in this cause. The community is a necessary party to this action, in which its creditor is seeking the collection of a community debt. Although as individual members of such community, the husband and wife were both made parties, the action was nevertheless against the community as such. The creditor is endeavoring to subject its property to the pay-

ment of his claim. He could not judicially establish such claim as a community obligation without proceeding against the husband and wife. He has thus obtained a community judgment, and if the wife is now entitled to object to an examination of her husband, in proceedings supplemental to the execution, instituted to subject the community property to the payment of such judgment, there is no good reason why the husband might not successfully object to her examination in the same proceedings. Neither party could then, upon such an examination, be required to disclose property fraudulently concealed by him or her. Such a construction of section 5994 would, whenever a community judgment happens to be involved, completely nullify the chapter of our code, Ballinger's Code, section 5312 et seq. (Pierce's Code. section 897), authorizing supplemental proceedings in aid of execution, which chapter expressly provides that a judgment debtor may be required to appear in court and answer concerning property which he unjustly refuses to apply toward the satisfaction of the judgment. When the rule as to the competency or incompetency of the husband and wife as witnesses was fixed by our statute, the legislature certainly did not intend any such result. Mr. Waples, in his work on Attachment, at section 950, says: "Could she [the wife] shield herself from further examination after having denied liability in answering the statutory questions, she might thus interpose the sanctity of the marital relation to the defeat of the ends of justice. Her husband, [5] being already adjudged the debtor of the plaintiff, should in good conscience permit the execution of the judgment against any property or credit of his not exempt from execution. His wife, by failing to disclose any such property in her possession or credit due him from her, would not be in the position of one refusing to testify in a cause pending against her husband, but in that of one impeding the execution of a judgment already obtained."

The same rule should be applied to the husband.

The supreme court of Wisconsin, in the matter of the Petition of Mary J. O'Brien for a Writ of Habeas Corpus, 24 Wis. 547, well said: "It is fully admitted that supplementary proceedings are a substitute for a creditor's bill under the old practice. And, as we understand the former practice, where the property of the judgment debtor, against whom an execution had been returned unsatisfied, was in the actual possession and control of the wife, under circum-

stances that rendered it impossible to reach and obtain possession of it by a creditor's bill against the husband alone, a bill might be filed against the husband and wife jointly, so as to obtain a decree which would reach the property in her hands, and compel her to deliver it up for the satisfaction of her husband's debts": See, also, Clairmont Bank v. Clarke, 46 N. H. 134.

In Frankenthal v. Solomonson, 20 Wash. 460, 72 Am. St. Rep. 116, 55 Pac. 754, 41 L. R. A. 311, this court cited with approval the case of Thompson v. Silvers, 59 Iowa, 670, 13 N. W. 854, in which the supreme court of Iowa said: "We come, then, to consider whether the garnishee was exempt from answering because her answers, if they had disclosed an indebtedness to her husband, or property in her hands belonging to her husband, would have been testimony against him. It would not be contended, of course, if her answers had been unfavorable to the plaintiff [the judgment creditor], that they would have been testimony against her husband. The objection must be deemed to be predicated upon the theory that her answers might have been favorable to the plaintiff, and such as would have justified the court in charging her as garnishee. We have then to determine whether such a result would have been against the execution debtor's interest. To hold that it would, would be to hold [6] that it is his interest to be allowed to conceal his property and thereby evade the payment of his just debts. Now, the law, we think, does not recognize that such is his interest. The debtor ought to use all his property which is not exempt in the payment of his debts, and the law cannot recognize that to be his interest which is not right."

The answers made by the appellant Perry E. Platter upon his examination did not disclose any privileged communication between himself and his wife. He did not testify to any information or knowledge obtained by him from or through her. On the contrary, he only stated upon such examination that he had in his possession a large sum of money which he had obtained from the sale of certain wheat, made by him, and which money he had withdrawn from bank for the purpose of concealing it and thereby avoiding the payment of an honest debt. Justice and fair dealing require that community debts shall be paid with community property or funds not exempt from execution. It was to the interest of the appellant Morva O. Platter that this should be done. Appellants seek too broad a construction of the statute. Appellant Perry E. Platter was not examined as a witness against his wife's

interest, in contemplation of the statute, which must, if possible, be so construed as to promote justice and fair dealing, instead of being made an instrument for the promotion of dishonesty, injustice and fraud.

Some question has been raised as to the form in which the final order was entered. The appellant was ordered to make payment to the clerk instead of the sheriff. As the property disclosed was money, we fail to see that any prejudicial error was committed by ordering its payment to the clerk, or that the appellants have been thereby injured.

The judgment is affirmed.

Rudkin, C. J., Mount, Dunbar and Fullerton, JJ., concur.

Chadwick, Gose, Morris and Parker, JJ., took no part.

The Question as to When a Husband can be Examined as a Witness for or against his wife, and a wife for or against her husband, is considered in the notes to De Farges v. Ryland, 24 Am. St. Rep. 663; Commonwealth v. Sapp, 29 Am. St. Rep. 411; and in the subsequent cases of Heckman v. Heckman, 215 Pa. 203, 114 Am. St. Rep. 953; Booker v. Booker, 208 Ill. 529, 100 Am. St. Rep. 250. It has been held that a statute providing that a wife shall not be examined for or against her husband without his consent does not shield the wife of a judgment debtor in proceedings supplementary to execution brought against her to discover whether she has property belonging to him in her possession: Frankenthal v. Solomonson, 20 Wash. 460, 72 Am. St. Rep. 116. In Layson v. Cooper, 174 Mo. 211, 97 Am. St. Rep. 545, it is affirmed that a wife is not competent to testify, in replevin against her husband, that the property belongs to her.

WOODDY v. BENTON WATER COMPANY.

[54 Wash. 124, 102 Pac. 1054.]

VENDOR AND VENDEE—Deficiency in Area—Damages.—Where a contract of purchase calls for a certain number of acres out of a larger tract, without other description, the vendee may assume that his deed, which describes an irregular tract by metes and bounds, conveys the quantity of land specified in the contract, and if there proves to be a deficiency in the area, he is entitled to damages although he has accepted the deed. (p. 1104.)

VENDOR AND VENDEE—Restriction on Caveat Emptor.—The tendency of recent authorities is to restrict rather than extend the doctrine of caveat emptor; the unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim. (p. 1105.)

VENDOR AND VENDEE—Reliance on Misrepresentations of Vendor.—A vendee may rely upon the representations of his vendor when for any reason their falsity is not readily ascertainable. (p. 1106.)

VENDOR AND VENDEE—Misrepresentation That Land can be Irrigated.—It is error to nonsuit a vendee in his action for damages for false representations by the vendor that the land can all be irrigated from a certain canal by gravity flow, when in fact only a part of it can be, which fact, the evidence tends to show, could be ascertained only by an accurate survey and was known to the vendor. (pp. 1106, 1107.)

C. O. Anderson, O. R. Holcomb and C. L. Holcomb, for the appellants.

Henry J. Snively, for the respondents.

[125] RUDKIN, C. J. On the third day of November, 1906. the plaintiffs and the defendant, the Benton Water Company. entered into a written contract wherein the water company agreed to exchange sixty acres of land, with a perpetual water right for irrigation purposes, situate in Benton county, for one hundred and fourteen acres of farming lands situate in Whitman county. The lands of the plaintiffs were particularly described in the contract by references to the government surveys, but the only description given of the water company's lands was the following: "All that part of the Northeast quarter of section twenty-three, township nine, North range twenty-eight E. W. M., in Benton county, Washington, lying E of the county road as now laid out and S and against the canal, necessary to make 60 A. of land." On the seventeenth day of December, 1906, pursuant to this contract the water company purported to convey to the plaintiffs the sixty acres and the water right in Benton county, under the following description: "Commencing at a point on the north line of Section Twenty-three Township nine North Range Twenty-eight EWM. 483 feet westerly from the Northeast corner of said section which corner is a stone marked X. thence running along said section line north 89° 37′ west 1035.00 feet, thence South 2° 7′ west 1645.5 feet, thence South 89° 53′ East 2194.65 feet, thence North 11° 12′ East 209.9 feet to the center of the Benton Water Company's lateral Number 3, thence along the center line of said lateral North 76° 16′ west 381.8 feet, thence south 80° 40′ West 208.10 feet, thence North 52° 33′ West 88.60 feet to the North line of lot one (1) Section [126] Twenty-four township Nine North Range twenty-eight EWM., thence along said North line North 89° 28′ west 33 feet, thence North 00° 49′ East 72.10 feet to center line of said lateral Number 3, thence along said center line North 22° 37′ West 150.25 feet, thence North 32° 44′ West 458.10 feet, thence North 15° 49′ West 332.4 feet.

thence North 9° 37′ West 415.20 feet to place of beginning, excepting a strip for canal right of way purposes 20 feet wide, measured at right angles from the above center line of said lateral Number 3 containing sixty acres more or less"; and the plaintiffs in turn conveyed the Whitman county property to the defendant Munsey at the instance of his codefendants. This action was instituted to recover damages for false representations made by the defendants in the negotiations leading up to the contract of sale, both as to the quantity of land to be conveyed and the number of acres susceptible of irrigation from the water company's canal by gravity flow.

The complaint alleged, and the testimony on the part of the plaintiffs tended to show, that the defendants represented that the tract to be conveyed by the water company contained sixty acres in all, and that the sixty acres was so situated with relation to the water company's canal that the entire tract could be irrigated therefrom by gravity flow; that in fact the tract contained only fifty-two and sixty-four one-hundredths acres, and twenty-eight and twenty-four one-hundredths acres of this was above the level of the canal and could not be irrigated therefrom; that before entering into the contract the plaintiff James T. Wooddy visited the land, accompanied by certain of the defendants, and viewed the premises in a general way; that the fact that portions of the land could not be irrigated from the canal could only be ascertained by an accurate survey; that the defendants had caused such survey to be made and knew that portions of the tract could not be irrigated from the canal, that this fact was unknown to the plaintiffs, etc.

At the close of that portion of the plaintiff's testimony disclosing the circumstances under which the exchange of [127] property was made, the court directed a nonsuit, and from the judgment of nonsuit this appeal is prosecuted. We are at a loss to know upon what theory the court denied a recovery for the deficiency in the quantity of land which the respondents agreed to convey in exchange for the lands conveyed by the appellants. If we should assume that a purchaser must at his peril ascertain the quantity of land in a given tract with fixed and definite boundaries, before entering into a contract of purchase, and this is an extreme view to take, it would not avail the respondents in this case, for here the contract of purchase called for sixty acres of land out of a larger tract, without other or further description, and the appellants had no means of measuring or other-

wise ascertaining the quantity of land to be conveyed until the boundaries were fixed and defined in their deed. They had a right to assume that the quantity of land conveyed by the deed corresponded with the contract, and are not barred from a recovery for a deficiency by the mere acceptance of the deed. The respondents agreed to convey sixty acres of land, they breached their contract and the appellants are entitled to recover damages for the breach, regardless of oral representations made at the time of sale.

Nor can we agree with the court below that the doctrine of caveat emptor applies to the representations made by the respondents to the effect that the entire tract was under the level of the canal and susceptible of irrigation therefrom. Strong language has been used by this and other courts in defining the duties of purchasers from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor. Thus in Strand v. Griffith, 97 Fed. 854, 38 C. C. A. 444, the court said: "There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, [128] and refuses them redress, whenever they fail to act upon that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.'"

In Noyes v. Belding, 5 S. D. 603, 59 N. W. 1069, the court said: "The unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim": See, also, Watson v. Molden, 10 Idaho, 570, 79 Pac. 503, and cases there cited. In 14 American and English Encyclopedia of Law, second edition, pages 120, 121, the rule is thus stated:

"By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the

truth for himself. By the weight of authority and in reason, the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain of the same, applies only where the parties have equal present opportunity and means to ascertain the truth at the time of the transaction, and does not apply merely because it is possible to ascertain the facts. Indeed, it has been held that a person is justified in relying on a representation made to him, in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth."

In McMullen v. Rousseau, 40 Wash, 497, 82 Pac. 883, this court said: "The main contention of the appellants is that this case comes within the rule often announced by this court that, where the vendor and purchaser are dealing at arm's length, and where the subject matter of the sale is at hand, the purchaser [129] must protect himself and cannot rely upon representations made by the vendor. This rule is firmly established where the representations relate to the subject matter of the sale which is at hand, or to other facts the truth of which may readily be ascertained by the exercise of ordinary care and prudence. But the converse of this rule is equally well established where the subject matter of the sale is not at hand, so that the truth or falsity of the representations concerning it may be ascertained, or where the representations relate to facts within the knowledge of one of the parties, and the truth or falsity of such representations cannot be ascertained by the other party upon reasonable investigation or by the exercise of reasonable care and prudence. Such are the cases of O'Connor v. Lighthizer, 34 Wash. 152, 75 Pac. 643, Mulholland v. Washington Match Co., 35 Wash. 315, 77 Pac. 497, Stack v. Nolte, 29 Wash. 188, 69 Pac. 753, and Lawson v. Vernon, 38 Wash. 422, 107 Am. St. Rep. 880, 80 Pac. 559."

Within this rule we think the representations made by the respondents were actionable, or at least that it was a question for the jury to say whether the appellants acted with that degree of prudence and circumspection which would mark the conduct of a reasonably prudent man under like circumstances. All the cases agree that the purchaser may rely upon representations of the vendor where the property is at a distance, or where for any other reason the falsity of the representations are not readily ascertainable; and we think the representations as to location of the land in relation to the canal were of this class, or at least that the jury might.

have so found. For these reasons the court erred in granting the nonsuit, and the judgment is reversed with directions to award a new trial.

Fullerton, Gose and Morris, JJ., concur.

Chadwick, J., concurs in the result.

The Remedy of the Vendee of Land When the Area or boundaries have been misrepresented by the vendor is discussed in the recent case of Mabardy v. McHugh, 202 Mass. 148, ante, p. 484, and cases cited in the cross-reference note thereto. As a rule, the misrepresentation of material facts as to the quality, quantity or title to land, made by the vendor and relied upon by the vendee as true, entitles him to repudiate the sale: Cressler v. Rees, 27 Neb. 691, 20 Am. St. Rep. 691; Newton v. Tolles, 66 N. H. 136, 49 Am. St. Rep. 593; Wilson v. Carpenter, 91 Va. 183, 50 Am. St. Rep. 824; Perry v. Boyd, 126 Ala. 162, 85 Am. St. Rep. 17.

If a Vendor Represented That a Tract of Land contains a specified large quantity of pine timber, when it in fact has little or no timber, the vendee may rescind, if the circumstances excused him from not verifying the accuracy of the statement, though the vendor believed it to be true: McKinnon v. Vollmar, 75 Wis. 82, 17 Am. St. Rep. 178.

HANSARD v. GREEN.

[54 Wash. 161, 103 Pac. 40.]

MUNICIPAL CORPORATION—Irregular Issue of Bonds.—Under a statute requiring municipal bonds for the purchase of waterworks to be sold as may be deemed for the best interests of the municipality, a town has no power to borrow money to purchase waterworks and promise to pay the lender in bonds of an equal amount subsequently to be authorized and issued. (pp. 1109, 1110.)

MUNICIPAL CORPORATION—Acquisition of Waterworks—Submission to Vote.—Where the law provides that the system or plan proposed in the acquisition of a public improvement shall be submitted to the people for ratification, a submitting ordinance is insufficient which gives no further information than to recite the advisability of purchasing an existing water system and issuing bonds to pay therefor in a certain sum, but not setting out the plan or system, nor stating the time the bonds are to run, the rate of interest, or the manner of payment. (pp. 1110, 1111.)

Merritt, Oswald & Merritt, for the appellant.

Happy & Hindman and Martin & Grant, for the respondents.

162 CHADWICK, J. Plaintiff brought this action as a taxpayer, to enjoin the issuance of certain municipal bonds.

The town made no appearance, and an order of default was entered. The defendants John F. Green, M. F. Adams and A. G. Mitchum are copartners, doing business under the firm name and style of the Bank of Harrington, at Harrington, Washington, and were allowed to intervene, alleging themselves to be taxpayers and property owners within the town of Harrington. The interveners alleged in their petition:

"That in the year 1907, at a special election held in the said town of Harrington, over three-fourths of the qualified voters of said town voted to purchase a water system and to issue bonds for the payment therefor, to supply said town with water, and to pay therefor the said sum of twenty-two thousand dollars ($22,000), and to issue bonds for said sum; and that after said election was held and carried, at the special instance and request of the said town of Harrington, the said owner of said water system, Olner Dobson, deeded said waterworks to said town, and said town is now and ever since has been in possession thereof, and collecting the revenues therefrom; that at the time said system was conveyed to the said town, these interveners, at the special instance and request of the said town and said Olner Dobson, paid to the said Dobson the said sum of $22,000 in cash money, and the said town, with the consent of the said Dobson and of the interveners, promised and agreed to transfer and deliver the said $22,000 of bonds when printed and executed, to these interveners, in payment of the said sum of $22,000, so paid over to the said Dobson by these interveners at the special instance and request of the said town of Harrington; and the said bonds have not yet been delivered to these interveners. as promised, but the said T. A. Hansard, plaintiff in [163] the above-entitled action, is now seeking to enjoin the said town from executing and delivering the said bonds to these interveners."

The foregoing is a succinct statement of the utlimate facts upon which the interveners rely, and we do not deem it necessary to make further mention of, or reference to, their complaint in intervention. To the complaint in intervention a motion to strike was interposed, upon the grounds, inter alia:

"(2) For the reason that said interveners have no right, title or interest in and to the subject matter of this action, to wit, the right of said town, or its officers, to issue and sell said bonds for the reason that said interveners could not have or acquire any interest in said bonds although said bonds could be issued until said bonds were sold as by law provided.

"(3) For the reason that if the interveners have, or ever did have, the contract and arrangement as alleged in their complaint, whereby said bonds were to be turned over and delivered to them, such contract would be in contravention of law, the specific provisions of the statute of the state of Washington and against public policy."

This motion was overruled. After other proceedings, all of which occurred over the protest of plaintiff, the case proceeded to trial upon the complaint in intervention and denials of plaintiffs; and, after hearing the evidence, the court ordered that plaintiff take nothing, and rendered judgment in favor of the interveners for their costs and disbursements.

A number of errors are assigned, but from the view of the case taken by us, it is unnecessary to discuss any of them other than those going to the full merit of the case. Waiving the question whether a taxpayer may substitute himself as a defendant in an action against a municipality, which has been brought into court under a proper process and has defaulted by direction of the council, thus substituting his judgment for that of the council, and trying out an individual right, and coming to the main question, it would seem 164 that respondents cannot recover. We know of no rule of law which permits a municipal corporation to contract a debt upon an agreement to issue bonds to cover it. To so hold in this case would be equivalent to holding that the court had the right and power to say that the contract should be executed—the bonds sold to interveners—when the right is reserved to and the duty put upon the corporate authorities to sell them in such manner as they should deem for the best interests of the town (Ballinger's Code, section 1077), and thus by judicial decree usurp and exercise a legislative function. It is within the power of a city or town to purchase a waterworks system and to issue its bonds to raise money to pay therefor, but it cannot contract a bond issue in advance of its authorization, and deliver them, over the challenge of a taxpayer. The bond must be in existence before it can be delivered or become an object of barter and sale.

"As was said by this court, in Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 123, 'this class of securities are made and issued for the express purpose of raising money by their sale.' They cannot accomplish the purpose of their execution and issue except by being sold; and they cannot be sold without establishing their market value. They are made for the market, are sold in the market, and hence must have

and always do have a market value; and while it is true that this value may and often does change, it is, nevertheless, always susceptible of very direct and satisfactory proof": Griffith v. Burden, 35 Iowa, 138.

To hold that a party advancing money at the request of the officers of a municipal corporation, upon their promise to reimburse the creditor by an issue of its negotiable bonds, can acquire a right of action would defeat both the purpose and spirit of the law.

There is another reason that would compel a reversal of this case in any event. The law provides that the system or plan proposed in the acquisition of a public improvement shall be submitted to the people for ratification or rejection. The ordinance before us goes no further than to recite the [165] advisability of purchasing the existing waterworks system, and that "said town become indebted and issue its bonds as provided by law in the sum of twenty-two thousand ($22,000) dollars, for the purchase of such waterworks." The plan or system is not set out. The time the bonds are to run, the rate of interest, the manner of payment, are all matters proper to be considered, and, without some mention thereof, the taxpayer cannot vote with that understanding contemplated by the statute. Payment is as much a part of the "plan or system" as is the purchase, and a method should be provided in the ordinance. Otherwise the voter has expressed his opinion upon a part only of the object sought to be attained.

From the authorities Mr. Simonton, in his work on Municipal Bonds, section 89, draws these conclusions: "The title should state the object of the ordinance; then usually follows the introduction ordaining or enacting the ordinance, after which follows the scope and purpose of the ordinance. Hence when the object is to authorize the issue of bonds, the bonds should be directed to be issued, the purpose of the issue should be stated, the amount to be issued, the denomination of the bonds, when they shall bear date, time and place of payment, the rate of interest and place of payment thereof."

This we consider well within the reasoning of Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077, Buckley v. Tacoma, 9 Wash. 253, 37 Pac. 441, and Aylmore v. Seattle, 48 Wash. 42, 92 Pac. 932. It will thus be seen that the interveners have sought to do indirectly what they could not have done directly; that is, put the stamp of legality upon a contract that could not have been enforced in a direct action. Hav-

ing no standing in court to contest the right of appellant, and the town having defaulted, it follows that the motion for nonsuit was improperly entered.

The cause is reversed and remanded, with directions to enter a judgment of default in favor of the appellant and [166] against the town, and to dismiss the complaint in intervention.

Rudkin, C. J., Fullerton, Gose and Morris, JJ., concur.

Municipal Bonds and defenses thereto are discussed in the notes to De Voss v. Richmond, 98 Am. Dec. 664; Jones v. Camden, 51 Am. St. Rep. 822.

ESTATE OF GUYE.

[54 Wash. 264, 103 Pac. 25.]

ADMINISTRATORS.—Intestacy is a Necessary Prerequisite to the granting of general letters of administration. (p. 1112.)

ADMINISTRATOR cannot be Appointed for Community if There is a Will.—The husband or wife, as the case may be, has authority to name an executor for community property, and the executor thus named cannot be superseded by an administrator appointed at the suggestion of the surviving spouse. There can be no general administration upon the community when one of the spouses has died testate, devising and bequeathing his half of the community and naming an executor. (p. 1114.)

ADMINISTRATOR—Writ of Prohibition Against When There is a Will.—The supreme court will restrain a superior court by prohibition from issuing general letters of administration for community property on the application of the widow of the deceased, who left a will disposing of his half of the community and naming an executor. (pp. 1114, 1115.)

Higgins, Hall & Halverstadt, for the relators.

Blaine, Tucker & Hyland, for the respondents.

[265] RUDKIN, C. J. On the twenty-fifth day of May, 1908, Francis M. Guye died testate in King county of this state, leaving an estate therein subject to administration. On the second day of June, 1908, the last will and testament of the decedent was admitted to probate in the superior court of King county, a certificate of probate was granted, and the appointment of the relators as executors and trustees of the will was confirmed. The executors and trustees duly qualified and entered upon the discharge of their duties, an inventory

of the estate was filed, appraisers appointed, and notice to creditors published as prescribed by law.

On the eighth day of June, 1908, after the admission of the will to probate and the confirmation of the appointment of the trustees and executors therein named, Eliza W. P. Guye, surviving wife of the deceased, presented her petition to the superior court of King county praying for the appointment of an administrator for the community property belonging to the estate of her deceased husband and herself. Notice of this application was duly given, and the matter came on regularly for hearing. At the close of the hearing the court indicated its intention to grant the prayer of the petition, whereupon the executors and trustees named in the will applied to this court for a writ of prohibition to restrain the superior court from carrying out its expressed intention. The case is now before us for final determination on the return to the alternative writ, and two questions are presented for our consideration: First, was the superior court acting without or in excess of its jurisdiction? and second, If so, have the relators a plain, speedy and adequate remedy in the ordinary course of law?

Section 6141, Ballinger's Code (Pierce's Code, section 2433), provides that "Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:"

[266] Section 6142 (Pierce's Code, section 2435) provides that "Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the superior court, which petition shall set forth the facts essential to giving the court jurisdiction of the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased died without a will."

The power to grant letters of administration upon the estate of a deceased person is purely statutory, and it would seem that intestacy is a necessary prerequisite to the granting of general letters of administration in this state.

"The grant of original and general administration by a probate court corresponds to that of letters testamentary issued to an executor; its application being, however, in cases where a deceased person whose estate should be settled either died wholly intestate or left a will of which, for some reason, no one can be a qualified executor within the jurisdiction.

According to the various cases which may arise, there are various special kinds of administration, besides what may be termed 'general administration' ": Schouler on Executors, 3d ed., sec. 90.

Our statute provides for general administration in cases of intestacy, for administration de bonis non, and for special administration pending contests over wills or the granting of letters of administration, and in other like cases, but we find no statutory authority for a general administration upon community property, such as is here sought.

"To the grant of general and original administration upon the estate of a deceased person, intestacy is a prerequisite; such allegation should be made in the petition, and the court should have reason to believe the statement true. Letters of general administration, granted during the pendency of a contest respecting the probate of a will, or after probate regardless of the executor, are null and void. And local statutes interpose reasonable delay to such grants of administration, in order to give full opportunity for the production [267] of a will, so that the estate may be generally committed, if possible, according to the last expressed wishes of the deceased": Schouler on Executors, 3d ed., sec. 91. See, also, 1 Woerner on American Law of Administration, *p. 402; 18 Cyc. 82; In re Davis' Estate, 11 Mont. 196, 28 Pac. 645; Slade v. Washburn, 25 N. C. 557.

Section 6128, Ballinger's Code (Pierce's Code, section 2420), provides that if letters of administration have been granted, and a will is thereafter found and probated, the letters already granted shall be revoked and letters testamentary or with the will annexed granted in their stead. The letters of administration sought in this case are general in their character, so far as the community property is concerned at least, and the court below was about to grant them, regardless of the fact that a will had been probated and executors were already in charge of the estate.

In Re Hill's Estate, 6 Wash. 285, 33 Pac. 585, it was intimated, rather than decided, that the husband or wife could not appoint an executor to take charge of the community property to the exclusion of the surviving spouse, and that in such cases application for an administrator for the community estate might be made under Ballinger's Code, section 6141, supra. But, as said by Mr. Justice Stiles in his concurring opinion, many questions were argued and decided in the majority opinion in that case that were not involved in the

case itself, and the majority of the court seems to have lost sight of the fact that a general grant of letters of administration is only authorized in case of intestacy.

By sections 4490 and 4621, Ballinger's Code (Pierce's Code, sections 3876, 2703), one-half of the community property is subject to the testamentary disposition of each spouse, subject to the community debts, and in the absence of some controlling statute, the power to name an executor to administer an estate is coextensive with the power to devise or bequeath the estate itself. In the case at bar, the deceased devised and bequeathed his half interest in the community estate and named executors [268] to administer that estate. Owing to the peculiar characteristics of the community estate, administration upon an undivided one-half interest therein is impracticable, if not impossible, so that administration upon the whole estate is indispensable upon the death of either spouse. The right to name the executor or administrator must vest in either the husband or wife; for, in the nature of things, there cannot be two personal representatives for the same estate acting independently of each other. It is said that it will work an unwonted hardship upon the survivor if one of the spouses may name an executor to take charge of the estate after death, to the exclusion of the survivor; but power to make the selection must be lodged some place, and it is suggested in the briefs that it would be equally unfair to vest the sole power of selection in the survivor. But these questions of policy are for the legislature and not for the courts, and suffice it to say we are convinced that the husband or wife, as the case may be, has authority under our statutes to name an executor for community as well as for separate property, and that the executor thus named cannot be superseded by an administrator appointed at the suggestion of the surviving spouse.

We do not desire to be understood as holding that the husband or wife may tie up the community property longer or further than is necessary to settle and close the estate. Administration upon the whole community estate upon the death of one of the spouses arises from the necessities of the case, and the surviving spouse has a right to insist that it shall be speedily closed, and that his or her half of the community property shall not be withheld after the debts and expenses of administration have been paid. We are of opinion that the court below was acting in excess of its jurisdiction when it attempted to appoint an administrator for the community property under the circumstances disclosed by this

record; and if so, the relators have no adequate remedy at law under former holdings of this court: In re [269] Sullivan's Estate, 36 Wash. 217, 78 Pac. 945; State v. Superior Court, 48 Wash. 141, 92 Pac. 942.

The writ will therefore issue as prayed.

Chadwick, Fullerton, Mount, Dunbar and Crow, JJ., concur.

The Appointment of an Executor must ordinarily be made in accordance with the will of the testator, unless he is ineligible or disqualified by law: Breen v. Kehoe, 142 Mich. 58, 113 Am. St. Rep. 558; Clark v. Patterson, 214 Ill. 533, 105 Am. St. Rep. 127.

While an Executor Remains in His Relation as such, the court cannot appoint a trustee to supersede him in the exercise of his functions of executor: Greenland v. Waddell, 116 N. Y. 234, 15 Am. St. Rep. 400.

The Writ of Prohibition is the subject of a note to State v. Superior Court, 111 Am. St. Rep. 929.

MOLLER v. NIAGARA FIRE INSURANCE COMPANY.

[54 Wash. 439, 103 Pac. 449.]

ADMINISTRATOR'S SALE—Passing of Title on Confirmation. Confirmation of an administrator's sale passes the equitable title to the purchaser before the execution of the deed and the payment of the purchase money, and any loss or destruction thereafter occurring falls on him. (p. 1116.)

FIRE INSURANCE—Administrator's Sale, When Avoids.—The confirmation of an administrator's sale of insured property, although the deed is not yet executed or the purchase money paid, transfers the equitable title to the purchaser, and hence avoids the insurance because of a change in the interest or title of the insured. (pp. 1117, 1120.)

FIRE INSURANCE—Change in Title to Property—Notice to Agent.—The fact that an agent of an insurance company knows of a change in the title to property which avoids the insurance thereon, and makes no objection thereto, does not affect the right of the company to declare a forfeiture. (p. 1120.)

John C. Hogan, for the appellant.

Granger & Magill, for the respondent.

[440] CROW, J. Action by J. A. Moller, administrator of the estate of Eli Anderson, deceased, against Niagara Fire Insurance Company, a corporation, on an insurance policy to recover loss sustained by fire. From a judgment in favor of defendant the plaintiff has appealed.

The appellant contends that the trial court erred (1) in entering judgment in favor of the respondent; (2) in refusing to enter judgment in appellant's favor; and (3) in failing to make findings requested. Only one of several defenses interposed by the respondent is now before us for consideration, all others having been waived at the trial. The policy, issued to appellant July 1, 1904, contained the following clause:

"This entire policy, unless otherwise provided by agreement, indorsed hereon, or added hereto, shall be void if any change, other than by the death of the insured, take place in the interest, title or possession of the subject of insurance, ... whether by legal process or judgment or by voluntary act of the insured, or otherwise."

441 The material facts, shown by the evidence and found by the trial court, are, that the insured property, which was located in Pacific county, belonged to the estate of the deceased; that its principal value consisted of improvements protected by the policy; that on June 2, 1904, and August 3, 1904, in probate proceedings regularly conducted, the superior court of Pacific county entered orders in the matter of the estate of Eli Anderson, deceased, authorizing and directing the appellant, as administrator, to sell real estate, including property covered by the policy, for the payment of debts, the sale to be for cash; that on August 26, 1904, he sold the property here involved to one Fred Reif, for six hundred dollars cash; that on September 3, 1904, the sale was confirmed by order of court, and the appellant was directed to execute and deliver an administrator's deed; that on September 12, 1904, after entry of the order of confirmation, the buildings upon the property so sold, and which were covered by the policy of insurance, were destroyed by fire; that no administrator's deed has been delivered to Fred Reif, and that he has not paid the purchase money.

The appellant contends that the policy was in effect at the date of the fire, and that no change in interest, title or possession had occurred sufficient to avoid it, no deed having passed to the vendee, and the purchase price not having been paid. In support of this contention he cites numerous authorities which are not pertinent to the facts in this action. They are decisions which either construe clauses in policies different from the one now before us, or involve execution or other judicial sales in which the insured continued to hold title to the property or the possession thereof, or was entitled to redeem from such sale within a fixed statutory period. For

instance, in Wood v. American Fire Ins. Co., 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80, cited by appellant, it appears that about ten days before the fire the real estate which was the subject of the insurance was sold by the sheriff under execution. The court, construing the identical forfeiture [442] clause we now have under consideration, held the insured was entitled to recover on the policy, but in announcing its reasons for so holding said: "The effect of a sale of real estate upon execution is declared by statute, and no other effect can be given to it. The judgment debtor, or his assignee, or his creditors, may redeem the same within fifteen months thereafter, and the right and title of the judgment debtor is not devested by the sale until the expiration of the period for redemption: Code Civ. Proc., sec. 1440. During that time the debtor is entitled to the possession and use of the rents and profits. At the time, therefore, that the property in question was destroyed by fire, the interest, title or possession of the insured had not been changed. The statute had operated to postpone the effect of the sale upon the interest, title or possession of the owners until the expiration of the period for redemption."

The doctrine announced by this court in Browne Nat. Bank v. Southern Ins. Co., 22 Wash. 379, 60 Pac. 1123, is on principle in harmony with the New York case, but no redemption from an administrator's sale is granted by the statutes of this state which can have the effect of preventing the immediate passing of either the legal or equitable title to the vendee.

The respondent contends that the sale so changed appellant's interest and title as to avoid the policy and relieve it from liability thereon. The controlling questions before us are, whether the estate, of which the appellant was administrator, continued to hold the equitable title, and whether appellant was, after confirmation, entitled to tender a deed to the vendee, and demand payment of the purchase money irrespective of the loss of the building. If the purchaser was then liable, or if, in other words, a specific performance of the judicial contract of sale could be obtained compelling him to accept the legal title and make payment, there must have been such a change in the equitable title as would avoid the policy.

Ballinger's Code, section 6265 (Pierce's Code, section 2573), provides that the court [443] may order an administrator's sale for cash, or on credit not exceeding six months. This sale was ordered to be made for cash, and it may be

seriously questioned whether the appellant should have accepted the bid, have reported the sale, or have obtained an order of confirmation without first collecting the purchase price. Without regard to this question, we hold, upon the record before us, that the equitable title passed to the vendee Reif, and that after confirmation the appellant may tender him a deed and collect the entire purchase price, notwithstanding the loss by fire. The probate proceedings were in all respects regular and valid. The sale had been legally conducted and confirmed. No further order of the court was necessary to transfer the legal title. It was appellant's duty to perform the ministerial act of executing and delivering the deed. No report to the court of the performance of that act was necessary. The equitable title passed when the sale was confirmed, and the appellant was not only entitled to receive the purchase money, but should have previously collected the same. The sale is one that can be specifically enforced against the purchaser Reif. Mr. Pomeroy, at section 316 of his work on Specific Performance of Contracts, second edition, says: "Whether a failure or defect or depreciation of the subject matter, or any other similar extrinsic event, beyond the control of either party—that is, happening without the agency or default of a party—shall affect the right to a specific performance, depends, as a general rule, upon the time when it took place with reference to the conclusion of the contract; or, in other words, upon the fact of its taking place before or after the contract was finally concluded so that the equitable estate would thereby pass to the vendee. It is necessary, therefore, to determine with precision, in the first place, the exact time when an agreement is regarded in equity as concluded."

In section 318, speaking of judicial sales, he further says: "The rule which seems to be sustained by the weight of authority pronounces the rights and estate of the parties [444] to be settled at the date of the sale, subject, of course, to be defeated by an order for opening the bids and reselling the subject matter; the confirmation thus relates back to that time. According to some authorities, or at least dicta, the time at which the equitable interests of the parties are established, and when the purchaser is to be considered as owner of the estate, is the date of the order confirming the order of sale, or of whatever other judicial act the practice substitutes in place of such order."

Ballinger's Code, section 6274 (Pierce's Code, section 2582), reads as follows: "If it appear to the court that the sale was

legally made and fairly conducted, and that the sum bidden was not disproportionate to the value of the property sold, or if disproportionate, that a greater sum, as above specified, cannot be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; and such sale, from that time, shall be confirmed and valid."

The words "from that time" evidently refer to the time of confirmation, and under this section the sale must thereafter be considered as valid. If so, the equitable title would immediately pass. The cases from different jurisdictions are somewhat divided on the question as to whether a judicial sale binds the vendee from its date, or from and after the entry of an order of confirmation. There can be no question, however, under the weight of authority, but that confirmation finally passes the equitable title to the vendee, and that any loss thereafter occurring, without fault of either party to the sale, will fall upon such vendee: Robertson v. Skelton, 12 Beav. (Eng. Rep.) 260; Robb v. Mann, 11 Pa. 300, 51 Am. Dec. 551; McKechnie v. Sterling, 48 Barb. 330; Vance's Admr. v. Foster, 9 Bush, 389; McLaren v. Hartford Fire Ins. Co., 1 Seld. (N. Y.) 151; Maul v. Hellman, 39 Neb. 322, 58 N. W. 112; Ball v. First National Bank, 80 Ky. 501; Morrison v. Burnette, 154 Fed. 617, 83 C. C. A. 391; 2 Cooley on Briefs on Law of Insurance, p. 1753d.

"Upon the confirmation the purchaser is entitled to a deed and writ of possession, and therefore to the rent; he [445] is bound to pay the purchase money, and assumes the hazard of accidental destruction of the property": 2 Woerner on American Law of Administration, 2d ed., sec. 478.

In Robb v. Mann, 11 Pa. 300, 51 Am. Dec. 551, an administrator's sale had been made and confirmed. The purchase money had not been paid, possession had not been given, nor had the administrator's deed been delivered. Portions of the buildings and improvements were destroyed by a wrongdoer, without fault of either party to the contract of sale. On action by the administrator for the purchase money, the court, in sustaining his right to recover, said: "So much is the vendee considered, in contemplation of equity, as actually seised of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance; and he will be entitled to any benefit which may accrue to it in the interval. And the reason assigned is, that, by the contract, he is the owner of the premises, to every intent and purpose in equity: Richter v. Selin, 8 Serg. & R. 440; Sugden on

Vendors, Am. ed., c. 4, pp. 131, 132. This principle, which is indisputable, would seem decisive of the question, unless a distinction can be taken between a private and a judicial sale. But no such distinction has been recognized; rather the reverse has been ruled. Thus in Stoever v. Rice, 3 Whart. 21, 31 Am. Dec. 495, a sale by a sheriff is said to be attended with the ordinary incidents of a sale by an individual. And in Bashore v. Whisler, 3 Watts, 490, it is said that a sale by an administrator under an order of the orphans' court for payment of debts is a judicial sale, and that the principles which govern the one are applicable to the other."

In Vance's Admr. v. Foster, 9 Bush, 389, the court said: "The principle cannot, we think, be questioned that where at the time a sale is made no valid ground for setting it aside exists, the accepted bidder is entitled to his purchase, however much the property may appreciate in value between the sale and time for confirming it. This being so, why should he not be held bound by his purchase, although from accidental causes the property in the meantime may become impaired or depreciate in value?"

[446] In Ball v. First Nat. Bank, 80 Ky. 501, the court said: "The purchaser, from the confirmation, is entitled to a deed and writ of possession, and is bound to pay the purchase money, and hazard the accidental destruction of the property even from the sale, and he is entitled, therefore, to the rent from the date of confirmation, but not from the sale, because he acquires no right to the possession until the sale is confirmed."

Applying the principles thus announced, we are compelled to hold that the appellant is entitled to tender a deed and collect the purchase money for the reason that, after confirmation, Reif became the equitable owner of the property and must suffer the loss resulting from the fire. This being true, there was a change in interest and title sufficient to release the respondent from liability on the policy: Jump v. North British etc. Ins. Co., 44 Wash. 596, 87 Pac. 928, 12 Ann. Cas. 257. A different rule might prevail in judicial sales where a right of redemption remained in the insured; but that question is not now before us, no redemption from an administrator's sale being authorized in this state.

The appellant further contends that the trial court erred in refusing to make findings, to the effect that the agent of the respondent, who issued the policy, was apprised of all of the facts in relation to the administrator's sale and its

confirmation, and that he made no objection thereto, but allowed the policy to stand. Such findings, if made, would be immaterial. No question is here presented as to the validity of the policy when first issued. The change in the title which avoided it occurred afterward, and even though the agent of the respondent had known of such change, no duty devolved upon him to take any action by reason thereof, unless he was requested to do so by the assured.

The judgment is affirmed.

Rudkin, C. J., Mount, Dunbar, Morris, Parker, Gose and Chadwick, JJ., concur.

Judge Fullerton Dissented, expressing the opinion that the sale was incomplete for want of payment and delivery.

Insurance—Judicial Sale.—A Condition in a Policy of Insurance that it shall be void if, without the consent of the insurer, the property shall be sold, is held not violated, in International Wood Co. v. National Assur. Co., 99 Me. 415, 105 Am. St. Rep. 288, by a judicial sale and its confirmation, if payment has not been made and no bill of sale executed. And when the statute gives the debtor time for redemption, and permits him to remain in possession during the time, a sale of the property at execution does not avoid the insurance thereon: Wood v. American etc. Ins. Co., 149 N. Y. 382, 52 Am. St. Rep. 733.

KLUSKA v. YEOMANS.

[54 Wash. 465, 103 Pac. 819.]

NEGLIGENCE—Presumption from Accident—Pleading and Proof.—The plaintiff in a personal injury case does not lose his right to a presumption of negligence from the happening of the accident, by alleging specific acts of negligence of which he makes no proof. (p. 1125.)

NEGLIGENCE—Issues and Evidence.—Where at the close of the evidence in a personal injury case the specific cause of the accident appears from the defendant's evidence, the plaintiff is entitled to such evidence as well as his own; and if his complaint does not conform to all the proofs, it may be amended, and if not challenged on that ground, it will be treated by both the trial and appellate courts as sufficient. (p. 1126.)

NEGLIGENCE—Res Ipsa Loquitur.—When the Defendant's Evidence in a personal injury case discloses the cause of the accident, the right of recovery does not depend upon the doctrine of res ipsa loquitur. (p. 1126.)

MASTER AND SERVANT—Defective Logging Car or Roadbed.—If brass pieces which are necessary on top of the axles of a

logging car are likely to slip out of place (and no foresight can prevent it), so as to permit the frame of the car to drop down and catch upon a highway crossing, the owner of the railway and car is negligent in failing to construct the roadbed so as to prevent the frame of the car from catching, under such circumstances, to the injury of his employés riding thereon. (p. 1126.)

MASTER AND SERVANT—Duty to Promulgate Rules.—If a logging car and roadbed cannot be so constructed as to prevent the frame of the car, under some circumstances, from dropping down and catching upon a highway crossing, then it is the duty of the owner of the car to promulgate rules against his employés riding thereon. (p. 1126.)

MASTER AND SERVANT—Notice of Condition of Roadbed.—Where new planking has been laid on a highway at a point where a logging road crosses it, and the owner of the logging road has run his cars over the place for two days, he is put on inquiry as to whether the cars may catch on the planks, to the injury of his employés riding thereon. (pp. 1126, 1127.)

George Dysart and Hayden & Langhorne, for the appellant.

Bates, Peer & Peterson, for the respondent.

466 FULLERTON, J. The respondent recovered a judgment against the appellant for personal injuries, and this appeal is taken therefrom. In his complaint the respondent alleged, in substance, that the appellant was engaged in the business of manufacturing and selling lumber, at the town of Pe Ell, in this state, and owned and operated in connection with his business a line of railroad; that, as a part of the equipment of his road, the appellant owned an engine and certain logging trucks or cars, which, at the time of the respondent's injury, he had transformed into gravel cars by connecting two of the trucks together with a reach or pole and laying on the trucks so connected planks and boards forming a bed; that on November 17, 1906, the respondent was in the employment of the appellant as a common laborer, and was put to work on the gravel train, his duties being to assist in loading the train at one point of the road and unloading it at another under the direction of the appellant's foreman; it also being his duty, in order to facilitate the work, to board the cars and ride thereon from the place of loading to the place of unloading. The cause and manner of his injury he alleged in the following words:

"That on said seventeenth day of November, 1906, at about the hour of 11:30 o'clock in the forenoon of said day, plaintiff was working at his said employment of laborer for said defendant and had assisted in loading said train of cars aforesaid with gravel and dirt; that said train of cars were at said time ready to proceed to the place of unloading desig-

nated by the foreman in charge of said work, under whose direction plaintiff was then working, and plaintiff was directed to ride upon one of said cars and was required to ride upon one of said cars in the performance of his duty, to the [467] place of unloading. That said car upon which plaintiff was required to, and did, ride at said time in the performance of his duties to complete said work of unloading, was an old, worn and defective logging car, which had long been owned and used by said defendant, and that the equipment of said car, and the fastenings, and the reach holding the front and back of said car together, for some time prior to said date, were carelessly, negligently and wantonly suffered and permitted by said defendant to be and remain out of repair, and were in such a worn, used and unfit condition as to render said logging car unsafe and unfit for the purposes required of it, which defective and unsafe condition of said logging car and its equipment was known to said defendant for a long time prior to said accident, or could have been known to said defendant by the exercise of ordinary care and proper inspection of said car, but which defects were unknown to plaintiff, and could not by the exercise of reasonable care have been known to said plaintiff. That at about the hour of 11:30 in the forenoon on the seventeenth day of November, 1906, after plaintiff had got on board of said car, and while he was proceeding upon said car to the place where said gravel and dirt was to be unloaded, and when said car had reached a certain trestle on said defendant's line of railroad about a half mile south of the defendant's sawmill, the pole, or reach holding together the trucks of the car upon which plaintiff was riding broke away from and became loosened from one of the trucks of said car, owing to the worn and dilapidated condition of the equipment of said car, causing said car to be drawn and broken apart by the engine then drawing said logging train, and causing the bed or planks on said car upon which said gravel and dirt was loaded, and upon which plaintiff was then riding, to be thrown from off said trucks and down upon the ties and track of said railroad, and causing the plaintiff to be thrown down between said parted trucks onto said ties and track under said car in such manner that his left arm was caught between the ties of said track, and the rear truck of said car not having wholly broken away and rolling over and on said plaintiff, twisted plaintiff's said left arm between the ties of said track in such a manner that plaintiff's said arm was broken in two places,

and plaintiff's back, hips and thighs injured and wrenched, and other parts of plaintiff's body bruised and maimed, causing [468] plaintiff to receive a severe nervous shock to his whole system."

For answer the appellant denied specifically the allegations of negligence set out in the complaint, and alleged that the respondent assumed all risk of injury by accepting employment from the appellant and engaging therein.

On the trial of the action the respondent offered no evidence tending to show a defective condition of the pole or reach further than that it broke and allowed the trucks to pull apart, and the jury found by a special finding that it was not defective. It was shown that the accident was caused by another defect entirely. It appeared that between the place of loading the gravel and the place of its unloading a wagon road crossed the railroad track. At this crossing, to form a bed for the road, planking had been laid parallel with the rails and spiked to the ties. The accident occurred at this crossing. When the last truck on the hindmost car reached the crossing, certain iron bolts which protruded through the frame of the truck caught on the planking and caused sufficient strain to pull out the reach and allow the trucks to spread apart far enough to drop the load of gravel onto the railroad track. After the respondent rested his case in chief, the appellant called witnesses whose evidence tended to explain the cause of the defect. It was shown that the appellant's trucks were standard logging trucks of the kind in use on practically all of the logging railroads of the state; that as a necessary part of their construction there is fitted into the top of the axle-box a brass piece with a surface shaped to fit the axle of the truck, and which when properly adjusted forms the surface on which the axle revolves; that these brass pieces, owing to the character of the load usually carried on the trucks, the unevenness of the track over which they are hauled, and the rough usage the trucks receive, are extremely liable to slip out of place, letting the frame drop down until it catches on the steel plate that forms the top of the axle-box; that this has [469] the effect of lowering the frame of the truck and increasing its liability to catch on anything put upon the roadbed. It was further shown that the truck caught on the plank in this instance because of the slipping out of one of these brass pieces. It was shown also that it was a common circumstance for these brass pieces to slip out, not only on the ap-

pellant's road, but on all similarly equipped roads, some of the witnesses going so far as to say that no means had yet been found to make them absolutely secure when subjected to the uses to which they were put upon the ordinary logging road.

At the conclusion of the evidence the appellant challenged its sufficiency to support a verdict for the respondent, and moved the court to instruct the jury to return a verdict in his favor on the ground that the respondent had failed to prove any actionable negligence on his part. The motion was overruled and the cause submitted to the jury, who returned a verdict in favor of the respondent, on which the judgment was entered from which this appeal is taken.

The appellant first contends that the respondent is not entitled to recover, for the reason that he failed to sustain by proofs the specific acts of negligence alleged in his complaint. It is argued that the respondent, having stated a case of specific negligence, abandoned his right to the presumption arising from the rule of res ipsa loquitur, and voluntarily took upon himself the burden of proving the specific negligence charged. A number of cases from the supreme court and court of appeals of the state of Missouri are cited which seemingly sustain this position, but this court has heretofore had occasion to consider the question and has declined to follow the rule of these cases. On the contrary, we have followed the rule announced in Massachusetts, and perhaps other jurisdictions, which hold, in effect, that a plaintiff who proves the happening of an accident and is otherwise entitled to certain presumptions arising therefrom, does not lose the benefit of such presumptions because he has alleged [470] what he conceived to be the specific cause of the accident: Walters v. Seattle etc. R. Co., 48 Wash. 233, 93 Pac. 419, 24 L. R. A., N. S., 788.

But it seems to us that this question is not presented by the record before us. At the close of the evidence, when the challenge to its sufficiency was made, the specific cause of the accident was made to appear, and there was then no room for the application of presumptions. The respondent was then entitled to the benefit of all the proofs in his favor, that introduced by the appellant as well as that introduced by himself, and, unless the whole evidence made it clear that there was in law no liability, he was entitled to have his case submitted to the determination of the jury. If his complaint did not conform to the proofs, the defect was an amendable

one, and the respondent would have been entitled to amend had a challenge been interposed to his right to recover on that ground. But no such challenge was interposed, and the trial court, as well as this court, must treat the complaint as sufficient. The respondent's right to recover, therefore, does not depend on the doctrine of res ipsa loquitur. He must recover, if he recovers at all, on a consideration of all of the evidence, and this, as we have stated, shows the specific cause of the accident.

The appellant next insists that the evidence as a whole clearly shows nonliability on his part. He argues that since he used standard made trucks, such as were in common use on all railroads of similar character to his own, and that since these brasses were liable to slip out of place at any time and no foresight could prevent their doing so, he cannot be held in law for an injury happening because thereof, But manifestly this falls far short of showing an exception from liability. Surely the roadbed could be constructed so that the frame of the car would not catch thereon, even should a brass drop out of place; and this being so, it was negligence, since he knew that the brasses were liable to slip, not to construct his roadbed so that danger would not arise [471] therefrom. Of if it be impossible to construct the roadbed so as to be free from this charge, then it was his duty not to let his servants ride on the cars over the roadbed; or, at least, to so clearly point out to them the danger of riding thereon as to make the risk of injury for so doing their own. The appellant, evidently foreseeing this defect in his proofs, introduced evidence tending to show that he had promulgated general rules forbidding his employés from riding upon the cars. But these rules were not posted about his place of business, and whether they were communicated to the appellant was a disputed point, making it a question for the jury. He also introduced evidence tending to show that the wagon road crossing his railroad was a county road, and that the road supervisor in the course of his duties had laid new planking on the road crossing, and that it was on this new planking that the bolts in the truck frame caught; and from this fact his counsel strenuously argue his nonliability. But it was shown that these new planking had been laid several days before the injury, and had been run over by the appellant's cars for two days, at least, prior to that time. This was sufficient time to give the appellant notice that the change had been made, and put him upon inquiry as to

whether his cars could pass over them with safety with the brass pieces out of place; or, at least, sufficient time to make the question of notice to him one of fact for the jury rather than a question of law for the court.

This view of the facts taken by us renders it unnecessary to notice the many questions of law suggested by counsel based on a different view, and renders it needless to pursue the inquiry further. The judgment will therefore be affirmed.

Rudkin, C. J., Gose, Chadwick and Morris, JJ., concur.

Presumptions of Negligence from the happening of an accident are discussed in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986; and presumptions of the exercise of due care are discussed in the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108.

The Liability of an Employer to His Employés for injuries resulting from defective appliances is discussed in the notes to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289; Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884.

HULET v. WISHKAH BOOM COMPANY.

[54 Wash. 510, 103 Pac. 814.]

NAVIGABLE WATERS—Obstruction—Injunction by Riparian Owner.—A riparian owner whose means of ingress and egress to and from his property by way of a navigable stream is totally obstructed by the logging operations of a boom company is entitled to an injunction against the obstruction. (p. 1130.)

PUBLIC NUISANCE—Right of Individual to Enjoin.—A public nuisance, such as the obstruction of a highway, if it occasions an individual damage differing in kind and degree from that suffered by the general public, entitles him to an injunction or an action to abate. (pp. 1130, 1131.)

NAVIGABLE STREAM—Obstruction Injuring Riparian Owner. The fact that tide lands along a navigable river belong to the state does not bar the right of a riparian owner to an injunction against the total obstruction to that part of the stream which is a means of access to his property, nor bar his action for damages from water and logs thrown upon his uplands. (p. 1132.)

Morgan & Brewer, for the appellant.

Elmer E. Shields and W. I. Agnew, for the respondents.

511 CROW, J. Action by Charles H. Hulet and Maggie Hulet, his wife, against the Wishkah Boom Company, a corporation, to enjoin the defendant from so operating its

splash dams and boom as to obstruct navigation of the Wishkah river and injure respondents' lands, and to recover damages. From a judgment and decree granting an injunction and awarding damages, the defendant has appealed.

The case comes to this court on the pleadings, and the findings made by the trial court. The assignments of error present the single question whether the respondents are entitled to the injunctive relief, and the damages awarded. The sufficiency of the complaint is challenged, but the record does not show that the appellant attacked it by demurrer. This being true, we will, in the absence of the evidence which might have amplified and aided the complaint, confine ourselves to the single question whether the findings support the judgment and decree.

[512] The trial court found that respondents are the owners in fee simple of lands located on the westerly bank of the Wishkah river; that said river is a navigable, meandered stream and public highway, being respondents' means of ingress to and egress from their lands, which reach its meandered line; that the appellant corporation is carrying on its business as a boom and driving company on the river, in which it has constructed a logging boom, below respondents' land, for catching, holding and sorting logs; that its boom has been approved by the war department of the United States, and is not in itself an unreasonable hindrance to navigation; that appellant has also constructed and maintained above respondents' land, and above the influence of the tide, three large splash dams, and authorized their use by certain loggers to create artificial freshets and drive logs down the river to appellant's boom; that the river is influenced by the tide and is navigable in fact for a distance of about fifteen miles above its mouth; that respondents' lands are about ten miles above its mouth, and are located between appellant's boom and the splash dams; that the river above the influence of the tide carries and maintains an insufficient supply of water to float and drive logs to the appellant's boom; that for three years certain loggers have deposited timber products in the river above and below respondents' land, all consigned to appellant's boom; that for the purpose of securing the driving of logs to its boom, appellant entered into a contract with the loggers whereby it authorized them to use the splash dams for creating artificial freshets; that by the terms of the contract such use was to be considered a driving of the logs by appellant, it receiving a stipulated toll therefor, and paying

some of the employés who operated the dams; that under this agreement large volumes of water were collected and stored by the dams, and under the loggers' directions were suddenly released about three times a week, to create artificial freshets and drive logs; that the logs were thus driven [513] in such large quantities that immense jams and drifts formed in the river channel and obstructed its navigation above appellant's boom; that logs were deposited in the river, some above and others below the splash dams; that those deposited above were driven by artificial freshets through the gates of the dams, and with others deposited below the dams would, by floating on the incoming tide, return up the river; that when the tide receded some would lie in jams in the river-bed, while others, returning with the tide, would block the landings of certain loggers located below respondents' lands; that such loggers for their own convenience placed a boom stick across the river below respondents' land and above appellant's boom, to prevent the obstruction of their landings; that appellant allowed the boom stick to remain as an obstruction across the river and hold the logs coming down from above; that when logs were needed in its boom, it would from time to time open the boom stick and allow them to float down; that it then replaced or closed the boom stick, and that by reason of the location of the boom stick across the river large jams of logs were maintained in the river above the same; that the boom stick and appellant's splash dams so operated by the loggers under their arrangement with appellant did for three years cause a total obstruction of navigation and prevent the respondents from using the stream as a highway to and from their lands; that artificial freshets produced by the operation of the splash dams washed away lands of the respondents abutting the stream to the extent of one acre, in addition to loss from natural erosions, to their damage in the sum of two hundred dollars; that the artificial freshets also caused a large number of logs to float out of the channel of the stream and to remain where deposited upon respondents' cultivated lands, to their further damage in the sum of fifty dollars, and that such damages were caused by acts of the appellant in permitting the loggers to drive more timber products down the stream than it could care for in its boom.

[514] Upon these findings a final judgment was entered whereby it was ordered that the appellant be enjoined from placing and maintaining in the water of the river between

its mouth and the respondents' lands any sawlogs or timber products which will, in any unreasonable manner, impede or obstruct the navigation of the river by respondents, as a highway; that appellant be commanded to remove, abate and clear away any logs, timber products or other obstructions which exist in the river between respondents' lands and the mouth of the river, so as to unnecessarily interfere with or prevent its navigation by respondents; that appellant be restrained from operating its splash dams so as to create such unnatural freshets as will damage respondents' land by overflowing the same, or depositing logs thereon, or causing the lands to be eroded and washed away, and that respondents recover two hundred and fifty dollars damages and costs.

Appellant's first contention is that obstructions to the respondents' navigation of the river, if they existed, were a public nuisance, the continuance of which could not be abated by an injunction obtained in an action maintained by a private individual; that respondents as private individuals cannot maintain this action, for the reason that they are similarly situated with many others upon the river, and fail to allege special injury to themselves. The trial court found that the river was the highway which constituted the respondents' means of ingress and egress to and from their lands. It does not appear from the findings that they did or did not have any other highway, but it does appear that they had this one which was totally obstructed. This finding establishes the fact that the respondents were specially injured, which fact entitled them to maintain an equitable action to enjoin the appellant from causing the obstructions: Carl v. West Aberdeen Land & Imp. Co., 13 Wash. 616, 43 Pac. 890; Smith v. Mitchell, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667; Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807.

[515] Mr. Farnham, in volume 1 of his work on Waters and Water Rights, section 85a, says: "Regarding the obstruction of the stream as a public nuisance it necessarily follows that to enable an individual to maintain an action he must show a special injury to himself, different in kind from that suffered by the public at large. But the owner of a wharf or other improvement on a stream does suffer an injury different in kind from that suffered by the public when the value of his wharf is destroyed by the closing of the stream. Furthermore, a nuisance may be both public and private. And the closing of a stream may be a public nuisance so far as it

interferes with the public right of navigation, and a private nuisance to owners of land along the bank whose navigation rights are thereby cut off."

In Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807, it was found that a certain navigable slough, extending from lands of the plaintiff to Bellingham bay, subject to the ebb and flow of the tide, was used by the plaintiffs and other loggers in carrying their timber products to market; that the plaintiffs had no other feasible or practicable way to carry their timber to market; and that the navigation of the slough was obstructed by the defendant. This court, in passing upon the identical question now raised by the appellant, said: "Appellants' last position is based upon the claim that the United States is the only party having a right to prevent the obstruction, and that respondents are not injured until they are denied free passage. It has been frequently held by this court that, where, by a public nuisance, a private party is specially damaged, his damage differing in kind and degree from that of the general public, he may maintain an action to abate such nuisance: Carl v. West Aberdeen Land Co., 13 Wash. 616, 43 Pac. 890; Smith v. Mitchell, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667; Griffith v. Holman, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239, 54 L. R. A. 178; Sultan W. & P. Co. v. Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114; 21 Am. & Eng. Ency. of Law, 2d ed., p. 444. By findings Nos. 4, 5 and 7, it is shown that respondents are specially damaged, and also that the obstruction exists, and that respondents are prohibited from using the highway and from removing their timber products to market."

[516] It does not appear, nor has it been found, that appellant is not keeping a portion of the channel of the river open along the side of its boom, as required by law, but it does appear that the operations above its boom, conducted by it, and through the medium of the splash dams operated by loggers with whom it has an agreement, are causing obstructions to navigation. These acts which interfere with the respondents' use of a public highway ordinarily affording them ingress to and egress from their lands, may be enjoined in an action prosecuted by them.

Appellant complains of the order commanding it to remove, abate, and clear away the logs and other timber products which create jams, drifts, and obstructions in the river and interfere with its navigation by respondents. It insists that

the findings are not broad enough to establish the fact that its boom or splash dams have caused such obstructions, but that the findings do show that they were caused by loggers over whom appellant has no control, who deposited the timber products in the stream, constructed the boom stick, and operated the splash dams. We think the findings show these acts to have been performed by the loggers under appellant's direction and control. The situation disclosed by the findings indicates that the appellant's boom has not sufficient capacity to collect, store and care for all the logs consigned to it, and that instead of properly enlarging its boom and keeping the river open for navigation, it has endeavored to detain the logs by use of the boom stick which the loggers placed in the stream. The appellant could prohibit the loggers from using its splash dams to such an extent as will prevent the driving of more logs than it can care for in its boom. The findings show the appellant to be so closely identified with the loggers in these operations upon the river that if the latter are not its servants or employés, they are at least joint tort-feasors with appellant, making them and appellant jointly or severally liable.

[517] The appellant, citing Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, and Van Siclen v. Muir, 46 Wash. 38, 89 Pac. 188, decided by this court, insists that respondents have no riparian or littoral rights on the stream, as it is subject to the ebb and flow of the tide, and that the tide lands belonging to the state lie between the natural stream and respondents' upland. The respondents in common with the public have the right to use the stream for navigation. It is the highway affording their means of ingress and egress, and its obstruction especially injures them. It cannot be seriously contended that the appellant, by its operations on the river, can wash away respondents' uplands or deposit obstructions on their cultivated lands, on the theory that they have neither riparian nor littoral rights. Their uplands having been injured and damaged, they were entitled to the injunction and damages granted, even though the state does own tide lands between their uplands and the navigable stream. Were the appellant to purchase the tide lands, such purchase would not confer upon it the right to destroy and injure respondents' uplands on the theory that they have neither riparian nor littoral rights, nor would it relieve the appellant from liability for unnecessarily interfering with the

public right of navigation over the highway which affords respondents ingress to and egress from their lands.

The judgment is affirmed.

Rudkin, C. J., Dunbar, Mount, Parker, Fullerton and Chadwick, JJ., concur.

A Private Individual may Sue to Enjoin or Abate a public nuisance which causes him to suffer a special injury, different in kind and degree from that suffered by the public in general. This rule is often applied to obstructions in the nature of nuisances in a public street or highway: See Whitmore v. Brown, 102 Me. 47, 120 Am. St. Rep. 454, and cases cited in the cross-reference note thereto. As to its application to obstructions to navigable waters, see Priewe v. Wisconsin State Land etc. Co., 103 Wis. 537, 74 Am. St. Rep. 904; McMeekin v. Central C. P. Co., 80 S. C. 512, 128 Am. St. Rep. 885; Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905; San Francisco Sav. Union v. R. G. R. Petroleum etc. Co., 144 Cal. 134, 103 Am. St. Rep. 72; Mobile Transportation Co. v. Mobile, 153 Ala. 409, 127 Am. St. Rep. 34.

BARDSLEY v. WASHINGTON MILL COMPANY.

[54 Wash. 553, 103 Pac. 822.]

BILLS AND NOTES—If No Place of Payment is Expressed in a bill or note, it is payable where the maker resides or at his usual place of business. (p. 1136.)

BILLS AND NOTES—Declaring Due on Default in Interest—Presentment.—The holder of a note cannot, without presentment for payment, exercise his option to declare the whole amount due for default in payment of interest; and if no place of payment is expressed in the note, the presentment must be made at the maker's known place of business. (p. 1137.)

Danson & Williams, for the appellant.

Belden & Losey, for the respondent.

554 PARKER, J. This is a suit upon a promissory note executed by the defendant December 21, 1904, and due December 21, 1909. The ground upon which the plaintiff contends that he is entitled to recover at this time is the alleged default in the payment of interest installments past due, giving him the right to declare the whole debt due. Upon a trial before the court, findings and judgment were made and rendered favorable to the plaintiff, from which the defendant appeals to this court. Exceptions were duly taken

by appellant to certain of the court's findings, as well as the court's refusal to make others proposed by appellant. All of the evidence is brought here for our review of the case, and so far as the facts are concerned which, in our opinion, determine the rights of the parties, they are practically undisputed, and may be summarized as follows:

The plaintiff is a resident of Spokane, and the defendant is a domestic corporation of the state of Washington with its place of business at Spokane, at all times since the making of the note sued upon, which is in words and figures as follows:

"$5000.00 Spokane, Wash., Dec. 21st, 1904.

"On or before Dec. 21, 1909, after date, without grace, we promise to pay to the order of Maida T. Carson Five Thousand Dollars in Gold Coin of the United States of America of the present standard value, with interest thereon, in like Gold Coin, at the rate of 10 per cent per annum from date until paid, for value received. Interest to be paid monthly and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute a reasonable sum of Dollars in like Gold Coin for Attorney's fees in said suit or action.

"Due Dec. 21, 1909, at Spokane, Wash.

"WASHINGTON MILL CO.
"Per W. H. ACUFF, Pres.
"Per J. C. BARLINE, Treas."

555 Sometime after the making of the note it was purchased by E. H. Belden, a resident of Spokane, from the original payee, and by him put up as collateral with the Exchange National Bank of Coeur d'Alene, Idaho. Prior to this time, the installments of interest had been paid from time to time at the office of the appellant, but thereafter, upon notice from the bank, appellant made some payments of interest upon the note by remittance through the mail to the bank, the last of which remittances paid the interest up to December 15, 1907. No further payments being made, the note was transferred to the respondent for the purpose of instituting this suit, which soon thereafter was commenced on February 20, 1908. It is conceded, however, that E. H. Belden was, and still is, the real owner of the note. The evidence is not

very satisfactory as to notice of or demand for payment of the interest installments falling due after December 15, 1907, and prior to the commencement of this action. But in any event, such notice or demand, at best, consisted of nothing more than the sending to appellant of a notice or demand for payment of such interest through the mail by the bank while the note was in its possession at Coeur d'Alene. The appellant has at all times been ready and willing to pay the interest accruing since December 15, 1907, as it became due at its place of business in Spokane. But the note has not been presented there at any time, nor was appellant given any opportunity to pay the interest there prior to the bringing of this suit, though the respondent, and also Belden, the real owner of the note, at all times knew the location of the place of business of appellant at Spokane. In so far as these facts were not found by the trial court, they were requested to be found by appellant, and are established beyond controversy by the evidence. It is unnecessary for us to point out the particulars in which we regard the court's findings and conclusions as erroneous.

This is not a question of charging the company primarily liable upon this note as to its ultimate liability. The appellant [556] would not be released from liability to pay the principal and interest thereon by any failure to present the note or demand payment at any particular time or place. This would be true whatever construction might be placed upon its terms as to place of payment, but for determining the right of the respondent to exercise his option to declare the whole of both principal and interest due and collectible upon default in payment of interest installments, we regard the place of payment and the presence of the note there, thus furnishing an opportunity to pay, as of vital moment. Some contention is made upon the question of whether or not the note is by its terms payable at a particular place—that is, whether or not the place named in the note, to wit, "Spokane, Wash.," is a particular place. Considering the fact that Spokane is a large commercial city, it may be that such designation of place of payment is not very specific, and such provision, standing alone, may not under all circumstances be regarded as designating a particular place of payment other than limiting it to some place within the city. There is, however, a principle of law sufficient for this purpose which we regard as fixing the place of payment of this note and

interest thereon with equal certainty as if specifically named by its express terms.

In 1 Daniel on Negotiable Instruments, fifth edition, section 90, the rule is laid down that "Where no place of payment is expressed in a note the place of payment is understood to be where the maker resides." And the supreme court of the United States in the case of Cox v. National Bank, 100 U. S. 704, 712, 25 L. ed. 739, uses this language: "Where no place of payment is expressed in a bill or note, the general rule, in the absence of any agreement or circumstance fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business": See, also, Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594; Oxnard v. Varnum, 111 Pa. 193, 56 Am. [557] Rep. 255, 2 Atl. 224; Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. 444; Hunt on Tender, sec. 313.

At all times since the making of this note the appellant had an established place of business in Spokane. The original payee and each successive owner of the note, being all residents of Spokane, knew of appellant's place of business there. The note was at no time, after the last payment of interest, presented there, and the only knowledge of the whereabouts of the note on the part of the appellant, after the last payment and before the commencement of this action, was that the same was in possession of a bank in another state. In view of the law, which we regard under the circumstances of this case as fixing the place of payment specific and certain as if named in the note at the place of business of appellant, we think it was not required to go elsewhere to pay interest thereon in order to prevent the owner from exercising his option to declare the whole debt due on account of interest remaining unpaid. Before the owner has the right to exercise such option he must furnish the maker of the note an opportunity to pay at the place where the same is payable, whether that place is determinable by express words in the note or by implication of law. Our negotiable instruments statute, Laws of 1899, page 353, section 70, provides: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part."

As above indicated, this note may not be "by its terms payable at a special place," and for that reason we do not base our decision upon this statute, but upon the law which, applied to these undisputed facts, does fix a special place for its payment independent of statute. The appellant being ready and willing to pay at the time and place for payment 558 we are of the opinion there was no such default in payment of interest as to entitle respondent to maintain an action upon the whole debt, and that this action was prematurely commenced.

We conclude that the judgment of the superior court should be reversed, with instructions to dismiss the action. It is so ordered.

Rudkin, C. J., Mount, Crow and Dunbar, JJ., concur.

If No Place of Payment is Named in a Note, it is presumed to be payable at the place of residence of the maker: McCruden v. Jonas, 173 Pa. 507, 51 Am. St. Rep. 774. And the dating of a note at a particular place is not sufficient to make it payable at that place: McNair v. Moore, 55 S. C. 435, 74 Am. St. Rep. 760. But see Bigelow v. Burnham, 83 Iowa, 120, 32 Am. St. Rep. 294. As to the necessity of presentment at the place of payment, see Brown v. Jones, 113 Ind. 46, 3 Am. St. Rep. 623.

CONRAD v. GRAHAM.

[54 Wash. 641, 103 Pac. 1122.]

EXPLOSIVES—Intoxication Contributing to Accident.—If in an action for injuries from the explosion of a chemical sold by the defendant there is evidence that prior to the accident the plaintiff had been drinking, the jury may be instructed that if in consequence thereof he was prevented from using his senses, and was injured on that account, he cannot recover. (p. 1138.)

EXPLOSIVES—Notice to Agent of Purchaser.—Where a photographer sends a messenger to purchase a certain chemical, notice to the messenger that the chemical sold him is different from and more dangerous than the one ordered is notice to the photographer. (p. 1139.)

EXPLOSION—Contributory Negligence of Photographer.—Where an experienced photographer, who knows that only magnesium can safely be used in a magazine lamp, is injured by an explosion from using therein a different chemical which was sold to his messenger, he has no cause of action against the vendor if the latter labels the package and informs the messenger that the chemical is different from and more dangerous than the one called for. (pp. 1139, 1140.)

Robertson & Rosenhaupt and J. B. Hart, for the appellant.

Post, Avery & Higgins, for the respondent.

642 MOUNT, J. The appellant was injured on December 31, 1903, by the explosion of a magazine lamp which he was at that time attempting to use for the purpose of making flashlight photographs. He alleged in his complaint that on the afternoon of that day he sent a messenger to the respondent's store to purchase a particular kind of flashlight chemical, and that there might be no mistake as to the character of the chemical, he wrote a description thereof on a card as follows: "Magnesium metal for Rex magazine lamp," which card was handed to respondent's clerk; that the respondent sold and sent to appellant another kind of chemical which was much more dangerous than the kind ordered, and that appellant or his agent was not informed of that fact; that by reason thereof appellant was severely injured.

The respondent, by its answer, denied that it furnished flashlight chemicals of any kind to the appellant, or anyone for him, and alleged that appellant's injury was caused by his own negligence, and that he assumed all risk of using the chemicals which caused his injury. The case was tried to a jury, and a verdict was returned in favor of the respondent, and a judgment of dismissal followed. The appellant alleges that the court erred in instructing the jury as follows: "Or if you find that the plaintiff while handling such chemicals was under the influence of intoxicants or was thereby 643 prevented from using his senses and knowledge, that he was injured in consequence, and that he had such knowledge of such chemicals that if he had been sober and had exercised reasonable care he would not have handled the chemicals as he did and would not have been injured, the plaintiff could not recover."

It is argued that this instruction was error because there was not sufficient evidence to warrant an instruction upon the question of intoxication of the appellant, and, also, that the instruction emphasized the question of intoxication, and was not a true statement of the law. We think the instruction is not subject to these criticisms. There was evidence that the appellant had been drinking prior to the time of the accident. One of the defenses was that the appellant was himself negligent. It seems too plain for argument that if the jury found that the appellant was under the influence of intoxicants, and in consequence thereof was injured, and if the jury found that had appellant been sober and used reasonable care he would not have handled the chemicals as he did and would not have been injured, he could not recover even if the re-

spondent was negligent, and this is in substance what the jury were told. It may be that the mere fact of drunkenness was not sufficient to show contributory negligence. The court did not say to the jury it was, but said that if in consequence thereof the appellant was prevented from using his senses and was injured on that account, he could not recover. This was without doubt a correct statement of the law. This is not in conflict with the rule in Lawson v. Seattle & Renton R. Co., 34 Wash. 500, 76 Pac. 71. The instruction was not erroneous.

It is next claimed that the court erred in instructing the jury to the effect that, if they found that notice was given to the messenger sent by the respondent to purchase the chemical that such chemical furnished was not magnesium but another more dangerous chemical, but would answer as well, such notice was notice to the appellant. It is argued that this instruction presupposes that notice was given to the [644] messenger that the article furnished was not the article ordered. We need not consider whether this instruction does presuppose such fact, because the fact was not a disputed one. It was assumed from the beginning of the case that the chemical furnished to Mr. Jauslan, who acted as messenger for the appellant, was not the article ordered, and Mr. Jauslan understood that fact and was told, "This will do the work." The case was tried upon the theory that Mr. Jauslan was informed that the article he purchased was not the article he ordered. We think there can be no doubt that notice to Mr. Jauslan was notice to the appellant that the chemical delivered was not the chemical ordered: Fowler v. Randall, 99 Mo. App. 407, 73 S. W. 931, and cases there cited.

It is next claimed that the court erred in instructing the jury: "If you find that notice was given to Jauslan as I have already instructed you, and you further find that the chemical delivered to Jauslan was labeled cautioning that it be not used in a magazine lamp, and that the plaintiff saw and read, or if he had exercised reasonable care would have seen and read such caution, and notwithstanding such caution plaintiff nevertheless did use such chemical in a magazine lamp, and was injured in consequence thereof, he cannot recover from the defendant, and your verdict would be for defendant."

It is admitted that the appellant was an experienced man in photography with flashlight chemicals, and he knew that only magnesium could be used in a magazine lamp such as he was using, and he also knew that such packages were usu-

ally labeled. Under these circumstances the instruction was clearly right. It did not assume any disputed fact and was not a comment thereon, and was certainly within the issues of the case.

It is argued that the court erred in refusing to give several instructions requested by the appellant. The record shows that the substance of all these instructions was given, and that is all that is required. Several errors are based on the [645] ruling of the court on the question of evidence during the trial. There is no merit in any of these assignments; they are not of sufficient importance to justify extended consideration. The trial of the case seems free from error, and upon a consideration of the whole case, we think the verdict of the jury was right. The judgment is therefore affirmed.

Rudkin, C. J., Dunbar, Crow and Parker, JJ., concur.

The Liability of the Vendor or Manufacturer of a dangerous substance or instrumentality is discussed in the notes to Kuelling v. Lean Mfg. Co., 111 Am. St. Rep. 701; Woodward v. Miller, 100 Am. St. Rep. 192.

DENNY v. SCHWABACHER.

[54 Wash. 689, 104 Pac. 137.]

COMMUNITY PROPERTY—Presumption.—Property Acquired by Purchase during marriage is presumed to be community, and the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory evidence. (p. 1142.)

HUSBAND AND WIFE—Gift or Resulting Trust.—Where the consideration for a conveyance is paid from the separate funds of one spouse, while the property is conveyed to the other, a presumption of gift rather than of trust arises, which presumption can be overthrown and a trust relation established only by clear and convincing evidence. (p. 1142.)

HUSBAND AND WIFE—Property Purchased with Her Funds in His Name.—Land conveyed to a man will be regarded as the separate property of his wife held in trust, and hence not subject to a judgment subsequently recovered against him, where it appears that she paid the purchase price and the cost of improvements from her separate estate, that he admitted the trusteeship, no credit was given in reliance of his supposed ownership, and they conveyed the property to a third person before the execution sale. (p. 1144.)

WITNESS—Transaction With Person Since Deceased.—A widow who has filed a sworn disclaimer in an action to quiet title is not disqualified, by an averment in a cross-complaint that she claims an interest in the property, to testify to facts showing that her husband, since deceased, held the title in trust for her. (p. 1144.)

Harold Preston and G. W. Kemp, for the appellant.

William Martin and John B. Denny, for the respondent.

[690] GOSE, J. This action, instituted by the respondent July 1, 1907, to obtain a decree declaring him to be the owner in fee of the property in controversy and to quiet his title, terminated in a decree in his favor on October 10, 1908, from which this appeal is prosecuted. The complaint alleged that the respondent was, and since July 16, 1903, had been, the owner and in the possession of the property; that the appellant Schwabacher claimed an interest therein adverse to the respondent, under an execution sale upon a judgment against D. T. Denny and D. Thomas Denny; that neither of the judgment defendants at any time owned any interest in the property, but that the same became the separate property of Louisa Denny, wife of D. T. Denny, on October 5, 1889, in virtue of a purchase of the same by her and a conveyance of the legal title to her husband, D. T. Denny, who held the legal title for her until July 16, 1903, at which date they conveyed it to the respondent.

The answer denied the respondent's ownership, and alleged affirmatively that the property was acquired as the community property of D. T. Denny and his wife, Louisa Denny; that the appellant Schwabacher acquired title as a purchaser at an execution sale upon a judgment in his favor against D. T. Denny and D. Thomas Denny, theretofore entered upon a community indebtedness of D. T. Denny and his wife, Louisa Denny; that the respondent's right to maintain the action was barred by the statute of limitations and by his laches. Louisa Denny was made a cross-defendant, under an allegation in the answer and cross-complaint that she claimed an interest in the property. The reply joined issue [691] on the new matter in the answer. Louisa Denny before the trial answered, disclaiming any interest in the property, and alleging that on the sixteenth day of July, 1903, she conveyed the same to the respondent by a deed of gift. Upon the issues thus joined the case was tried to the court.

It is admitted that D. T. Denny and Louisa Denny were husband and wife on October 5, 1889, and that on that date the property was conveyed to D. T. Denny, and that the legal title remained in his name of record until July 16, 1903, when it was conveyed to the respondent by D. T. Denny and his wife Louisa, by a deed which was filed for record on November 20th following.

The principal question to be determined is, whether the property was purchased with the separate funds of Louisa Denny and conveyed to D. T. Denny in trust for her. If it was so purchased and conveyed, respondent's title is complete, unless a determination in his favor is precluded by the statute of limitations or his laches. If it was not so purchased and conveyed, the appellant Schwabacher acquired title as the purchaser at the execution sale. A brief review of the evidence, therefore, becomes incumbent in order to determine this question.

The evidence shows conclusively that D. T. Denny died November 25, 1903; that in 1896 the appellant Schwabacher recovered a judgment against D. T. Denny and D. Thomas Denny, which was renewed in 1902; that in 1906 all the right, title and interest in the property owned by D. T. Denny on May 8, 1902, was purchased by the appellant Schwabacher at a sale made upon an execution issued upon the judgment; that the sale was confirmed; that D. T. Denny and Louisa Denny, in consideration of love and affection, conveyed whatever interest they had in the property to the respondent, their son, on July 16, 1903, and that he has since been in possession thereof; that the deed of conveyance was filed for record on November 20th following; that before the execution sale the respondent caused a notice to be served on the attorneys for the [692] appellant Schwabacher, and upon the sheriff notifying them that D. T. Denny owned no interest in the property, and that he caused public notice to that effect to be given at the sale.

There are two applicable fundamental principles of law in the instant case: 1. Property acquired by purchase during marriage is presumed to be community property, and the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory evidence: Ballard v. Slyfield, 47 Wash. 174, 91 Pac. 642. 2. Where the consideration for a conveyance of property is paid from the separate funds of one spouse and the property is conveyed to the other, a presumption of a gift rather than a trust arises, and this presumption can only be overthrown and the trust relation established by evidence that is clear, cogent and convincing: Pomeroy's Equity Jurisprudence, sec. 1041.

Applying these rules to the evidence, we have no difficulty in reaching the conclusion that the property was purchased at the instance of Louisa Denny, paid for by her from the proceeds of her separate property, and conveyed to D. T.

Denny in trust for her. The evidence shows that, in 1866, a patent was issued by the United States, conveying to D. T. Denny the east half and to Louisa Denny the west half of a three hundred and twenty acre donation claim; that at the time of the purchase of the property in controversy, the land of the latter had become valuable, and that she had separate property of great value; that she wanted the property involved in this suit for a family burial ground; that one of her daughters had recently died; that she purchased the property from her son in law and daughter, and paid them therefor the sum of eight hundred dollars, five hundred dollars of which was paid by her personal check, and three hundred dollars was paid by her satisfying a loan of that amount which she had made the grantors a few months before. This money was derived from the sale of a part of her donation claim, which was admittedly her separate property. The evidence further shows that she paid for certain work done in clearing a part of the property, from her separate money, 693 and that D. T. Denny, prior to his death, stated to his son and a daughter that their mother owned the property; that prior to the purchase of the property he stated to his son in law, the then owner of the property, that his wife wanted to purchase it.

The appellant argues that eighteen years having elapsed between the date of the purchase and the trial, the memory of interested witnesses as to the nature of the transaction should not be permitted to overthrow the presumption arising from the deed, and that the evidence of the witnesses, near relations of the respondent, bears the earmarks of consultation, preparation and even collusion. Answering the first proposition, it is true that such evidence will be carefully scrutinized, and it is also true that ordinarily statements and conversations, resting in memory only, as to ancient transactions are not of great probative force. But in the instant case, it is clear that the mother's desire to procure the property in controversy as a place for the interment of the remains of the members of her family was so great as to fix the transaction indelibly in her memory. It appears from the evidence that the children had for years used this property as a resort for camping and frequent daily outings, that they had become much attached to it, and that from these associations there arose in her a fixed purpose to procure the property and devote it to the use stated. As to the question of preparation, consultation and collusion, a careful reading of the evidence

has convinced us of the candor, veracity and credibility of the several witnesses.

It is further argued that certain exhibits in the record disclose that it was the habit of Louisa Denny to keep her separate property in her own name, and convey it without her husband joining. We have examined the exhibits in connection with the other evidence, but do not regard the inference to be drawn therefrom of sufficient strength to qualify the view we have expressed. A more extensive review of the evidence would serve no useful purpose.

694 The appellant urges that Louisa Denny was disqualified from testifying, under the provisions of our code, Ballinger's Code, section 5991 (Pierce's Code, section 937). When she filed her disclaimer she was no longer a party to the action. The appellant could not, against her sworn disclaimer, disqualify her by an averment in the cross-complaint that she claimed an interest in the property: Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819.

It is finally contended that the respondent's cause of action is barred by the statute of limitations and by his laches. The authorities cited do not, in our opinion, even tend to support either view. We have seen that the property was conveyed to the respondent before the execution sale; that the trustee acknowledged and executed the trust before his death, and that the respondent, since he acquired title, has been in possession of the property. There is no evidence that any credit was given to D. T. Denny relying upon his supposed ownership of the property, nor is there any evidence that the latter ever asserted title; but, upon the contrary, as we have seen, he admitted his trusteeship. The indebtedness upon which the judgment was entered arose in March, 1893, at which time D. T. Denny was reputed a wealthy man.

From what we have said, it follows that the decree should be affirmed, and it is so ordered.

Rudkin, C. J., Fullerton and Chadwick, JJ., concur.

Morris, J., took no part.

As to What is Community Property, and the presumptions in respect thereto, see the note to Nilson v. Sarment, 126 Am. St. Rep. 99.

Resulting Trusts in Favor of a Husband or Wife who pays the purchase price of land and takes the title in the name of the other spouse are discussed in the note to Stonecipher v. Kear, 127 Am. St. Rep. 252.

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2. **CRIMINAL LAW—Leading a Life of Lewdness.**—To sustain a charge under Iowa Code, section 4943, which provides that any person found at any hotel or other place, leading the life of prostitution or lewdness, shall be imprisoned, etc., it is necessary to show more than the commission of such acts during one night only. Illicit cohabitation on one occasion, though the result of a previous arrangement, or mere private incontinence on different occasions with different persons, does not constitute the offense contemplated. To bring such an offense within the statute there must be a habitual resorting there for lewd purposes or a repeated indulgence in lewdness while living there. (Iowa) State v. McDavitt, 275.

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ADVERSE POSSESSION.

1. **ADVERSE POSSESSION Between Parties to Illegal Marriage.**—Where a marriage is illegal, a claim by the woman as wife to land through a deed by which title was conveyed to the man will not ripen into title in her by adverse possession. (Tex.) Hayworth v. Williams, 879.

2. **ADVERSE POSSESSION—Tenant Disavowing Landlord's Title.** When a tenancy is once shown to exist, in order to set the statute of limitations running in favor of the tenant desiring to avail himself of it, to acquire title by adverse possession, he must openly and explicitly disclaim and disavow any and all holding under his former landlord; and unreservedly and steadily assert that he himself is the owner of the true title, all of which must be brought to the knowledge of the rightful owner. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

3. **ADVERSE POSSESSION—Interest Claimed—Quality and Extent.**—It is not possession alone, but possession accompanied with the claim of the fee, that gives character to adverse possession; for possession per se may evidence only the mere act of rightful occupa-

tion, consistent with a present interest under a lease. The quality and extent of the interest claimed is the sole basis on which the presumption of law will stand in the claimant's favor. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

4. **ADVERSE POSSESSION, Consistent With License.**—Where the riparian owner gave a license to erect a boom, the licensee to pay the taxes on the land, which he did for a long term, and the license was transferred several times, always with an acknowledgment of the riparian owner's boom privilege, and ultimately a claim was made to the boom by adverse possession of the licensee, such claim failed on the ground of the distinction in ownership of the license to construct the boom and of the boom itself, the claimant's so-called adverse possession being consistent with possession under the license. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

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ANIMALS.

Liability for Bite of Dog—Hydrophobia.

1. **TORT—Contract—Scienter.**—The owner of a vicious dog which bites another person is responsible only on proof of the scienter, but there is no such burden of proof when there is a contractual relation between the parties, as in the case of hiring out a vicious horse. (Pa.) Conn v. Hunsberger, 770.

2. **DAMAGE, Fear of the Plaintiff as an Element of—Evidence.**—In an action wherein the plaintiff seeks to recover for being bitten by a dog claimed to have been suffering from hydrophobia, evidence on the plaintiff's part showing a fear of contracting the disease and of being worried thereby is admissible. (Md.) Buck v. Brady, 459.

3. **EVIDENCE of the Fears of an Employé of the Defendant Respecting a Dog's Being Afflicted with Hydrophobia.**—In an action to recover damages from being bitten by a dog claimed to have been suffering from hydrophobia, evidence is admissible to show that a servant or employé of the defendant having the dog in charge seriously apprehended danger from the dog and communicated his fears to his employer. (Md.) Buck v. Brady, 459.

4. **MASTER AND SERVANT.**—The Knowledge of a Servant as to the condition of a dog in his charge developing symptoms of hydrophobia is the knowledge of his master. (Md.) Buck v. Brady, 459.

5. **EVIDENCE OF HYDROPHOBIA — Experiments and Notes and Memoranda Thereof.**—If the head of a dog suspected of having

hydrophobia is placed in the Pasteur Institute, and different parts are examined by different persons, who enter on different records the result of their examinations, such entries and the opinions of the witnesses thereon are admissible to prove that the animal was so afflicted. (Md.) Buck v. Brady, 459.

6. **HYDROPHOBIA, Owner of Animal, When Liable to Person Bitten by.**—If a dog suspected of having hydrophobia is turned loose by its owner after knowledge of its symptoms and behavior, he may be found to have been guilty of negligence, and he is liable to one injured subsequently by being bitten by such animal. (Md.) Buck v. Brady, 459.

7. **HYDROPHOBIA, Duty of Owner of Animal Suspected of Having.**—Whenever the owner of a dog has reason to suspect that it may be afflicted with hydrophobia, it becomes his duty to be very circumspect and to use every precaution to prevent the animal from inflicting injury on any creature. (Md.) Buck v. Brady, 459.

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APPEAL AND ERROR.

1. **CRIMINAL LAW—Appeal.—The Bill of Exceptions** must contain such objections to instructions and to remarks of the attorneys as it is desired to bring under the notice of the court of appeal, otherwise they cannot be considered. (Or.) State v. Young, 689.

2. **APPEAL—Readiness to Give Stay Bond.**—Where an order for an injunction cannot be stayed on appeal unless the appellant gives a bond in an amount to be fixed by the court, if the appellant has requested such court to fix the amount of the bond, it is the duty of the court to fix it, and until it does, no contempt proceedings for violation of the injunction should have been entertained. (Cal.) Clute v. Superior Court, 54.

3. **APPEAL AND ERROR—Waiver of Right Pending Appeal.**—The rule is settled in Oregon that evidence dehors the record is admissible to establish the fact that, since a judgment was rendered or a decree given, the party appealing therefrom has so dealt with the subject matter of the suit or action as to preclude him from further asserting his alleged right on appeal. (Or.) Thomas v. Booth-Kelly Co., 713.

4. **APPEAL AND ERROR.—Rulings Favorable to the Appellant** will not be considered on appeal. (Ala.) Harper v. Raisin Fertilizer Co., 32.

5. **APPEAL AND ERROR—Review.**—There being no decree on a motion to dismiss an original bill, before the filing of an amendment, the court on appeal can consider only the motion to dismiss the bill as amended and the overruling of the motion to strike the amendment. (Ala.) Harper v. Raisin Fertilizer Co., 32.

6. **APPEAL AND ERROR—Motion to Strike.**—The ruling of the court on a motion to strike may be reviewed on appeal from the final decree. (Ala.) Harper v. Raisin Fertilizer Co., 32.

7. **APPEAL AND ERROR—Weight of Findings of Trial Court.**—The findings of the chancellor who had the opportunity for hearing witnesses and observing their demeanor are entitled to great weight, and will not be set aside unless manifestly against the weight of evidence. (Ill.) Ogden v. Stevens, 237.

8. **APPEAL AND ERROR, Facts, When may be Re-examined.**—Where, in a suit in equity, the trial judge reports the case to the appellate court for such decree "as justice and equity may require," that court will examine the facts and come to its conclusion, giving due weight to the conclusion of that judge where he has found certain facts. (Mass.) Nelson v. Peterson, 503.

9. **APPEAL AND ERROR — Nonsuit, Denial of — Review.**—The appellate court will not review a motion for a nonsuit where, though the evidence originally was insufficient, it has been cured by subsequent testimony properly disclosed by the record. (Or.) Jennings v. Trummer, 680.

10. **APPEAL AND ERROR—Conflict of Evidence.**—When there is a conflict of evidence, it is for the jury to resolve it from the evidence and not for the court of appeal to review. (Or.) Jennings v. Trummer, 680.

11. **APPEAL AND ERROR—New Trial—Remittitur—Instructions—Remediable Error.**—Where an instruction to the jury contained an error as to the quantity of goods in respect to which they were to assess the damage, such error not affecting the real controversy and being easily remediable by reason of the amount of damages being severable from the rest of the verdict, a new trial will not be granted if the damages are remitted by consent. (Or.) Eaton v. Blackburn, 705.

12. **APPEAL AND ERROR—Admission of Hearsay.**—The subsequent proof of what was originally hearsay evidence admitted after objection renders the error of admitting it harmless and unprejudicial. (Or.) Eaton v. Blackburn, 705.

13. **APPEAL AND ERROR—Evidence in Support of Finding.—The Objection that There is No Evidence** to support a finding is not well taken, when there is evidence from which the jury may reasonably infer the necessary fact, nor is it any objection that more than one inference may be drawn from such testimony. (Pa.) Lehner v. Pittsburg Ry. Co., 729.

14. **APPEAL — Jurisdiction of Trial Court After Affirmation.**—After a judgment has been affirmed on appeal the trial court has no jurisdiction, in the absence of permission first obtained from the appellate court, to entertain jurisdiction of an action to vacate it for fraud. (Wash.) Kath v. Brown, 1084.

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ASSAULT AND BATTERY.

1. **ASSAULT AND BATTERY—Plea of not Guilty—Burden and Details of Proof—Admissions by Prisoner.**—Section 1370, B. & C. Comp., provides that a plea of not guilty controverts and is a denial of every material allegation in an indictment, and, therefore, where the charge is an assault with a dangerous weapon by shooting the prosecutor, and the defendant admits the assault by shooting and pleads a justification, the burden nevertheless of proving every material element of the charge beyond reasonable doubt is upon the state. Evi-

dence of the number and character of the gunshot wounds in such case is both relevant and admissible. (Or.) State v. Young, 689.

2. **ASSAULT AND BATTERY—Evidence—Justification.**—Where the indictment charges an assault with a dangerous weapon, and the defendant seeks to justify on the ground that the prosecutor was about to commit a felony on defendant's wife, he cannot give evidence that the prosecutor's moral character is bad, that he is a disturber of the family relations of others as well as of the defendant, that he had made statements to the defendant's wife from which defendant believed he intended to seduce her, and that at the time of making the assault he believed that if his wife were in the prosecutor's presence that night she would be in imminent danger from the prosecutor, there being no evidence to show that the prosecutor had made any threats or offered any violence to the defendant or to his wife, who was not present at the time of the assault. (Or.) State v. Young, 689.

3. **ASSAULT AND BATTERY — Self-defense — To What Extent Warranted.**—By section 1654, subdivision 1, B. & C. Comp., resistance to the commission of crime may be lawfully made by the party about to be injured, or by any other person in his aid or defense, when it is necessary to prevent a crime against his person, to the extent (under section 1757 of the same subdivision) of killing one about to commit a felony upon such party or his wife. Armed with these provisions, it is not only the right, but the duty, of a husband to resist an assault on his wife and to use reasonable force to that end, even to take the life of the assailant to prevent the commission of such felony if the circumstances are such that the wife had the right to use the force in her own defense, the right to defend another being no greater than such other has to defend himself. (Or.) State v. Young, 689.

4. **APPEAL AND ERROR—Excessive Damages—New Trial.**—The court will not disturb the finding of the jury as to damages for an assault except they are so grossly excessive as to "shock the conscience of the court" or have been awarded emotionally from passion or prejudice aroused by the justice's charge to them. (R. I.) Hickey v. Booth, 832.

5. **APPEAL AND ERROR—Punitive Damages for Perjury.**—In an action for damages for an assault, where there was a direct conflict of evidence, it was error to lead the jury to believe that the manifest perjury committed by one of the parties to the action could be punished by them in their verdict; and while punitive damages might be awarded, the jury should have been instructed they should be for the assault and not for the perjury. (R. I.) Hickey v. Booth, 832.

6. **APPEAL AND ERROR—New Trial—Statements of Presiding Justice.**—In an action for damages for assault it was error for the presiding justice to charge the jury that they had not only the duty to decide between the parties to the action, but the extraordinary duty to see to it that no liars or perjurers prevail, and that they must not shirk that important duty, and further, that as perjury had been undoubtedly committed, some one must be punished for it. (R. I.) Hickey v. Booth, 832.

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ASSIGNMENT.

1. **CHOSE IN ACTION—Assignee.—The Beneficial Owner** or assignee can, under section 2860 of the code, maintain an action thereon in his own name. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

2. **ASSIGNMENT, Effect of Prior Notice of.**—The assignment of a fund operates in favor of the assignee who first gives notice to the debtor, depositary, or trustee. (Md.) Lambert v. Morgan, 412.

3. **ASSIGNMENT, Notice of to a Trustee, What Amounts to.**—Where there is a fund within the control of trustees and an administration by a court of equity, the filing of an assignment in the case has the effect of notice to the trustees, and gives the assignee precedence over a prior assignment of which no notice has been given. (Md.) Lambert v. Morgan, 412.

4. **ASSIGNMENT, When not Protected by the Registry Acts.**—If a testator devises lands to trustees to sell and pay the income of the fund for life, the tenant for life has no such interest as he can mortgage, and a mortgage thereof and its registration does not give notice to any person of the priority of the lien attempted to be created thereby, nor take precedence over an assignment subsequently made of which notice is given to the trustees by filing it in the case in which the trust is subject to the jurisdiction and administration of a court of equity. (Md.) Lambert v. Morgan, 412.

5. **THE ASSIGNMENT OF A FUND does not by Being Recorded Become Operative Against Persons Having No Notice Thereof.** Such an assignment is not an instrument within the provisions of the registry act, and its recordation gives it no greater effect than the law itself gave. (Md.) Lambert v. Morgan, 412.

6. **ASSIGNMENT OF A FUND, Mortgage, When may Operate as.**—If lands are devised to a trustee to sell and pay the income of the fund to a life tenant, his mortgage of the land cannot operate except as an assignment of the fund of which, notwithstanding the recording of the mortgage, notice must be given as in other cases of assignment. (Md.) Lambert v. Morgan, 412.

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ATTORNEY AND CLIENT.

ATTORNEY—Implied Authority to Take Appeal.—An attorney employed only to try a litigated issue in a nisi prius court has no implied authority to prosecute an appeal or writ of error from an adverse decision and bind his client for the cost of a transcript to be used for that purpose. (Colo.) Tobler v. Nevitt, 142.

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AUTOMOBILES.

AUTOMOBILES—Duty of Passenger to Warn Driver.—A passenger in an automobile for hire is not required, in the presence of railway tracks, to warn, advise, or direct the chauffeur, nor is he bound by the doctrine of "stop, look and listen." (Wash.) Wilson v. Puget Sound Elec. Ry., 1044.

BAILMENT.

See Livery-stable Keepers.

BANKRUPTCY.

1. **BANKRUPTCY—Preference, What is.**—The intent of a debtor or creditor or the knowledge of the creditor of the insolvency of the debtor constitutes no material part of the transaction by which a creditor may be preferred. If the insolvent debtor transfers any of his property while insolvent, and such transfer enables the creditor to whom it is made to obtain a greater percentage of his debt than any other creditor of the same class, the transfer is a preference. (Okl.) Kahn v. Bledsoe, 665.

2. **BANKRUPTCY.—A Surety is a Creditor of a Bankrupt Principal** before default and from the signing of the note. (Okl.) Kahn v. Bledsoe, 665.

3. **BANKRUPTCY—Classification of Creditors, How Determined.**—Creditors of a bankrupt and their claims against his estate are respectively of the same class when the creditors are entitled to receive thereon the same percentage of dividends from the bankrupt's estate. (Okl.) Kahn v. Bledsoe, 665.

4. **BANKRUPTCY — Surety, Effect of Receipt of Preference by on Another and Open Account.**—A surety on an obligation of a bankrupt is a "creditor" under bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. Stats. 1901, p. 3418]); and, when he has received from the bankrupt, within four months next preceding the filing of the petition for adjudication in bankruptcy, while the bankrupt is insolvent, a preference on an open account due by the bankrupt to him, such surety will not be allowed his claim for the amount paid after the adjudication by him as surety in discharge of the obligation of the bankrupt principal, unless he returns to the trustee the preference received by him upon the open account. (Okl.) Kahn v. Bledsoe, 665.

BANKS AND BANKING.

1. **CRIMINAL LAW—Drawing Check Without Funds—Evidence.**—In a prosecution for drawing a check without funds to meet it, the admissions or confession of the accused, coupled with the testimony of an officer of the bank, are sufficient to carry the case to the jury on the question of the existence of funds to pay the check. (Wash.) State v. Pilling, 1080.

2. **CRIMINAL LAW — Drawing Check Without Funds — Ownership of Funds.**—In a prosecution for drawing a check upon a bank in which are no funds to meet it, the technical ownership of the money paid out by the bank is immaterial; the material question is the intent to defraud. (Wash.) State v. Pilling, 1080.

3. **CRIMINAL LAW—Drawing Check Without Funds.—The Naming in the Indictment** of the person intended to be defrauded, in a prosecution for drawing a check without funds to meet it, is immaterial, and may be treated as surplusage so that evidence that a different person was defrauded does not constitute a variance. (Wash.) State v. Pilling, 1080.

4. **CRIMINAL LAW—Drawing Check Without Funds—Imprisonment for Debt.**—A statute making it a felony for a person to draw a check when he has no funds to meet it, with intent to defraud, does not violate the constitutional prohibition against imprisonment for debt. (Wash.) State v. Pilling, 1080.

5. **CRIMINAL LAW—Drawing a Check Without Funds—Intent to Defraud.**—It is error to instruct the jury that the law presumes an intent to defraud where a man issues a check on a bank in which he has no funds to meet it and obtains something of value therefor; and the error is not cured by a general instruction disassociated from the others. (Wash.) State v. Pilling, 1080.

See False Pretenses.

BENEFICIAL ASSOCIATION.

1. **BENEFICIAL ASSOCIATIONS—Beneficiary—Interest—Nature and Extent.**—A beneficiary named in a certificate or policy issued by a beneficial association acquires no vested interest in it, nor a right to anything, during the lifetime of the member to whom it is issued, but merely an expectancy, which does not become a vested or absolute right to the proceeds of the certificate or policy until the death of the assured. (Pa.) Noble v. Police Beneficiary Assn., 783.

2. **BENEFICIAL ASSOCIATIONS—Change of Beneficiary, What is.**—Where a member of a beneficial association names his sister as

beneficiary, but keeps the certificate issued to him, and subsequently on his marriage surrenders it and obtains a new one, naming his wife as beneficiary, this is not a transfer to another without the consent of the beneficiary in the terms of the by-laws of the association. (Pa.) Noble v. Police Beneficiary Assn., 783.

3. **BENEFICIAL ASSOCIATIONS — Rights of Member to Deal with Certificate.**—There is no obligation on a member of a beneficial association to pay the assessments levied on his certificate, and he may let it lapse at will, and the beneficiary, having no vested interest in it till the member's death, has no cause of complaint. (Pa.) Noble v. Police Beneficiary Assn., 783.

4. **BENEFICIAL ASSOCIATIONS — Certificate to Member — By-laws—Estoppel.**—Where a member of a beneficial association names his sister beneficiary and subsequently surrenders the certificate and obtains another, naming his wife as beneficiary, the association is estopped from questioning the regularity of the second certificate, notwithstanding the issue of it violated their by-laws. (Pa.) Noble v. Police Beneficiary Assn., 783.

5. **BENEFICIAL ASSOCIATIONS—By-laws—Object.**—By-laws of a beneficial association are made solely for the convenience and protection of the association, and if it waives its rights or does not claim under its rules, no one else can take its place. (Pa.) Noble v. Police Beneficiary Assn., 783.

See Insurance.

BILLBOARDS.

See Municipal Corporations, 24–26.

BILL OF EXCEPTIONS.

See Appeal and Error, 1.

BILLS AND NOTES.

In General.

1. **BILLS AND NOTES—Want of Consideration.—The Maker of a Note** may show that there was no consideration for the instrument. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

2. **PLEADING—Replication, When a Departure.**—Where the plaintiff declares on a bill of exchange as payee, it is not good pleading to set up in the replication that such bill was purchased after acceptance, and it is demurrable as for a departure. (Ala.) Alabama Grocery Co. v. First Nat. Bank, 18.

3. **PROMISSORY NOTE—Partial Defense—Affidavit.**—If a plaintiff takes a rule for judgment for his whole claim for want of a sufficient affidavit of defense, he is not in a position to ask that judgment be entered for that part of his claim which is practically admitted to be due in the affidavit. (Pa.) Faux v. Fitler, 742.

Maturity, Presentment and Payment.

4. **BILLS AND NOTES.—If No Place of Payment is Expressed** in a bill or note, it is payable where the maker resides or at his usual place of business. (Wash.) Bardsley v. Washington Mill Co., 1133.

5. **BILLS AND NOTES—Declaring Due on Default in Interest—Presentment.**—The holder of a note cannot, without presentment for payment, exercise his option to declare the whole amount due for default in payment of interest; and if no place of payment is expressed in the note, the presentment must be made at the maker's known place of business. (Wash.) Bardsley v. Washington Mill Co., 1133.

Contemporaneous Parol Agreement.

6. **PROMISSORY NOTE — Parol Contemporaneous Agreement — Fraud.**—Where an action is between the original parties to a promissory note, the maker may show a contemporaneous parol agreement between the payee and himself which induced him to sign it and which agreement had been violated by the payee. (Pa.) Faux v. Fitler, 742.

7. **PROMISSORY NOTE—Parol Contemporaneous Agreement—Affidavit of Defense.**—In a defense to an action on a promissory note the affidavit is sufficient if it avers that the defendant, the maker, signed the note under a contemporaneous agreement with the plaintiff payee that the note was not to be enforced if losses occurred to a stated amount in a partnership venture of the parties, and that such losses had actually been sustained. (Pa.) Faux v. Fitler, 742.

Transfer and Indorsement.

8. **NEGOTIABLE INSTRUMENTS — Transfer for Collection.**—Where the holder of a note indorsed and gave it for collection to his agent, who returned it to him on its nonpayment, such facts being proved by the evidence of both, a finding that there was no absolute transfer of the note is sustained by their evidence. (Cal.) Nolan v. Nolan, 99.

9. **NEGOTIABLE INSTRUMENTS — Animus Endorsandi Evidence.**—Where the holder of a note indorsed and gave it for collection to his agent, who returned it to him on its nonpayment, it was not error to allow the holder and his agent to testify to these facts and the holder further to testify the purpose for which he gave the note, and that he did not intend to part with its ownership. (Cal.) Nolan v. Nolan, 99.

10. **BILLS AND NOTES—Parol to Explain Indorsement.—Parol Evidence** is admissible to show that an indorser signed as surety, although the note recites that all the parties signing or indorsing it bind themselves as principals and not as sureties. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

11. **BILLS AND NOTES—Transfer After Maturity of One Note.**—Where four notes arising out of the same transaction are transferred with the mortgage securing them, the fact that the first note is due at the time of the transfer is not notice of an infirmity in the three unmatured notes, especially when the overdue note bears indorsement of a payment made after maturity, and the statute defines notice of an infirmity as actual knowledge of the defect or of such facts as to show bad faith. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

12. **BILLS AND NOTES.—A Transferee of Notes After Dishonor** as security for the payment of an antecedent debt is not a bona fide holder. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

Bona Fide Holders.

13. **NEGOTIABLE INSTRUMENTS—Bona Fide Holder.**—Where a bank discounts paper for one not in its debt, and credits him with the proceeds, unless some other and valuable consideration passes, the bank is not a bona fide holder protected against infirmities in the paper, or equities of the prior parties. Until the money is withdrawn, the ordinary relation of debtor and creditor stands, even though the paper has been taken before maturity and without notice. (Ala.) Alabama Grocery Co. v. First Nat. Bank, 18.

14. **CORPORATION—Transfer of Note Payable to Officer.**—Where a corporation executes a note to its president and manager, this

throws no suspicion on his title and does not affect the bona fides of a purchaser from him. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

See Corporations, 2; Limitation of Actions, 1.

BLASTING.

See Railroads, 2.

BONDS.

See Municipal Corporations, 32; Principal and Surety.

BOOMS.

See Navigable Waters.

BROKERS.

1. REAL ESTATE BROKER—Contract in Excess of Authority—Commission.—Where an agent to sell land exceeds his authority by inserting in the contract of sale a stipulation that the vendor shall forfeit fifty dollars for each day's failure to make a deed after a specified date, the principal is not bound by the contract, and the broker cannot recover commissions. (Tex.) Evants v. Fuqua, 892.

2. BROKERS—Commission—Simultaneous Employment of Several.—To entitle one of several brokers employed to sell the same property to his commission, the prospective purchaser must have dealt with such one originally and without previous inquiry from or negotiation with any of the others; the relation once established continues to the end of the transaction, and cannot be broken off by the employer selling through another, even after rescission of the contract of brokerage with such one. (Or.) Jennings v. Trummer, 680.

3. BROKERS—Commission—When Earned.—It is not necessary for a broker for sale to personally introduce a buyer to his principal, it being sufficient if he advises him of and names the prospective purchaser. (Or.) Jennings v. Trummer, 680.

4. BROKERS—Commission—When Earned.—If an owner, with knowledge of the facts, deals with his broker's client, even through another agent, he is liable for the commission to such broker. (Or.) Jennings v. Trummer, 680.

5. BROKERS—Commission—When Several Employed.—The duty of the vendor who employs more than one broker to sell his property is to allow them to act independently and remain neutral as between them, and between them and a purchaser. He cannot step in and complete the sale and escape liability for the commission. (Or.) Jennings v. Trummer, 680.

6. BROKERS — Commission — When Several Employed.—Where independent brokers are employed on the sale of the same property, the first who sells is entitled to the commission without any express contract to that effect. (Or.) Jennings v. Trummer, 680.

7. BROKERS—Commission—Duty of Vendor—Uberrima Fides.—Between the principal and the broker the utmost good faith must be exercised. (Or.) Jennings v. Trummer, 680.

See Specific Performance, 1.

BUILDING CONTRACT.

See Contracts, 11-13.

CARRIERS.

Separation of White and Colored Passengers.

1. **RAILROADS—Separation of White and Colored Races—Street Railroads—Interurban Railroads.**—While a street railway operating within the territory to which its charter confines it is not required by law to provide separate cars or compartments for the transportation of white and colored passengers, an interurban railway is, and cannot evade its duty by leasing or otherwise turning over the use of its lines to a street railway or other railroad. (Ky.) Louisville Ry. Co. v. Commonwealth, 408.

2. **RAILROADS—Separation of White and Colored Races—Street Railroads—Interurban Railroads.**—Kentucky statutes of 1903, section 795, require interurban railroads to have each separate coach for the transportation of white and colored passengers or the compartments thereof for each race to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart. A street railroad company which operates interurban cars in contravention of the section cannot rely upon the want of authority under its charter as a defense. (Ky.) Louisville Ry. Co. v. Commonwealth, 408.

Notice to Passenger of Place of Transfer—Sleeping-cars.

3. **CARRIERS—Passengers—Failure to Notify of Place of Transfer.**—When the servants of a carrier know that a passenger is in the wrong car, they may simply tell him what to do, and ordinarily leave him to follow their directions; but if they tell him to keep his seat and that they will transfer him to the other car, and fail to do so, their company is liable. (Ky.) Cincinnati etc. Ry. Co. v. Raine, 400.

4. **CARRIERS—Passengers—Misleading as to Means of Reaching Destination.**—The servants of a carrier must not mislead a passenger to his prejudice. It is proper that a passenger should obey the instructions which he receives from them; and when they tell a passenger to keep his seat and they will at the proper time transfer him, he has a right to trust implicitly to their directions. (Ky.) Cincinnati etc. Ry. Co. v. Raine, 400.

5. **CARRIERS—Sleeping-cars, Who not a Passenger in.**—A passenger who orders a reservation in a sleeping-car which is to be attached to the train she is traveling in at a given junction, which train belongs to another company, is not a passenger of the sleeping-car company, and that company is not liable to her because its conductor failed to get her into the right car. (Ky.) Cincinnati etc. Ry. Co. v. Raine, 400.

6. **CARRIERS—Passengers—Duty to Advise Means of Reaching Destination.**—A passenger who purchases a through ticket on an overnight train and orders a reservation in a sleeping-car which was usually attached thereto, and is informed by the sleeping-car conductor, in the presence of the conductor of the train she is in, that the car will not be attached till they reach a named junction, and that she should stay where she was and he would transfer her to it, and after passing the junction she is informed by him that her sleeper had been attached to the first section of the train for her destination which had gone on and she had her choice of submitting to a night's delay in a strange place or of returning to her starting point, which latter alternative she adopted, has a valid claim for damages against the company whose train she was in up to the junction referred to, the sleeping-car conductor being pro hac vice their agent in making the arrangements for her disposition. (Ky.) Cincinnati etc. Ry. Co. v. Raine, 400.

Collision—Presumption of Negligence—Action for Damages.

7. **NEGLIGENCE.—The Presumption of a Common Carrier's Negligence** is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it, when made on a well-grounded belief that it will occur. (Pa.) Lehner v. Pittsburg Ry. Co., 729.

8. **CARRIER—Presumption of Negligence from Collision of Cars.** Where the plaintiff's evidence shows the relationship of passenger and carrier between her and the defendant, the collision of two of the defendant's cars, with consequent injury to the plaintiff, and the exclusive control of these cars by the defendant and its employés, there arises a presumption of negligence against the carrier, so that at the close of the plaintiff's case a demurrer to the evidence should be overruled. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

9. **CARRIER—Presumption of Negligence not Waived by Specific Proof.**—The plaintiff in an action against a carrier for personal injuries is not precluded from the presumption of negligence to which she is entitled under her petition charging negligence in general terms and not specifically, by introducing evidence of specific acts of negligence, which proof does not clearly show what caused the accident. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

10. **CARRIER—Collision of Cars—Res Ipsa Loquitur.**—Where the relation of passenger and carrier is established between the plaintiff and defendant, and the petition alleges general and not specific negligence, and a collision of cars with consequent injury to the plaintiff is shown, a presumption of negligence arises against the carrier, and the doctrine of res ipsa loquitur applies. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

11. **CARRIER—Presumption of Negligence from Collision of Cars.** Where a passenger is injured by a collision caused by a cable train running backward down an incline and colliding with another train, the carrier has the burden of showing that it has exercised the highest degree of care, and the same proof that will show that the collision was by some cause which the highest degree of care could not have averted will show that it was the result of inevitable accident. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

12. **CARRIER—Complaint, Whether Alleges General or Specific Negligence.**—An allegation that "the defendant carelessly, negligently caused and permitted the train on which the plaintiff was riding as a passenger to come in violent collision with another train of defendant's, said other train being on said Twelfth street and on said incline as aforesaid; that said collision was occasioned without any fault on the part of the plaintiff, but by reason of the negligence as aforesaid of the defendant," charges general negligence. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

13. **CARRIER—Instructions in Action for Personal Injury.**—An instruction in an action against a carrier for personal injuries sustained by a passenger is not objectionable because it recites her claims as stated in the petition, if it in no wise assumes them to be true or to have been proved. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

14. **CARRIER—Elements of Damages for Personal Injury.**—In an action against a carrier for damages for personal injuries received by a passenger, the jury may consider her loss of earnings and the money expended for medical services. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

15. **CARRIERS—Passengers—Measure of Damages.**—Where a railroad company fails to furnish transportation according to agreement, the proper measure of damages is a reasonable compensation for the

time lost by the passenger and any expense he was forced to incur and no recovery can be had for vexation or personal inconvenience or sickness by reason of the delay. (Ky.) Cincinnati etc. Ry. Co. v. Raine, 400.

Duty to Use Safe Brakes and Appliances.

16. **CARRIER—Safe Appliances.—The Same Degree of Care** is not required of a master to adopt the latest appliances as is required of a carrier. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

17. **CARRIER—Failure to Use Most Approved Brake.**—In an action by a passenger for injuries sustained by a cable car breaking from its grip and backing down an incline into another car, evidence is admissible that the car was not equipped with a rail brake, it being shown that the carrier used such a brake on other cars operated over inclines, and that they were more effective than other brakes in stopping cars on an incline. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

Duty to Maintain Station in Safe Condition.

18. **CARRIER—Safe Premises—Duty to Friends of Passenger.**—A carrier does not owe the affirmative duty of keeping its station in a safe condition to mere friends or acquaintances of a passenger who go there to see him depart on a journey. (Tex.) Galveston etc. Ry. Co. v. Matzdorf, 849.

Street Railways—Passengers.

19. **STREET RAILWAY—Injury—Mode of Occurrence—Apprehension of Danger.**—When, under apprehension of a dangerous accident, a woman, alarmed at the rapid backward movement of a street-car, is seen pushing her way through the car to the platform, and immediately thereafter is found lying injured in the street, it is not unreasonable in the jury to draw from the circumstances the inference that she had fallen in an attempt to alight from the car. (Pa.) Lehner v. Pittsburg Rys. Co., 729.

20. **STREET RAILWAY—Apprehension of Accident—Passenger Leaping from Car.**—If a street-car is running away backward and rapidly down a dangerous grade, and a passenger has a well-grounded fear of imminent danger, he is justified, in obeying the instinct of self-preservation, in jumping from the car, if that seemed to be the best method of escape. (Pa.) Lehner v. Pittsburg Rys. Co., 729.

See Automobiles; Elevators.

CAVEAT EMPTOR.

See Vendor and Vendee, 9.

CERTIFICATE OF ENGINEER.

See Contracts, 11–13.

CHATTEL MORTGAGE.

See Estoppel.

CHECKS DRAWN WITHOUT FUNDS.

See Banks and Banking; False Pretenses.

COMMUNITY PROPERTY.

See Husband and Wife, 2–4.

CONCEALED WEAPONS.

See Weapons.

CONFESSION OF JUDGMENT.

See Judgment, 4–9.

CONSPIRACIES AND MONOPOLIES.

1. **CRIMINAL CONSPIRACY—Definition.**—Criminal conspiracy is a confederation to do something unlawful either as a means or an end. (R. I.) State v. Eastern Coal Co., 817.

2. **CRIMINAL CONSPIRACY—Combination to Fix Price.**—If it is unlawful for one person to fix the price at which a commodity shall be sold within the limits of a city, then it is a criminal offense for several persons to combine for that purpose. (R. I.) State v. Eastern Coal Co., 817.

3. **CRIMINAL COMBINATION — What Constitutes.— Whenever the Act to be Done** by a combination of persons necessarily tends to prejudice the public or to oppress individuals, the combination has always been held criminal. (R. I.) State v. Eastern Coal Co., 817.

4. **CRIMINAL CONSPIRACY—Monopoly.**—No person can control, regulate, or fix the price at which an article shall be sold without having complete dominion and control of the article itself. To enable him to fix and control the price he must be free from competition; in other words, he must have obtained a monopoly of the article. (R. I.) State v. Eastern Coal Co., 817.

5. **CRIMINAL CONSPIRACY—Common-law Offense—Dardanarii —Engrossing.**—Under the Roman law monopolists of grain and other earth products were called dardanarii, and were variously punished, and under the common law it was also a crime to obtain similar monopolies. Under modern English law the statutes against engrossing apply chiefly to monopolies of provisions. Coal, being an article of prime necessity in Rhode Island, is legally capable of being engrossed, which is doubtless an offense at common law in that state. (R. I.) State v. Eastern Coal Co., 817.

6. **CRIMINAL CONSPIRACY—Common-law Offense.**—Although the list of common-law offenses in Rhode Island may be said to include that of engrossing, there do not appear any prosecutions made under it; it may be considered dormant but ready when the occasion demands. The danger to be apprehended from engrossing is monopoly. (R. I.) State v. Eastern Coal Co., 817.

7. **CRIMINAL CONSPIRACY—Monopolies—Reasons for Abolition.—It is not Safe** to allow monopolies of prime necessities of life to exist for any purpose; they are "contrary to the genius of a free government." (R. I.) State v. Eastern Coal Co., 817.

8. **CRIMINAL CONSPIRACY—Universality of Monopoly—Unnecessary.**—In order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition. (R. I.) State v. Eastern Coal Co., 817.

9. **CRIMINAL CONSPIRACY—Foundation of Offense.—A Charge of Conspiracy** that the defendants combined to exercise a certain power must proceed upon the assumption that they have or will have the power to be exercised; and the gravamen of the offense consists in combining to acquire the power. (R. I.) State v. Eastern Coal Co., 817.

10. **INDICTMENT—Pleading—Criminal Conspiracy.**—An indictment for criminal conspiracy which charges the defendants with combining to do something that can only be done through a monopoly is ill-pleading to charge by implication, intendment and inference that the defendants conspired to create a monopoly in a certain

commodity in a city. Criminal pleading must be clear and definite, and if the facts warrant, the defendants should have been charged with conspiring to create a monopoly in order to regulate and fix the price of the commodity; that they were dealers therein or had power to regulate, etc., the supply; the means whereby that end was to be attained, and precisely what the agreement or combination was. (R. I.) State v. Eastern Coal Co., 817.

11. **INDICTMENT—Pleading—Criminal Conspiracy.**—It is not necessary to set out in an indictment for criminal conspiracy in fixing the price of a commodity that the defendants conspired to raise the price of it or to fix a price that was unlawful, exorbitant, unwarranted or oppressive; and if the offense is set out in proper particularity in other respects, the indictment need not aver that the illegal agreement was for any fixed time, or that it was a binding agreement on its parties, as the duration of the contract is not of the essence of the crime. (R. I.) State v. Eastern Coal Co., 817.

See Monopolies and Combinations.

CONSTITUTIONAL LAW.

In General.

1. **CONSTITUTIONAL LAW—Power of Court to Annul Statute.** It is only when statutes are clearly in opposition to the fundamental law that courts will declare them unconstitutional, and not then to nullify a law that seems unjust, but rather to preserve the declaration of right reserved and made immune from legislative interference by the people themselves. (Wash.) In re Milecke, 968.

2. **CONSTITUTIONAL LAW—Legislation to Affect Pending Litigation.**—When action is once commenced jurisdiction is purely a judicial question, and it is unconstitutional for the legislature to attempt to usurp the judicial function by interfering legislation to oust the jurisdiction of the court. (Iowa) McSurely v. McGrew, 248.

3. **EVIDENCE—Rules of.—The Power of the Legislature to Alter the Rules of Evidence** and to make rules applicable to pending cases is paramount; and it is competent for the legislature to dispense with the requirement that proof should be made that a will was in existence at the death of a testator. (Cal.) Estate of Patterson, 116.

4. **CONSTITUTIONAL LAW—Imprisonment for Debt.—The Word "Debt,"** as used in the constitutional prohibition against imprisonment for debt, is confined to obligations arising out of contracts, express or implied, as distinguished from torts. (Wash.) In re Milecke, 968.

Curative Statutes.

5. **CONSTITUTIONAL LAW — Curative Acts — Retroactive.**—A curative act is necessarily retrospective in character and may be passed to cure or validate errors or irregularities in legal or administrative proceedings except such as are jurisdictional or affecting substantive rights and to give effect to contracts for failure to comply with some technical requirement, or whenever the irregularity to be healed consists in the doing of some act, or the doing of it in such manner as the legislature might have made immaterial or have authorized by a prior law. (Iowa) McSurely v. McGrew, 248.

6. **CONSTITUTIONAL LAW—Curative Act Construed with Code Sections—Nonconflict.**—Section 1457, Iowa Code, provides that a county treasurer shall not be relieved of liability on his bond by reason of having deposited money in an approved and selected bank. A county treasurer who had forborne from taking a bond for his own security by the inducements of the board and the county attorney, and in consequence of such forbearance a loss was incurred, was

released from liability by the board under the authority of an act of the legislature passed for the purpose. Such an act is not in conflict with the code section, however much its propriety or wisdom may be questioned. (Iowa) McSurely v. McGrew, 248.

See Counties; Food; Statutes, 1; Taxation.

CONTEMPT.

1. **INJUNCTION—Contempt Pending Appeal—Remedy—Supersedeas.**—Where a contempt consists in the violation of a temporary injunction, the execution of which was claimed to be stayed by appeal, supersedeas, rather than certiorari, is the writ applicable. (Cal.) Clute v. Superior Court, 54.

2. **INJUNCTION, When Mandatory—Appeal—Contempt.**—An injunction restraining the manager of a hotel corporation from holding himself out as manager, and from interference with the business or the employés thereof, on the ground of his removal from office by the board of directors, the right and power of such directors to represent the corporation being disputed by him, is mandatory in effect, and, pending appeal, its violation cannot be punished as a contempt. (Cal.) Clute v. Superior Court, 54.

CONTRACTS.

Interpretation and Construction.

1. **STATUTES—Construction—Contracts.**—In determining whether an agreement is prohibited by statute, the intention of the legislature must be ascertained and must govern. (Ala.) Sunflower Lumber Co. v. Turner Supply Co., 20.

2. **CONTRACTS—Practical Interpretation by Parties.**—The practical interpretation given to their contracts by the parties thereto while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent. (Colo.) Lovell v. Goss, 184.

3. **CONTRACT, Construction of, When Against the Party Preparing.**—Where doubt exists as to the construction of an instrument prepared by one party thereto, upon faith of which the other has incurred an obligation, that construction will be adopted which will be favorable to the latter. (Md.) McEvoy v. Security Fire Ins. Co., 428.

Supplemental and Simultaneous Papers.

4. **CONTRACTS—Papers Executed Simultaneously—Construction.** Where two papers are executed at the same time, or contemporaneously between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

5. **CONTRACT—Supplemental Agreement for Special Adjustments—Construction.**—When, to complete the performance of a contract, preliminary to conveying the property, the parties make an ancillary agreement providing for exceptions and their future adjustment, the presumption is that save as to those matters the conveyance has satisfied the contract. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

Substance Preferred to Form.

6. **CONTRACTS—Equity Prefers Substance to Form.**—Courts of equity look to the substance rather than the form of written instruments, and will seek to discover and carry into effect the real inten-

tion of the parties and enforce it according to the sense in which it was understood as shown by the subsequent acts and conduct of the parties. (Ill.) Ogden v. Stevens, 237.

Validity—Illegal or Immoral Acts.

7. **CONTRACTS—Agreements Ousting Jurisdiction of Court.**—Courts guard with jealous eye any contract innovations upon their jurisdiction. (Mo.) First Nat. Bank v. White, 612.

8. **CONTRACTS, When Void as in Violation of Statutes.**—Agreements in violation of conditions imposed for the benefit of the public by a statute are void. This result does not follow if the conditions are imposed for administrative purposes, and no penalty is attached. (Ala.) Sunflower Lumber Co. v. Turner Supply Co., 20.

9. **CONTRACTS, Consideration of Which is to do an Immoral or Illegal Act.**—A stipulation to do an immoral act taints the entire contract and renders it void in toto. A like result follows where the entire consideration is illegal. (Md.) Nicholson v. Ellis, 445.

10. **CONTRACT Partly Founded on a Consideration Illegal as in Restraint of Trade.**—If, in consideration of a transfer of the business, stock in trade, goodwill and accounts by an agreement containing a stipulation not to enter into a similar business in the United States, a mortgage is given for a part of the purchase price, such mortgage will not be denied enforcement on the ground that such stipulation is invalid and in restraint of trade, if the stipulation is not immoral and is severable from the other parts of the contract. (Md.) Nicholson v. Ellis, 445.

Certificate of Engineer in Case of Constructive Contract.

11. **CONTRACTS—Final Certificate—Conclusiveness—Mala Fides—Fraud.**—Notwithstanding a contract provides that the final estimate of a chief engineer on certain work is to be conclusive, if the evidence disclosed an error on his part, either of judgment or calculation, so gross as to imply bad faith and amount to a fraud on the plaintiff, though such may not have been the intention of the chief engineer, the plaintiff will be entitled to recover the just amount due to him according to correct items submitted in his claim. (Va.) Cornell v. Steele, 931.

12. **CONTRACTS—Final Certificate—Gross Error—Pleading—Averments of Fraud.**—Where a contract provides that the final estimates of the chief engineer of certain works shall be conclusive, and they are so grossly incorrect as to amount to bad faith and fraud on the contractor, it is not necessary to allege either the fraud or bad faith, or that such was the engineer's intention; if the evidence is sufficient to justify it, the jury may find that the estimates, etc., of the engineer are so grossly erroneous as to amount to a fraud upon the contractor's rights. (Va.) Cornell v. Steele, 931.

13. **CONTRACTS—Finality of Referee's Arbitrament.**—A stipulation in a contract between a railroad company and a contractor that the estimate made by the former's engineer as to the quality, character and the value of the work performed by the contractor shall be final against the latter, "without further recourse or appeal," cannot deprive him of the right to resort to the courts for the recovery of what may be due him, notwithstanding the estimates. (Va.) Cornell v. Steele, 931.

See License Taxes, 5, 6.

CONTRIBUTION.

See Principal and Surety, 5, 6.

CONVERSION.

1. **CONVERSION, EQUITABLE.—Where Lands are Devised to a Trustee with Directions to Sell and Pay the Income to a Tenant for Life,** the realty must be treated as personalty on the death of the testator. (Md.) Lambert v. Morgan, 412.

2. **CONVERSION OF REALTY into Personalty, When not Prevented by the Existence of a Discretion Respecting the Sale.**—Where lands are devised to a trustee with an absolute direction for their sale, but giving him a discretion as to the terms, place, times and manner of sale, such discretion does not prevent the conversion of the realty into personalty on the death of the testator. (Md.) Lambert v. Morgan, 412.

CORPORATIONS.

In General.

1. **CORPORATIONS OF ANOTHER STATE—Stockholder's Liability, Enforcement of Beyond the Jurisdiction.**—An action cannot be maintained in Massachusetts against a resident thereof on his liability as stockholder of an insolvent corporation of another state to enforce a liability created by its statutes, when it does not appear that they have provided any remedy for the enforcement of such liability beyond the state in which they were enacted. (Mass.) Miller v. Aldrich, 480.

2. **CORPORATION—Authority to Become Surety on Note.—Unless the Power is expressly conferred by its charter,** a corporation has no authority to become surety on a note. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

3. **CORPORATION—Estoppel to Repudiate Act of Officer.**—A corporation of necessity acts through its officers and agents, and where it has named a president and general manager, neither it nor its creditors will be heard to dispute his acts, which are not ultra vires, when a person has dealt with him with every appearance of good faith. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

4. **CORPORATION—Estoppel to Urge Ultra Vires.—A Corporation** is not estopped to urge the defense of ultra vires on the ground that it has received the benefit of the contract if the evidence of such receipt is vague and uncertain. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

5. **CORPORATION, Presumed Legality of Acts of and of Its Officers.**—In the absence of anything to the contrary, there is always a presumption that the action of a corporation was lawful, and still more is there such a presumption in regard to the official acts of its board of directors. (Mass.) Whiting v. Malden etc. R. R. Co., 493.

Criminal Responsibility.

6. **CORPORATIONS—Capacity to Commit Crime.**—Actions can be maintained against corporations for malicious prosecution, libel, assault and battery, criminal conspiracy and other torts, and the malice and wicked intent needful to sustain such actions may be imputed to corporations. (R. I.) State v. Eastern Coal Co., 817.

7. **CORPORATIONS — Prosecutions — Defense — Ultra Vires.**—A corporation indicted for a statutable offense will not be permitted to escape punishment by showing that the act constituting the offense was ultra vires. (Ky.) Louisville Ry. Co. v. Commonwealth, 408.

Acquisition of Stock and Property of Another Company.

8. **CORPORATION, When not Answerable for the Debts of Another.**—The acquisition of the stock, property and assets of a corporation by an individual or by another corporation does not make the new holder liable to pay the debts of the corporation. The mere

purchase of such capital stock and assets is a taking of title, which leaves unsecured creditors with no claim against the purchaser and no means of collecting their debts except from their corporate debtor. (Mass.) Whiting v. Malden etc. R. R. Co., 493.

9. **CORPORATION, Presumption of the Doing of Acts Required by Law for the Acquisition by One Corporation of the Property and Rights of Another.**—Where a statute provides the acts and methods by which one corporation may acquire the property and rights of another, and it appears that a corporation acquired by purchase from one who had purchased from another corporation all its capital stock and assets, and that such purchasing corporation reported to the board of railroad commissioners that it owned the stock and property of such other corporation, and would like to have its report to the railroad commissioners omitted, and that such commissioners thereupon struck its name from their list and reported that it had merged with the purchasing corporation, and for more than twenty years such corporation operated as its own the system formerly owned by the other corporation, it will be presumed that all the terms and conditions required by law were complied with, and that the purchasing corporation became subject to the liability of the other corporation, where such liability was imposed by statute in the event of a purchase in the manner therein prescribed. (Mass.) Whiting v. Malden etc. R. R. Co., 493.

10. **CORPORATIONS, Judgment Against, Liability of a Purchasing Corporation to Pay Though Ignorant of It at the Time of the Purchase.**—Where the statute provides in the event of the purchase by one corporation of the capital stock and assets of another, the purchasing corporation should become liable for the obligations of the selling corporation, the former is liable to a suit in equity to compel the payment of judgments against the latter, though it was ignorant thereof at the time of the purchase. (Mass.) Whiting v. Malden etc. R. R. Co., 493.

Promoters.

11. **CORPORATIONS — Promoters — Rights of Creditors.**—Those dealing with promoters of corporations have the double security of the promoters and the corporation when formed except the promoters have contracted themselves out of liability. (Va.) Strause v. Richmond Woodworking Co., 937.

12. **CORPORATIONS—Promoters—Rights of Creditors—Selection of Debtor.**—Where the creditor of a newly formed corporation has manifested no intention to treat the promoter as his debtor, and has delivered goods to and been paid by the corporation before and after incorporation and up to its insolvency, he cannot then charge the promoter with a balance due on accounts merely because the negotiation originated in a letter signed by the promoter when the corporation was inchoate. (Va.) Strause v. Richmond Woodworking Co., 937.

13. **CORPORATIONS—Promoter's Liability Expressly Negatived.** A promoter cannot be held liable in the face of a contract against liability, fairly and legally entered into; and in determining the question whether he had been freed by the other party, facts as to the latter's acts or the agreement providing for the promoter's immunity are not to be ignored. (Va.) Strause v. Richmond Woodworking Co., 937.

See Bills and Notes, 14.

COUNTIES.

1. **COUNTY OFFICERS, Retroactive Release of.**—The legislature has power to authorize a board of supervisors to release a county treasurer or other quasi municipal officer and the sureties on his

official bond from liability for the loss of public funds on the ground that he is acting as an officer, and no one, except, perhaps, creditors, has any vested rights to the funds in his hands; and such delegation is not objectionable on the ground that it confers legislative powers upon some other body than the law-making department of the government. (Iowa) McSurely v. McGrew, 248.

2. **CONSTITUTIONAL LAW—County Funds—Legislative Control.**—A county, while a legal body corporate, is created a subdivision of the state for administrative and other public purposes, and is subject always to legislative control and change; its revenues may be diverted or taken altogether without redress by the citizens; and as neither they nor the county itself have any vested interest in the funds coming into the treasurer's hands, it is constitutional for the legislature to permit the deposit of county funds in bank and absolve the officers from any liability on account of them. (Iowa) McSurely v. McGrew, 248.

3. **COUNTY FUNDS—Legislative Control.**—The power of a municipality to raise money by taxation is a political one, delegated by the legislature, and the fund when collected is within the control of the legislature. (Iowa) McSurely v. McGrew, 248.

4. **CONSTITUTIONAL LAW—Special Legislation Releasing County Officers.**—An act of the legislature confirming the action of a board of supervisors in releasing a county treasurer and his sureties from liability for the loss of public funds is not unconstitutional, either on the ground that it confers special benefit or immunity upon a particular individual, or that the effect of the act is to appropriate a sum of money to a private individual. (Iowa) McSurely v. McGrew, 248.

COURTS.

1. **STARE DECISIS.**—The doctrine of stare decisis is a salutary as it is well recognized. (Mass.) Mabardy v. McHugh, 484.

2. **COURTS—Jurisdiction Depending on Amount—Garnishment.**—On writ of error the supreme court has jurisdiction over garnishment proceedings upon a judgment of the district court, although the amount garnished is less than five hundred dollars; the garnishment is not an original suit, but ancillary to the judgment, and could be sued out only in the court that rendered the judgment. (Tex.) Simmang v. Pennsylvania Fire Ins. Co., 846.

CREDITOR'S BILL.

1. **CREDITOR'S BILL—Lien for Support—Creditor's Rights.**—Where a charge for the care and support of one is made a lien on devised property, a judgment creditor is warranted in proceeding in equity for the purpose of ascertaining whether any moneys remain in the hands of the defendants subject to his judgment. (Iowa) Merchants' Nat. Bank v. Crist, 267.

2. **CREDITOR'S BILL, Property and Rights Which cannot be Reached by.**—Where a surviving husband has elected, under the will of his wife, to accept a provision for his care and support by the devisees, his children, in lieu of his statutory share of the wife's property, such care and support being made a lien on the property, the lien is only a security for the performance of the obligation and is beyond the reach of the husband's judgment creditors, because the husband could not convert his right to support into money so long, at all events, as he was receiving it, and his creditors can have no greater rights than he himself. (Iowa) Merchants' Nat. Bank v. Crist, 267.

CRIMINAL LAW.

Intention as Element of Crime.

1. **CRIMINAL LAW—Statute—Unlawful Act—Interpretation.**—When the legislature has declared that a given act shall be deemed unlawful, a person voluntarily doing that act will be charged with a criminal intent; but "voluntarily" in that connection means "intentionally." (Ky.) Louisville Ry. Co. v. Commonwealth, 408.

2. **CRIMINAL LAW—Intent—Presumption.**—A corporation violating a statute which imposed obligations to have certain words inscribed on their railroad cars must be presumed to have knowingly and willfully done so. (Ky.) Louisville Ry. Co. v. Commonwealth, 408.

3. **CRIMINAL LAW—Unintentional Crime.**—Unless wrongful intent or guilty knowledge, commonly designated by the use of the words "willfully" or "maliciously," is made an essential element of an act prohibited by statute, the violator of such statute may be convicted and punished, though he had no design to disobey it. (Mass.) Commonwealth v. New York Cent. etc. R. R. Co., 507.

Offense Against Good Morals—Indecent Exposure.

4. **CRIMINAL LAW—Statutes—Offenses Against Good Morals.**—Section 1930, B. & C. Comp., was intended by its language to cover such offenses against the public peace, the public health, and the public morals as were not elsewhere made punishable by the code, and which were known at common law as "indictable nuisances." (Or.) State v. Waymire, 699.

5. **CRIMINAL LAW—Offenses Against Good Morals—Essentials. The Common-law Definition** is that whatever grossly outrages public decency and tends to corrupt society is "an offense against good morals," and is punishable as a nuisance. The crime need not be a continuous one, but may consist of a single act, and need not affect the public at large, but only such as come in contact with it. (Or.) State v. Waymire, 699.

6. **CRIMINAL LAW—Information—Sufficiency.**—An information which charges a male and a female defendant with having, in pursuance of a conspiracy for that purpose, made a plot to get a certain man, in an indecent and compromising situation with the female defendant in a public place, and, while in such position, to direct the attention of a large concourse of citizens to them, and to an alleged attempt by such man to ravish the female defendant, thereby making a public exposition of their indecent and compromising attitude, sufficiently alleges an act which openly outraged public decency and was injurious to good morals within the meaning of section 1930, B. and C. Comp., rendering such persons liable to punishment. (Or.) State v. Waymire, 699.

7. **CRIMINAL LAW—Information—Duplicity.**—An information which alleges that a male and a female defendant, in conspiracy for the purpose, made a plot to get a certain man in an indecent and compromising situation with the female defendant in a public place, and while in such position to direct the attention of a large concourse of citizens to them, and to an alleged attempt by such man to ravish the female defendant, thereby making a public exposition of their indecent and compromising attitude, and further alleges that in pursuance of such conspiracy the male defendant, on hearing the outcry of his codefendant, broke open the door of the room in which she and the man were, and directed the attention of the assembled citizens thereto, etc., charges only one offense, the second allegation constituting a part of the crime charged and not an independent offense. (Or.) State v. Waymire, 699.

Former Jeopardy.

8. **CRIMINAL LAW—Once in Jeopardy.**—Where the defendant has been tried and convicted on an information for robbery, and a demurrer thereto that the offense was insufficiently alleged was overruled, but the averments in such information were sufficient to cover the charge of grand larceny, it was error in the court of appeal, when reversing the conviction, to order the defendant's discharge on the ground that a retrial would violate the principle of "once in jeopardy." (Cal.) People v. Tong, 110.

9. **CRIMINAL LAW—Once in Jeopardy—Cases Overruled.**—If it be the doctrine of the cases of People v. Arnett, 129 Cal. 306, 61 Pac. 930, People v. Smith, 136 Cal. 207, 68 Pac. 702, People v. Tilley, 135 Cal. 61, 67 Pac. 42, and People v. Curtis, 76 Cal. 57, that the defendant has been once in jeopardy in every case wherein a verdict of guilty of a crime not strictly embraced within the pleadings has been returned and the jury has been discharged without consent, then those cases should be overruled. (Cal.) People v. Tong, 110.

10. **CRIMINAL LAW—Pleading—Once in Jeopardy.**—Where the defendant has been tried and convicted on an information for robbery, and denied a motion for a new trial, and such information contained averments sufficient to sustain the charge of grand larceny, he was never in jeopardy upon the latter charge, and therefore, on the reversal of the judgment of conviction for robbery, he may be tried upon the charge of grand larceny. (Cal.) People v. Tong, 110.

11. **CRIMINAL LAW—Pleading—Once in Jeopardy—Waiver.**—A defendant's successful effort to set aside a verdict and judgment of conviction by means of a motion for new trial and an appeal is a waiver of his constitutional right to object to being placed again in jeopardy, because, in effect, he consents to be tried anew. (Cal.) People v. Tong, 110.

Trial—Evidence.

12. **CRIMINAL LAW—Trial—Presence of Defendant—Waiver.**—Where a defendant charged with misdemeanor has waived his right of presence at the rendition of the verdict, the failure of the deputy sheriff to intimate to him when the jury were ready to report is immaterial to the rendition of the verdict in absentia. (Or.) State v. Waymire, 699.

13. **CRIMINAL LAW—Trial—When Ended.**—A trial is not concluded until the verdict is received and recorded. (Or.) State v. Waymire, 699.

14. **CRIMINAL LAW—Evidence.**—Admissions of facts by a prisoner do not render inadmissible evidence of those facts relevant to the issue. (Or.) State v. Young, 689.

Judgment and Sentence.

15. **CRIMINAL LAW—Sentence, Time for, When Commences to Run.**—Where not controlled by statute, the date for the beginning of service of a term of imprisonment not fixed by the sentence is the day of the sentence, when not legally stayed. (Okl.) Ex parte Clendenning, 628.

16. **CRIMINAL LAW—Power of the Court to Issue the Commitment after the Lapse of the Term Involved or Intended in the Sentence.**—When a judgment of imprisonment is imposed by a court on plea of guilty or conviction in a criminal case, and the same is not stayed as provided by law, the defendant should forthwith be committed to the proper officer for incarceration; and where this is not done, and the court makes an order under which the defendant is discharged from custody, it has no power or jurisdiction, after the

lapse of the time involved in the sentence and after the term, to issue commitment on such judgment. (Okl.) Ex parte Clendenning, 628.

17. **CRIMINAL LAW—Erroneous Judgment in Criminal Cases, Effect of.**—The rule that where a court has power to hear and determine a question, the fact that it erred in such decision does not render its judgment void applies in criminal as in civil cases. (Cal.) People v. Tong, 110.

See Adultery; Banks and Banking; Corporations, 6, 7; Innkeepers; Jury; Statutes, 4, 5.

CURATIVE STATUTE.

See Constitutional Law, 5, 6.

CUSTOM AND USAGE.

CUSTOM—Necessity of Pleading.—A General Custom Need not be Pleaded in order to admit evidence thereof to throw light upon a contract which is obscure and dependent upon such evidence to make it plain. (Wash.) Ryder-Gougar Co. v. Garretson, 1053.

DAIRY REGULATIONS.

See Food.

DAMAGES.

1. **DAMAGES—Measure of for Destruction of Trees by Fire.**—A land owner whose trees have been killed by fire is not necessarily limited in his recovery to their value for lumber or other such uses; hence evidence is not admissible to show that the trees not consumed were as valuable for the purposes of timber immediately after the fire as they were before. (Colo.) Manitou & Pike's Peak Ry. Co. v. Harris, 140.

2. **DAMAGES—Allegation of Bodily Injury—Proof of Displacement of Organ.**—Under an allegation that the plaintiff received "serious, painful and permanent internal injuries," evidence is admissible that after the accident complained of she suffered from a displaced womb, since this is a bodily injury as distinguished from a condition or disease growing out of bodily injuries which should be specifically pleaded. (Mo.) Price v. Metropolitan St. Ry. Co., 588.

See Animals; Assault and Battery, 4, 5; Carriers, 14, 15; Telegraphs and Telephones.

DAYS OF GRACE.

See Time.

DECEIT.

See Fraud.

DECLARATIONS.

See Evidence, 1–4.

DEEDS.

Merger of Contract in Deed.

1. **DEED—Superseding Contract.**—Where a deed has been executed and accepted as a performance of an executory contract to convey real estate, the rights of the parties rest thereafter solely in the deed, even though the deed varies from that intended by the

contract; and in such case the law remits the grantee to the covenants in his deed if there is no ingredient of fraud or mistake in the case. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

2. **VENDOR AND VENDEE—Merger in Deed of Contract to Sell.** A quitclaim deed does not merge a prior agreement to sell the land and convey by quitclaim, where it develops that the grantor had no title; and in such a case, the grantee may recover the purchase money paid. (Wash.) Davis v. Lee, 973.

Covenant not to Erect Fence.

3. **DEEDS—Easement—Violation—Remedy.**—On a sale of land if the deed contains a covenant that the vendee and his assigns shall not for twenty-five years from the date thereof erect a fence east of a given line, such restriction creates an easement or servitude upon the land conveyed, and the vendor can enforce his right in equity or sue for damages at his election. (Iowa) Beck v. Heckman, 277.

4. **DEEDS—Easement—Onerous Covenant—Contrary to Public Policy.**—A covenant that the vendee and his assigns shall not for twenty-five years from the date of the deed erect a fence on a specified part of the land conveyed is not contrary to public policy, nor can the vendee impugn his covenant by averment of its inutility, harshness or iniquity. (Iowa) Beck v. Heckman, 277.

Description of Land.

5. **DEEDS—Sufficiency of Description—Extrinsic Evidence.**—Where an addition to a city contains twelve blocks, each having sixteen lots numbered from 1 to 16 consecutively, a deed to lots 7 and 8 in such addition without specifying the block is not void for uncertainty, when the grantor has never had any interest in but one of the blocks, for the defect is latent and subject to parol explanation. (Wash.) Wetzler v. Nichols, 1075.

6. **DEEDS.—The Rule for Determining the Sufficiency of a Description** of land is, that a surveyor with the deed before him, with the aid of extrinsic evidence, if necessary, shall be able to locate the land and establish its boundaries. (Or.) Bogard v. Barhan, 676.

Forgery—Acknowledgment by False Personation.

7. **DEED—Acknowledgment by False Personation.**—Where a deed is forged and the forger procures some one to personate the grantor, the certificate of the notary is not conclusive against the grantor even in favor of a bona fide purchaser for value who has relied on the pseudo title. A forged deed, recorded on a false certificate of acknowledgment, can never affect the real owner of the property. (Pa.) Smith v. Markland, 747.

8. **DEED—Forgery—Bona Fide Purchaser or Mortgagee.**—No man can be deprived of his property by a forged deed or mortgage, no matter what may be the bona fides of the party who claims under it. (Pa.) Smith v. Markland, 747.

Quitclaim Deed.

9. **QUITCLAIM DEED—Extent of Obligation of Grantor.**—The impression is erroneous that an agreement to sell land by a quitclaim deed, or other conveyance of less worth than a warranty deed, absolves the vendor from any obligation other than the execution of his deed, and that it is a reservation of immunity on his part from all liability for a breach of his contract or failure of title. (Wash.) Davis v. Lee, 973.

10. **DEED—Change of Printed Form so as to Substitute "Quitclaim Deed" for "Deed."**—The fact that the words "a deed to said premises" as printed in a contract to sell land are erased and the words "quitclaim deed to said premises," written in lieu thereof, does not show an intention to limit the contract to the legal effect of a quitclaim deed, since the written words are not inconsistent with the contract to sell, and a quitclaim deed is, under liberal rules of construction, in effect a bargain and sale deed or a "deed," and as effectual to convey title as either of them. (Wash.) Davis v. Lee, 973.

See Alteration of Instruments; Principal and Agent, 5, 6; Vendor and Vendee.

DEFAULT JUDGMENT.

See Judgment, 2, 3.

DEMURRER.

See Pleading.

DESCENT AND DISTRIBUTION.

1. **ADVANCEMENTS—Intention of Donor Ineffectual to Defeat Statute.**—Kentucky Statutes of 1903, section 1407, provides that any advancement to a descendant, excluding maintenance and education, shall be charged to the donee on the distribution of the ancestor's estate, and no intention of the donor will interfere with the operation of the statute or relieve the children who received advancements from accounting for them. (Ky.) Crain v. Mallone, 355.

2. **ADVANCEMENTS — Helpless Offspring.** — Kentucky Statutes of 1903, section 1407, providing that any advancement to a descendant, excluding maintenance and education, shall be charged to the donee on the distribution of the ancestor's estate, does not warrant some of the descendants in claiming that a charge for the maintenance of a helpless adult descendant since coming of age should be allowed against his share of the estate. (Ky.) Crain v. Mallone, 355.

DEVISES.

See Wills.

DIVORCE.

1. **DIVORCE—Right to Withdraw Demand for Decree.**—A party to an action for divorce may withdraw her demand for a decree at any time before it is entered, and after such withdrawal the court has no authority to grant a divorce in her favor. (Colo.) Milliman v. Milliman, 181.

2. **DIVORCE, Vacating Decree for Perjury.**—If a decree of divorce has become absolute, it will not be vacated on the ground that it was procured by perjured testimony as the cause for divorce knowingly procured by the libelant. (Mass.) Zeitlin v. Zeitlin, 490.

3. **DIVORCE, Evidence of at the Time of a Second Marriage.**—A statement by a husband that at the time he contracted a marriage the wife was a divorced woman, and that she told him so, being admitted without objection, it is improper for the court to direct a verdict ignoring the divorce. Whether there was one was, upon his testimony, a question of fact for the jury. (Mass.) Turner v. Williams, 511.

See Wills, 6.

DOGS.
See Animals.

EASEMENT.
See Deeds, 3, 4.

EJECTMENT.

EJECTMENT—Incorporeal Hereditaments.—The right to the continued enjoyment of a franchise granted by a shore owner to one to operate a boom in a navigable stream is an incorporeal hereditament, for the possession of which an action in ejectment will not lie. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

ELECTRICITY.

1. **ELECTRICITY—Defective Insulation—Licensees and Trespassers.**—A policeman who, without invitation from the owner, goes upon the roof of a private building to detect unlawful gambling in an adjoining building, and there comes in contact with a defectively insulated wire maintained by the city as a part of its electric light system, has no cause of action against the city for his injuries. (Tex.) City of Greenville v. Pitts, 843.

2. **CONTRIBUTORY NEGLIGENCE — Municipal Corporations — Safety of Appliances—Right to Rely upon.**—A lineman in the employ of a telephone company, whose duty it is to climb poles on which are strung the lighting wires of the municipal corporation is entitled to regard the wires as safe and properly insulated and his nonexamination of their dangerous conditions is not contributory negligence. (Mich.) Hodgins v. Bay City, 546.

3. **NEGLIGENCE—Safety of Appliances—Instruction to Jury.**—An instruction that if the jury found that the place where deceased was killed was then in a defective condition and became so after its construction, unless they found further that such condition had existed long enough to have enabled the defendant by reasonable diligence to have made an inspection, discover the defect, and make the repairs, they should find for the defendant, amply protects defendant's rights in an action for so negligently stringing and maintaining its electric wires as to cause the death of a lineman of another company whose duties took him into immediate contact with them. (Mich.) Hodgins v. Bay City, 546.

4. **CONTRIBUTORY NEGLIGENCE — Safety of Appliances — Need for Inspection.—An Instruction to the Jury** that deceased was not called upon to examine the electric wires of the defendant to see if they were well insulated, but had a right to assume that they were; and that unless the jury found that the danger therefrom was so patent that it should have excited his attention and been seen by him if he were ordinarily careful, that deceased could not be charged with notice of the danger, but only with such danger as might arise from a properly insulated wire; and that his degree of care should be commensurate with his experience and knowledge of the perils of the wires or he would be guilty of contributory negligence, is so fair a charge in an action for negligent maintenance of electric wires that the jury could not have been misled into believing that the question of due care on deceased's part was disregarded by the court. (Mich.) Hodgins v. Bay City, 546.

5. **NEGLIGENCE—Quantum of Evidence Necessary to Send Case to Jury.**—In an action against an electric company for injury caused

by shock from a broken wire, evidence that its "wrappings"—the insulation—were unraveled, the absence of any mechanical device to prevent wires from falling, the fact that kites were tangled in the wire, is sufficient to carry the case to the jury notwithstanding conflicting evidence on these points. Hence a motion to direct a verdict must be denied. (Ill.) Seith v. Commonwealth Elec. Co., 204.

See Municipal Corporations, 2.

ELEVATORS.

1. **NEGLIGENCE—Proximate Cause—Natural Consequence—Illustration.**—Leaving an elevator door open while the boy in charge is temporarily absent getting oil or changing his uniform is not the proximate cause of an injury to a passenger who travels in it with a stranger operating and is injured thereby, nor is it a natural and probable consequence of leaving the door open under such circumstances that a stranger would undertake to operate it, and either from ignorance or want of care injure one who might then come into the building to be carried by the elevator, and the owner cannot be charged with the obligation to foresee that such consequences would ensue from the boy in charge temporarily leaving his post. (Va.) Board of Trade v. Cralle, 917.

2. **MASTER AND SERVANT — Unauthorized Employment of Stranger by Servant—Irresponsibility of Master.**—A passenger by an elevator who, finding no one in charge of it, asked the hall boy where the elevator operator was, and was told of his temporary absence, and the hall boy asked a lad who was near by to take the passenger up, and he did so, and by improperly starting the elevator caused injuries to the passenger, takes passage in such elevator at his own risk, and the owner cannot be held responsible either for the act of the temporary operator or the hall boy in appointing him. (Va.) Board of Trade v. Cralle, 917.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENGINEER'S CERTIFICATE.

See Contracts, 11–13.

EQUITABLE CONVERSION.

See Conversion.

EQUITY.

1. **EQUITY—Supplemental Pleadings, When cannot Cure Defects** As a rule, if the record does not show that the complainant is entitled to relief under the original bill, the averment, either by supplemental bill or amendment, of subsequent validating matter does not cure the defect. (Ala.) Harper v. Raisin Fertilizer Co., 32.

2. **TRUSTS AND TRUSTEES—Considering as Done What Equity Would Decree to be Done.**—Whatever a chancellor would decree to be done shall be considered as though it were actually done. (Pa.) Morgan's Estate, 732.

ESTATE OF DECEDENT.

See Executors and Administrators; Wills.

ESTOPPEL.

ESTOPPEL, Holder of Chattel Mortgage, When Protected by.—Where, in an action of replevin brought by K. for certain cattle taken by defendant in foreclosure of a chattel mortgage as the property of B., the evidence disclosed that K., the owner of said cattle, while living in another state, branded them in B.'s brand and sent them into what is now this state, to be by him pastured for hire, and that while so in his possession were mortgaged to defendant by B. as his property, to secure a loan to B., held, that K. is estopped to set up title to the property as against the defendant. (Okl.) First Nat. Bank v. Kissare, 644.

EVIDENCE.

Statements, Declarations and Res Gestae.

1. **EVIDENCE—Res Gestae.—The Declarations of a Grantor** made ten days after he executed the deed are not so connected with the transaction as to be considered a part of the res gestae. (Colo.) Chappell v. John, 134.

2. **EVIDENCE.—Declarations Against Interest.**—In an action to recover for being bitten by defendant's dog, suspected of having hydrophobia, a statement of the defendant that his employé did not want the dog turned out for fear it had the hydrophobia is admissible as tending to prove scienter on the part of the defendant, and, therefore, being a declaration against interest. (Md.) Buck v. Brady, 459.

3. **EVIDENCE—Declarations by Injured Person.**—Statements by a person after returning from a pond are admissible to show that he was suffering, but not to show that he fell on the ice and struck his head. (Tex.) Roth v. Travelers' Protective Assn., 871.

4. **EVIDENCE.—Statements Made in Affidavits and Depositions** are not admissible in other proceedings against persons who did not make them. (Colo.) Chappell v. John, 134.

Judicial Notice.

5. **EVIDENCE — Judicial Notice — Trees Shedding Limbs.**—Judicial notice will be taken of the fact that many trees annually shed large numbers of dead limbs. (Mich.) Miller v. Detroit, 537.

Laws of Another State.

6. **LAWS OF ANOTHER STATE—Questions of Fact.**—Though both counsel in a case on the argument refer to the decisions of the courts of another state respecting its laws, yet they must be treated as questions of fact, and the court will not go beyond the averment of the declaration to ascertain either the common or the statutory law of such state, except as the court may be aided by the presumption that the common law is the same as that of the forum. (Mass.) Miller v. Aldrich, 480.

Opinion Evidence.

7. **TRIAL — Evidence — Witnesses — Opinions and Conclusions.**—There is no general rule of evidence which permits a witness to substitute opinions for facts. It rests largely in the discretion of the trial court, which will not be reviewed unless it is made plain that the admission of the evidence worked an injury. Such injury is unlikely where fair latitude is allowed on cross-examination. (Cal.) Nolan v. Nolan, 99.

8. **WITNESS—Opinion as to Condition of Injured Person.**—Answers to questions calling for the opinion of a witness as to the

mental or physical condition of a person after he is injured by falling on the ice are properly stricken out. (Tex.) Roth v. Travelers' Protective Assn., 871.

See Constitutional Law, 8; Witnesses.

EXECUTION.

1. **EXECUTION SALES—Removal of Timber During Time Allowed for Redemption.**—An action by the purchaser of premises at a foreclosure sale for the removal of timber from the mortgaged premises, before the expiration of the time allowed for redemption from a mortgage sale, is ex contractu. (Ala.) Richardson v. McCreary, 17.

2. **EXECUTION—Order Directing Payment.—In Proceedings Supplemental** to execution it is not prejudicial error, when money is disclosed, to order payment to the clerk instead of the sheriff. (Wash.) Belknap v. Platter, 1097.

Note.

Execution, attorneys' control over, 176.

EXECUTORS AND ADMINISTRATORS.

Appointment of Administrator.

1. **ADMINISTRATORS.—Intestacy is a Necessary Prerequisite to** the granting of general letters of administration. (Wash.) Estate of Guye, 1111.

2. **ADMINISTRATOR cannot be Appointed for Community if There is a Will.**—The husband or wife, as the case may be, has authority to name an executor for community property, and the executor thus named cannot be superseded by an administrator appointed at the suggestion of the surviving spouse. There can be no general administration upon the community when one of the spouses has died testate, devising and bequeathing his half of the community and naming an executor. (Wash.) Estate of Guye, 1111.

3. **ADMINISTRATOR—Writ of Prohibition Against When There is a Will.**—The supreme court will restrain a superior court by prohibition from issuing general letters of administration for community property on the application of the widow of the deceased, who left a will disposing of his half of the community and naming an executor. (Wash.) Estate of Guye, 1111.

Claims Against Estate.

4. **PAYMENT — Presumption — Claims Against Decedents for Domestic Service.**—The wages for domestic service or boarding and nursing are presumed to be paid at stated periods, and when a claim for such service is presented against a decedent's estate, extending over any great length of time, the burden is on the claimant to rebut the presumption by competent evidence, and until that is done the claim should be disallowed. (Pa.) Cummiskey's Estate, 787.

5. **PAYMENT—Presumption, When Properly Indulged.**—Where a sick woman of means and regular habits of payment lodged with and was nursed by an old servant for three years, and after the death of the former the servant claimed a large sum for such services, and there was no evidence to justify a finding that she had not been paid at stated intervals, the claim was disallowed, the presumption of payment not being rebutted. (Pa.) Cummiskey's Estate, 787.

Debt Owing to Estate from Executor.

6. **EXECUTORS AND ADMINISTRATORS—Debt Owing to Estate of Deceased—When Deemed to be Paid.**—When a solvent debtor is appointed executor of a creditor's will or administrator of his estate, the debt is by a fiction of the law regarded as collected and paid to himself in his representative capacity, and is unaffected by his subsequent insolvency. This is a modification of what is known as the Massachusetts rule. (Ill.) Wachsmuth v. Penn Life Ins. Co., 226.

7. **EXECUTORS AND ADMINISTRATORS—Debt Owing to Deceased.**—When a debtor is appointed executor of a creditor's will and is also a devisee thereunder, the net valuation of the devised property must be taken into account with the indebtedness to the estate when the executor has not charged himself with the debt so due and alleges his insolvency as a reason for not accounting; and a sale of the land of the estate to pay debts on the ground of deficiency of personal assets will be denied in such case. (Ill.) Wachsmuth v. Penn Life Ins. Co., 226.

Parties to Bill to Reform Deed.

8. **JURISDICTION — Parties — Executor not Representative of Heir.**—The heir at law should be made a party to a bill to reform the deed under which his ancestor derived title, the executor not representing him, where by the terms of the will a sale was directed on the cesser of a life estate created by it; and a decree in such a suit to which the executor was a party is not binding on the heir who was a nonresident of unknown address and who was served neither with process nor a copy of the publication. (Ill.) Smith v. Hunter, 231.

Sale Under Power in Will.

9. **ORPHANS' COURT—Jurisdiction to Set Aside Sale.**—The orphans' court has power in certain cases to review, set aside, and, if necessary, to order a resale of real estate made under a testamentary power, but no decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power. (Pa.) Mulholland's Estate, 791.

Sale by Order of Court.

10. **EXECUTORS AND ADMINISTRATORS — Sale of Realty Claimed by Decedent—Application of Purchase Money—Lapse of Time—Purchaser must Take Such Title as He Accepted.**—Where under power an executor sold his decedent's estate in realty and recited the title in the conveyance, received and applied the purchase money, and after the lapse of years the purchaser found the title was invalid, and the invalidity was apparent on the face of his deed, he is not entitled to a refundment of the purchase money even on the equitable ground of mistake, such so-called mistake being with a full knowledge of the facts which were disclosed in his purchase deed. (Pa.) Mulholland's Estate, 791.

11. **ADMINISTRATOR'S SALE—Passing of Title on Confirmation.** Confirmation of an administrator's sale passes the equitable title to the purchaser before the execution of the deed and the payment of the purchase money, and any loss or destruction thereafter occurring falls on him. (Wash.) Moller v. Niagara Fire Ins. Co., 1115.

12. **ADMINISTRATOR'S SALE—Ineffectual Description of Land.** Where an administrator's application for a sale describes the land "As all those lots yet unsold, being situated in the county of Hale

and state of Texas, and better known as the north half of the town of Plainview, patented to E. L. Lowe, by virtue of the pre-emption laws of the state of Texas"; and the report of the sale describes the property as "Also 7⅔ acres out of the N. E. quarter of E. Lowe pre-emption"; and the order approving the sale contains no description whatever, the sale is ineffectual for failure to describe the land. (Tex.) Wilkin v. Owens, 867.

13. **ADMINISTRATOR'S SALE—Estoppel of Heirs to Reclaim Land.**—Where a part of the estate of a decedent has been sold at an ineffectual sale, the heirs are not estopped to recover it by the fact that they have received the remainder of the property without protest, nor are they required to pay back the purchase money before recovering the land. (Tex.) Wilkin v. Owens, 867.

14. **ADMINISTRATOR'S SALE.—In Order to Assert an Equity of Subrogation** in property that has been sold at an administrator's sale, the facts must be pleaded. (Tex.) Wilkin v. Owens, 867.

15. **ADMINISTRATOR'S SALE—Recovery of Land by Heir—Modification in Supreme Court.**—If the property of a decedent is sold by his administrator, and his heir sues for its recovery and judgment is given in his favor, the supreme court may modify the judgment so as to place the recovery on condition that the plaintiff pay the defendant the amount of the bid for the land at the attempted sale and interest thereon to date. (Tex.) Wilkin v. Owens, 867.

16. **ADMINISTRATOR'S DEED—Effect as Conveying His Own Title.**—An administrator's deed, ineffectual because the sale was ordered at a time when the court could not lawfully sit, conveys his life estate in the property, and hence the possession of his grantees is rightful and the remaindermen have no right of action for possession until the termination of the life estate. (Tex.) Millican v. McNeill, 863.

17. **ADMINISTRATOR'S DEED—Refund by Heirs on Avoiding Sale.**—Where an administrator's deed is ineffectual to convey the title of the heirs, but his accounts show that the proceeds of the sale were applied to the satisfaction of charges against the estate, the heirs, before recovering the property from the purchasers, must refund the amount with interest from the time it was applied to the payment of the charges. (Tex.) Millican v. McNeill, 863.

Note.

Executors and Administrators, debts due from to the decedent, liability of and of bondsmen for, 230, 231.
sureties of, when bound by judgments against, 764–766.

EXEMPTIONS.

1. **EXEMPTIONS—Tort or Contract.**—Where the original action, in consequence of which an execution has issued, is ex delicto, no exemptions are allowed. (Ala.) Richardson v. McCreary, 17.

2. **EXEMPTION—Apparatus of Restaurant-keeper.**—If it be conceded that the keeping of a restaurant is a "trade," still counters, safe, tableware, kitchen utensils, etc., are not "tools or apparatus," within the meaning of the exemption statute. (Tex.) Simmang v. Pennsylvania Fire Ins. Co., 846.

EXPLOSIVES.

1. **EXPLOSIVES—Intoxication Contributing to Accident.**—If in an action for injuries from the explosion of a chemical sold by the defendant there is evidence that prior to the accident the plaintiff

had been drinking, the jury may be instructed that if in consequence thereof he was prevented from using his senses, and was injured on that account, he cannot recover. (Wash.) Conrad v. Graham, 1137.

2. **EXPLOSIVES—Notice to Agent of Purchaser.**—Where a photographer sends a messenger to purchase a certain chemical, notice to the messenger that the chemical sold him is different from and more dangerous than the one ordered is notice to the photographer. (Wash.) Conrad v. Graham, 1137.

3. **EXPLOSION—Contributory Negligence of Photographer.**—Where an experienced photographer, who knows that only magnesium can safely be used in a magazine lamp, is injured by an explosion from using therein a different chemical which was sold to his messenger, he has no cause of action against the vendor if the latter labels the package and informs the messenger that the chemical is different from and more dangerous than the one called for. (Wash.) Conrad v. Graham, 1137.

FALSE PRETENSES.

1. **FALSE PRETENSES—Definitions.**—A false pretense is a "representation of some fact or circumstance, calculated to mislead, which is not true"; or "such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value." (Or.) State v. Hammelsy, 686.

2. **FALSE PRETENSES—Obtaining Money or Property by.**—The gist of the offense, against which the statute is directed, is obtaining money or property of another by deceit, fraudulently and feloniously superinduced by the beneficiary; and when one by his acts intentionally creates a belief, as to an existing fact, which is false, with the intent to deprive another of his property, and does so, it does not matter whether the erroneous belief was induced by words or acts, or both. (Or.) State v. Hammelsy, 686.

3. **FALSE PRETENSES — Fraudulent Check.** — Under section 4463, B. & C. Comp., a check is an order on a bank purporting to be drawn upon a deposit of funds, and the drawer engages that on presentation it will be paid; and therefore when a check is given with the fraudulent and felonious purpose of obtaining the property of another, the drawer knowing that it will not be paid, the offense of obtaining property by false pretenses is complete, although the drawer made no other representation in reference to it. The giving of such a check is of itself as much of a representation as an oral declaration to that effect. (Or.) State v. Hammelsy, 686.

See Banks and Banking.

FELLOW-SERVANTS.

See Master and Servant.

FICTIONS OF LAW.

LEGAL FICTIONS—Choice Between.—In selecting a fiction, moreover, it may sometimes be wise to take one which has some slight inconvenience in practical results, if its logical development is generally convenient, rather than another which has a slight advantage in some respect, but whose logical developments would lead to such injustice that exceptions and subfictions must be numerous and strained. (R. I.) Johnson v. Union Pac. R. R. Co., 799.

FIRE.

See Damages, 1.

FIRE DEPARTMENT.

See Municipal Corporations, 3.

FIRE LIMITS.

See Municipal Corporations, 4.

FISHERIES.

1. **FISHERIES—Pacific Ocean—Municipal Ordinance—Construction—Ultra Vires—Habeas Corpus.**—A municipal ordinance of Santa Monica making it a misdemeanor to set, draw or use any fishing net in the Pacific Ocean at any point or place within that town less than one thousand feet from any wharf, dock or pier located in said town is an ordinance to protect and add to the piscatorial advantages of such wharves, docks and piers, and is void as beyond the power of the town to enact. One held for violating such ordinance is, on habeas corpus, entitled to his freedom. (Cal.) Ex parte Bailey, 95.

2. **FISHERIES—Pacific Ocean—Municipal Ordinance—Construction.**—A municipal ordinance of Santa Monica making it a misdemeanor to set, draw or use any fishing net in the Pacific Ocean at any point or place within that town less than one thousand feet from any wharf, dock or pier located in said town is manifestly not designed as an aid to navigation in the vicinity of such wharves, docks and piers, and to enable vessels to reach them conveniently, and safely. (Cal.) Ex parte Bailey, 95.

3. **FISHERIES—Title to Wild Game.**—The ownership of wild game, not reduced to actual possession by private parties of which the fish in our waters constitute a part, is in the people of the state, in their collective capacity. (Cal.) Ex parte Bailey, 95.

4. **FISHERIES—Title to Wild Game—No Local Proprietary Interest.**—The people of Santa Monica have no such proprietary interest in the fish swimming in the Pacific Ocean within the corporate limits of the town, as authorizes them to protect and preserve them therein, simply that they may be taken by those fishing from the wharves. (Cal.) Ex parte Bailey, 95.

5. **FISHERIES—Title to Wild Game.**—While the common right of fishery in any public water must give way to the right of navigation so far as is necessary for the fair, useful and legitimate exercise of the latter right, it cannot be unnecessarily and unreasonably impeded thereby. (Cal.) Ex parte Bailey, 95.

FOOD.

1. **MUNICIPAL ORDINANCE—Construction—Standard for Milk.** A municipal ordinance prescribing the standard for milk, "Total milk solids, 12.5 per centum by weight; butter fat, 3.5 per centum by weight; water, 87.5 per centum by weight," is not void for vagueness, uncertainty or contradictory propositions; the proper construction being that the 3.5 per centum of butter fat is included in the 12.5 total milk solids. (Cal.) In re Hoffman, 75.

2. **MUNICIPAL ORDINANCE—Reasonableness—Milk Standard.** The fact that the municipal standard for milk is higher than that of a particular breed of cow is not sufficient to tender an issue of the unreasonableness of the ordinance. (Cal.) In re Hoffman, 75.

3. **MUNICIPAL ORDINANCE — Urgency.** — Raising the milk standard by increasing the milk fat and decreasing the water each .5 per centum cannot be a matter for the immediate preservation of the public health, so as to bring an ordinance within the category of urgent measures justifying bringing it into immediate operation under powers contained to that effect in the municipal charter. (Cal.) In re Hoffman, 75.

FOREIGN CORPORATION.

See Corporations, 1.

FOREIGN LAWS.

See Evidence, 6; Pleading, 2.

FORGERY.

See Deeds, 7, 8.

FORMER JEOPARDY.

See Criminal Law, 8–11.

FRAUD AND DECEIT.

DECEIT, Action for, When will not Lie—Failure to Employ Means to Ascertain the Truth.—Where representations are made respecting a subject as to which the complaining party has at hand reasonably available means for ascertaining the truth, and the matter is open for inspection, if, without being fraudulently diverted therefrom, he does not take advantage of this opportunity, he cannot be heard to impeach the transaction on the ground of the falsehoods of the other party. (Mass.) Mabardy v. McHugh, 484.

FRAUDS, STATUTE OF.

Parol to Reform Writing.

1. **STATUTE OF FRAUDS—Parol Evidence to Reform Contract.** Parol evidence is not admissible in equity to reform a contract within the statute of frauds whose essential terms are not in writing. (Wash.) Mead v. White, 1092.

Surety's Undertaking.

2. **STATUTE OF FRAUDS.—An Undertaking to be Surety for a Building Contractor** is collateral to the main contract and must be in writing. (Wash.) Mead v. White, 1092.

3. **STATUTE OF FRAUDS—Memorandum of Surety's Undertaking.**—Persons who place their names under the word "sureties" at the bottom of a building contract which contains no provision tending to connect them with it are not bound as sureties of the contractor; their contract, if any, is not "in writing," and parol evidence is not admissible for the purpose of reforming it in equity. (Wash.) Mead v. White, 1092.

Description of Land.

4. **STATUTE OF FRAUDS—Description.**—A memorandum in writing purporting to be a contract for the sale of land which describes the property sold as "this place" is not sufficient to satisfy the statute of frauds. "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance wtih the statute." (R. I.) Cunha v. Callery, 811.

5. **STATUTE OF FRAUDS—Insufficient Description—Subsequent Deed with Accurate Description.**—Where a contract for the sale of land insufficiently described it as "this place," and the vendor afterward gave the purchaser a deed which contained an accurate description of a lot of land, but there was no reference to such deed in the contract, the deed did not form part of the memorandum in writing. (R. I.) Cunha v. Callery, 811.

6. **FRAUDS, STATUTE OF—Description of Land.**—The description of land in a contract of sale must be such as to make the intention manifest, and extrinsic evidence cannot be resorted to, to determine what land is intended. (Or.) Bogard v. Barhan, 676.

7. **FRAUDS, STATUTE OF—Description of Land—Extrinsic Evidence.**—If the description of land in a contract of sale fits and comprehends it, the contract is good under the statute of frauds; and extrinsic evidence may be resorted to either to ascertain the boundaries or otherwise fix its identity, so long as it does not vary the agreement. (Or.) Bogard v. Barhan, 676.

8. **FRAUDS, STATUTE OF.—The Following Descriptions of Lands Sufficiently Comply with the Statute of Frauds,** assuming that there are not two properties answering to the respective descriptions: "The brick store building occupied by Beebe & Whitman, located in Woodburn, Marion County, Oregon"; "his 5-acre residence property lying west of the Catholic Church"; "lot 7, block 2, Tooze's addition to Woodburn"; "my 15-acre farm located one mile north of Woodburn, Marion County, Oregon." (Or.) Bogard v. Barhan, 676.

See Landlord and Tenant, 2; Mortgages, 15; Vendor and Vendee.

FRAUDULENT CONVEYANCE.

In General.

1. **CREDITORS, Debtor's Power Over Funds not Reachable by Them.**—A surviving husband has the right to relinquish the statutory share of his wife's property and accept in its place a provision in the will for his care and support for life, and even though it is to the disadvantage of his creditors, unless the nature of the right accepted by him is such that it may be reached by them. (Iowa) Merchants' Nat. Bank v. Crist, 267.

2. **PLEADING—Fraudulent Conveyance.**—The grantee of a fraudulent conveyance may plead any defense, not merely personal, which the grantor of debtor could have made against it. (Ala.) Harper v. Raisin Fertilizer Co., 32.

Debt Barred by Statute of Limitations.

3. **FRAUDULENT CONVEYANCE—Barred Debt.**—If at the time a conveyance alleged to be fraudulent is made, the statute has barred the debt of the attacking creditor, the conveyance is not fraudulent. (Ala.) Harper v. Raisin Fertilizer Co., 32.

4. **LIMITATION OF ACTION—Fraudulent Conveyance as a Bar to.** A debtor is not disentitled from pleading the statute of limitations against the debt on the ground that he had made a fraudulent conveyance and successfully concealed the fact. (Ala.) Harper v. Raisin Fertilizer Co., 32.

Action to Set Aside.

5. **LIMITATION OF ACTIONS—Plea of by a Successor in Interest.**—While a mere creditor cannot raise the defense of the statute of limitations, in an action to set aside a fraudulent conveyance, yet the party who has acquired an interest in the property, by deed or mortgage, from the original owner is placed in the shoes of the grantor, and, in order to protect the property, may make any plea

which could have been made by such original owner. (Ala.) Harper v. Raisin Fertilizer Co., 32.

6. **FRAUDULENT CONVEYANCE—Issue in Suit to Set Aside.**—The fact of primary importance in a suit to set aside a fraudulent conveyance is the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable. (Ala.) Harper v. Raisin Fertilizer Co., 32.

Action to Set Aside—Limitation of Actions.

7. **LIMITATION OF ACTION—Demurrer—Bill to Set Aside Fraudulent Conveyances.**—The statute of limitations may be set up in equity by demurrer, where the bill shows prima facie the bar, notwithstanding that it does not contain the additional averment that the grantee, under a fraudulent conveyance, had held adverse possession for the time required. (Ala.) Van Ingin v. Duffin, 29.

8. **LIMITATION OF ACTION.—A Bill to Set Aside a Fraudulent Conveyance** is a suit for the recovery of land, and is governed by the statute of limitations. (Ala.) Van Ingin v. Duffin, 29.

9. **LIMITATION OF ACTION.—Time Begins to Run from the Date of the Execution of a Fraudulent Conveyance,** against antecedent creditors. As Code of 1907, sections 4832, 4834, paragraph 2, provides that actions for the recovery of lands must be commenced within ten years "after the cause of action has accrued," the date of the conveyance marks the period of accrual. (Ala.) Van Ingin v. Duffin, 29.

10. **LIMITATION OF ACTION—Fraudulent Conveyance.**—The fact that the party seeking to set aside a fraudulent conveyance was ignorant of the fraud until after the right to recover was barred, is not per se sufficient to entitle him to the benefit of the exception in Code of 1907, section 4852, in the absence of any act or conduct calculated to mislead, deceive, or lull inquiry. (Ala.) Van Ingin v. Duffin, 29.

See Creditor's Bill; Trusts, 6.

GARNISHMENT.

In General.

1. **GARNISHMENT—Rights of Garnishee.**—Under no circumstances can a garnishee, by the operation of proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself. (R. I.) Johnson v. Union Pac. R. R. Co., 799.

2. **GARNISHMENT.—The Effect of Attachment** is to bind all funds of the defendant debtor that come into the hands of the garnishee after service of the writ and before judgment is entered. (Pa.) Somerset Coal Co. v. Diamond State Steel Co., 775.

3. **GARNISHMENT—Construction of Statute.**—Under section 720, Code of Civil Procedure, as it read in October, 1906, in proceedings supplementary to execution, where one indebted to the judgment debtor denied the debt, the court or judge might "authorize, by an order made to that effect, the judgment creditor to institute an action," etc. An order that the judgment creditor "be permitted to bring an action, etc.," while not following the precise language of the code, is in substantial compliance with the law. (Cal.) Nordstrom v. Corona City Water Co., 81.

4. **GARNISHMENT—Denial of Garnishee's Indebtedness—Order to Bring Action Unnecessary.**—A judgment creditor, having prosecuted supplementary proceedings to the point of securing from the garnishee a denial of indebtedness to the judgment debtor, has the

right to sue without any order permitting him to do so. (Cal.) Nordstrom v. Corona City Water Co., 81.

5. **GARNISHMENT—Pleading of Judgment—Variance.**—Where the complaint of the judgment creditors alleged a judgment against the judgment debtor, and the evidence disclosed that such judgment was the aggregate of the amounts awarded to the judgment creditors severally, they having united in the original action, the variance was one which could not have misled the garnishee to his prejudice, and should be disregarded. (Cal.) Nordstrom v. Corona City Water Co., 81.

6. **GARNISHMENT—Consolidated Suit—Single Judgment—Sufficient.**—Where a statute authorizes a union of plaintiffs in one action, a single judgment is properly made and entered, although the causes of action may be distinct. (Cal.) Nordstrom v. Corona City Water Co., 81.

7. **GARNISHMENT—Code Provisions—Death of Judgment Debtor After Levy of Execution—Claim of Personal Representatives.**—When, after a garnishment upon execution, the judgment creditor proceeds by supplementary proceedings (designed to take the place of the equitable remedy by creditor's bill), any judgment recovered by him relates back to the levy of the garnishment and intervening rights are cut off; and such levy creates a lien within the purpose of section 1500 of the Code of Civil Procedure, which is designed to dispense with the necessity of presenting a claim against the estate of a decedent where recourse is sought only against property which is bound as security for the claimant's demand, the death of the debtor after the creation of the lien not necessitating the presentation of a claim against his estate precedent to its enforcement. (Cal.) Nordstrom v. Corona City Water Co., 81.

8. **GARNISHMENT—Setoff—Subsequent Judgment.**—The setoff which may be claimed by a garnishee must be one which existed at the time of the garnishment. A judgment obtained afterward by the garnishee against the estate of the judgment debtor, deceased, not founded on a lisability owing at the time of the garnishment, is not a defense entitling him to set it off. (Cal.) Nordstrom v. Corona City Water Co., 81.

Receivers.

9. **GARNISHMENT OF RECEIVERS.**—Where a receiver of a foreign corporation appointed in another state controls moneys thereof and holds them as a garnishee pending the determination of an attachment in a Pennsylvania court, it cannot be attached by a creditor of the corporation in Pennsylvania. (Pa.) Somerset Coal Co. v. Diamond State Steel Co., 775.

Foreign Corporations—Rolling Stock—Situs of Debt.

10. **GARNISHMENT—Railroads—Rolling Stock.**—A freight-car belonging to a defendant foreign corporation in the possession of a domestic railroad corporation, under a universal arrangement that such corporations, in lieu of unloading freight into their own cars, should haul those of other corporations to their destination, and when emptied return them at their convenience, is not subject to attachment in a tort action brought against such defendant foreign corporation on the ground that the garnishee has an immediate interest in the property, and such a right to operate the cars that in the ordinary course of business such cars may be taken beyond the jurisdiction of both courts. (R. I.) Johnson v. Union Pac. R. R. Co., 799.

11. **GARNISHMENT—Situs of Debt—Incorporations in Several States—Unity of Organization.**—The moneys belonging to a defend-

ant foreign corporation in the hands and possession of a domestic railroad corporation is subject to attachment and garnishment in a tort action brought against such defendant foreign corporation unaffected by the fact that such defendant foreign corporation was incorporated in three different states; and whether the defendant was a single corporation or a corporation with several aspects or several separate corporations, of which only one was recognized either in each or all of the creating states, the situs of indebtedness lay in any one of the states in which the defendant was incorporated. (R. I.) Johnson v. Union Pac. R. R. Co., 799.

12. **GARNISHMENT—Interstate Commerce.**—Garnishment process can be successfully adopted against accounts payable to a foreign railroad corporation arising out of the conduct of interstate commerce. (R. I.) Johnson v. Union Pac. R. R. Co., 799.

Statute of Limitations.

13. **GARNISHMENT.—The Statute of Limitations** has no application if the obligation of the garnishee to the judgment debtor is not barred, the same rules applying to both garnishment on attachment and on execution. The liability created by the garnishment is never barred. (Cal.) Nordstrom v. Corona City Water Co., 81.

See Courts, 2.

GIFTS.

1. **GIFT CAUSA MORTIS, Delivery Essential to.**—To support a gift causa mortis there must be a delivery or a change of possession made for the purpose of passing the title in praesenti. The only difference between a gift inter vivos and a gift causa mortis is that in the former the change in the title is irrevocable and indefeasible, while in the latter it is revocable and defeasible under certain conditions. (Mass.) Nelson v. Peterson, 503.

2. **GIFTS CAUSA MORTIS, Delivery, to Whom must be Made.**—It is not indispensable that in case of a gift causa mortis there be a delivery to the donee personally, but if not, it must be made to some person for him, who must, after the death of the donor, deliver the property to the donee, who must accept it. (Mass.) Nelson v. Peterson, 503.

3. **GIFT CAUSA MORTIS, When not Sufficiently Shown.**—Where property claimed to be given causa mortis consisted of five hundred dollars in money and of wearing apparel, the latter being in a trunk and partly in a closet of a room occupied by the donor as a boarder in the house of a third person, and the donor, knowing himself to be very ill and about to be taken to a hospital, offered his landlady the key of the trunk, telling her not to give it to any person but to the president and board of trustees of a designated society, and telling her of money in a pocketbook in the trunk and also referring to some wearing apparel, which he said he supposed his nephew could wear, and, on being asked by the landlady as to whom she was to give the trunk keys, answered, "The society, they will take charge of everything," and she, instead of taking the key, asked him to put it in a designated place, whence she subsequently took it, and on his being told that this was not lawful and that the transaction should be put in black and white, he replied that he would send for the president to come to the hospital, and that if his body was not cremated, he wanted a little headstone at his grave, and that what is left he wanted the society to have, this did not show a perfect gift causa mortis. (Mass.) Nelson v. Peterson, 503.

Note.
Guarantors, when bound by judgments against their principal, 766.
Guardians, sureties of, when bound by judgments against their principal, 766.

HABEAS CORPUS.

1. **HABEAS CORPUS.—The Sufficiency of a Warrant** issued by a court of competent jurisdiction will not be inquired into on habeas corpus; the remedy is by appeal. (Wash.) In re Milecke, 968.

2. **HABEAS CORPUS to Assail a Conviction Under a Void Municipal Ordinance.—Habeas Corpus** will lie to discharge a petitioner restrained of his liberty by virtue of a conviction based upon a void ordinance. (Okl.) In re Unger, 670.

HOMESTEAD.

Sale and Contract to Sell.

1. **HOMESTEAD—Method of Alienating.**—The only mode of dealing with a homestead is by the voluntary assent and signature of the wife in accordance with the Code of 1907, section 4161, with the one exception named in section 207 of the constitution in favor of laborers, and mechanics' liens. (Ala.) Clark v. Bird, 25.

2. **HOMESTEADS—Void Obligation for Sale—Refunding Purchase Money.**—The refunding of the purchase money paid under a void contract of purchase is not a condition precedent to the recovery of the homestead. Such a requirement would create a lien or encumbrance in defiance of the constitution. (Ala.) Clark v. Bird, 25.

3. **HOMESTEADS—Void Obligation for Sale—Payment for Such Improvements** as have been made by a purchaser under a void contract for sale cannot be imposed by a court of equity as a condition precedent to the recovery of the property from him. (Ala.) Clark v. Bird, 25.

4. **HOMESTEADS—Void Obligation for Sale.**—While a bond to sell, which is unsigned by the wife, is void as an obligation to convey the homestead, the personal liability of the obligor is unaffected. Cowan v. Southern R. R., 118 Ala. 554, 23 South. 754, distinguished. (Ala.) Clark v. Bird, 25.

Contract to Sell—Estoppel—Specific Performance.

5. **HOMESTEADS—Specific Performance—Contract to Sell Unsigned by Wife.**—A bond to sell part of a homestead, not being signed and acknowledged by the vendor's wife, as required by the Code of 1907, section 4161, is void as an obligation to convey, and is not the subject of specific enforcement. (Ala.) Clark v. Bird, 25.

6. **HOMESTEADS—Estoppel.**—A bond to sell part of a homestead, not signed by the wife according to law, does not operate as an estoppel against the husband, though he has received a valuable consideration. It is void, and a nullity to all intents and purposes. (Ala.) Clark v. Bird, 25.

Mortgage—Marshaling Assets.

7. **HOMESTEADS—Mortgage of Two Lots.**—Where there are no prior equities and the owner of two distinct lots has mortgaged them, and there exists as to one of such lots a homestead declaration, the weight of authority shows that equity will direct the sale first of that lot on which the homestead is not in order to preserve the homestead, if possible. (Cal.) Nolan v. Nolan, 99.

8. **HOMESTEADS—Mortgage of Two Lots—Marshaling of Assets.**—Where there are no prior equities, and the owner of two distinct lots, on one of which there exists a homestead declaration, has

mortgaged both lots to one mortgagee, and subsequently, but excepting the piece of that lot in respect to which the homestead declaration existed, to a second mortgagee, upon foreclosure proceedings, it has been held by a preponderance of authority that the second mortgagee could not compel the first to resort first to a sale of the homestead, to the end that their security might not be impaired, but the mortgagor and his wife, by the equity of their homestead, could compel the first mortgagee first to exhaust the lot not affected by the homestead, even though it resulted in the destruction of the second mortgagee's security. (Cal.) Nolan v. Nolan, 99.

9. **HOMESTEADS—Marshaling of Assets—Mortgage—Vendor's Lien.**—Where a vendor takes an unsecured note for unpaid purchase money of land and allows his lien to be subordinated to the claims of a subsequent mortgagee, and the purchaser, before the maturity of the note, causes a homestead to be declared on another lot adjoining, belonging to him, but subject to the same mortgage, for the obvious purpose of defrauding the vendor out of the security of his lien, the after-declared homestead will not carry with it an equity superior to the vendor's lien, and the vendor will be entitled to a marshaling of securities and to a decree that the lot holding the homestead shall be sold first in satisfaction of the mortgage before resort to that on which exists his lien. (Cal.) Nolan v. Nolan, 99.

Persons Entitled to Probate Homestead.

10. **PROBATE HOMESTEAD—Children Entitled to Claim—Illegitimates.**—A statute providing for the setting apart of a homestead for the "benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased," is for the benefit of legitimate children only, and cannot be invoked by an illegitimate widowed daughter remaining with the family. (Tex.) Hayworth v. Williams, 879.

Loss or Abandonment.

11. **HOMESTEAD—Whether Lost by Divorce.—Where a Wife Obtains Judgment** granting her a divorce and the custody of the children, and decreeing to her title to one-half of the property (claimed as community and as a homestead), with the use and possession thereof during the minority of the children, and also obtains a money judgment for personal injuries inflicted on her by the husband; and she is put in possession accordingly and he is put out of possession, taking the children with him; and subsequently the land is sold under the judgment for damages, she purchasing and then selling the tract to third persons, whereupon the husband with the children (he having had their custody and having supported them since the divorce) moves back upon the land (all this occurring within less than one year after the decree of divorce), he may assert his homestead right. (Tex.) Speer & Goodnight v. Sykes, 896.

12. **HOMESTEAD—Abandonment.**—Renting one part of a homestead and residing on the other does not operate as an abandonment by the owner, nor affect its character as a homestead. (Ala.) Clark v. Bird, 25.

See Public Lands, 1.

HOMICIDE.

1. **HOMICIDE—Manslaughter.**—A husband is not justified in killing, or attempting to kill, another to prevent the seduction or debauching of his wife by artifice or fraud, and even where the adultery is by consent of the wife, and the husband catches the offender in flagrante delicto and kills him, it is manslaughter. (Or.) State v. Young, 689.

2. **HOMICIDE—Justification for Slaying in Self-defense** or the defense of a wife or daughter must be founded on transactions occurring in respect to parties then and there present and not to such as merely threaten danger to one absent; and where it is in defense of the wife's chastity, it must be to prevent not a past offense or future attempt but a present and impending violation thereof, and reasonably necessary to prevent it. (Or.) State v. Young, 689.

Note.

Homicide, adulterer, act of need not be in flagrante delicto, 695.
adulterer, killing of in the act, what offense at common law, 695.
adulterer, killing of, when manslaughter, 695.
adulterer, killing of, when murder, 695.
adulterer, past act of, when does not reduce killing to manslaughter, 696.
adultery, deliberation over preceding the homicide, 696, 699.
adultery, force which may be used in preventing, 697.
adultery, past acts of, or attempts at, do not justify, 698.
adultery, resistance to and to abduction, 697, 698.
seduction, whether may be committed to prevent, 698, 699.
to prevent adultery, 698.

HUSBAND AND WIFE.

Conveyance by Wife Under Power of Sale.

1. **A MARRIED WOMAN Holding Realty as Trustee**, with a power of sale, may convey it without her husband joining in the deed, notwithstanding section 506 of Kentucky Statutes of 1903, which provides that a conveyance by a married woman may be by the joint deed of her and her husband. (Ky.) Antonini v. Straub, 350.

Community Property—Gift or Resulting Trust.

2. **COMMUNITY PROPERTY—Presumption—Property Acquired by Purchase** during marriage is presumed to be community, and the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory evidence. (Wash.) Denny v. Schwabacher, 1140.

3. **HUSBAND AND WIFE—Gift or Resulting Trust.**—Where the consideration for a conveyance is paid from the separate funds of one spouse, while the property is conveyed to the other, a presumption of gift rather than of trust arises, which presumption can be overthrown and a trust relation established only by clear and convincing evidence. (Wash.) Denny v. Schwabacher, 1140.

4. **HUSBAND AND WIFE—Property Purchased with Her Funds in His Name.**—Land conveyed to a man will be regarded as the separate property of his wife held in trust, and hence not subject to a judgment subsequently recovered against him, where it appears that she paid the purchase price and the cost of improvements from her separate estate, that he admitted the trusteeship, no credit was given in reliance of his supposed ownership, and they conveyed the property to a third person before the execution sale. (Wash.) Denny v. Schwabacher, 1140.

Antenuptial Contracts.

5. **ANTENUPTIAL CONTRACT—Validity of.**—A woman may release her rights in her intended husband's property, but such a contract must be free from fraud or misrepresentation or the practice of deceit on the part of the man, and must be reasonable and entered into with the best of good faith on the part of both. (Ky.) Tilton v. Tilton, 359.

6. **ANTENUPTIAL CONTRACT—Onus of Proof.**—Where an antenuptial contract shows upon its face that it is unjust or unfair, the burden is upon the husband or his representatives to show that it was fairly procured, and that the wife was not overreached or deceived in the execution thereof. (Ky.) Tilton v. Tilton, 359.

7. **ANTENUPTIAL CONTRACT — When Unconscionable.** — An antenuptial contract which provides that the intended wife shall release all rights to the intended husband's present and future property, covenants to keep him free from postnuptial debts except authorized in writing by him, that if there shall be no issue of the union all her estate shall go to him or his heirs on her death, that he will clothe and keep her, and as a further consideration gives her a sewing machine and a horse, is both unconscionable and unjust to the wife and could only be sustained by evidence of the most positive character that its terms were fully comprehended, understood and acquiesced in. (Ky.) Tilton v. Tilton, 359.

8. **ANTENUPTIAL CONTRACT.—To Determine the Fairness and Reasonableness of an Antenuptial Contract,** the court will inquire into all the circumstances, such as the means of both parties, their ages and the woman's full and clear knowledge of the nature of the deed she is signing. (Ky.) Tilton v. Tilton, 359.

9. **ANTENUPTIAL CONTRACT—Test of Fairness.**—If the provision made for the intended wife in an antenuptial contract is unreasonably disproportionate to the means of the husband, the presumption of designed concealment is raised and the burden of disproving the same is on him. (Ky.) Tilton v. Tilton, 359.

10. **ANTENUPTIAL CONTRACT—Comprehension by Woman.**—Where a woman had been a domestic and her mistress having died she stayed on with the master and his family and gossip arose about them, and as a "peace offering to the neighborhood" he proposed to marry her, and thereupon an agreement was prepared by his lawyers and she was taken by him to the hotel where they were and the contract was read and its terms explained to her, but their effect was not, some of them being merely a statement of a man's legal obligations with regard to his wife and others providing that she yielded all her claims to his estate, and the general tenor of the agreement being of a business nature and not bottomed on sentimental grounds, the court set it aside on the ground that the woman regarded it, in the absence of explanation of its effect, simply as the "peace offering to the neighborhood," and not as a barter away of her rights. (Ky.) Tilton v. Tilton, 359.

11. **ACQUIESCENCE—Unconscionable Contract.**—Where an unconscionable antenuptial contract was signed and the wife applied to have it canceled thirty-two years after its execution, the doctrine of acquiescence cannot be used to defeat her claim, when the same improper influence which induced her to sign it operated to lull her into silence during those years, and it was only after the death of her husband that she understood that she had been imposed upon and that she was left helpless and poverty stricken in her old age after a life of service and devotion. (Ky.) Tilton v. Tilton, 359.

See Adverse Possession, 1; Creditor's Bill; Homesteads; Marriage; Witnesses, 1, 2.

HYDROPHOBIA.

See Animals.

IMPRISONMENT FOR DEBT.

See Constitutional Law, 4.

IMPUTED NEGLIGENCE.
See Negligence, 2.

INDECENT EXPOSURE.
See Criminal Law, 4–7.

INDEPENDENT CONTRACTORS.
See Master and Servant, 11; Railroad, 2.

INDICTMENTS.

1. **INDICTMENT, Defects in not Curable by Bill of Particulars.** A Bill of Particulars is not the remedy for an indictment so defective that it charges no offense. (Pa.) Commonwealth v. Baltimore etc. R. R. Co., 723.

2. **INDICTMENT—Particulars, When must be Stated.**—Where an act is not in itself necessarily unlawful or a nuisance, but becomes so by its circumstances, all the matters necessary to show its illegality must be stated in the indictment. (Pa.) Commonwealth v. Baltimore etc. R. R. Co., 723.

3. **CRIMINAL LAW—Indictment—Demurrer.**—Where an indictment substantially follows the language of the statute and does not omit any essential averment necessary to constitute an offense under the statute, a demurrer cannot be sustained. (Ky.) Louisville Ry. Co. v. Commonwealth, 408.

See Criminal Law, 6, 7; Robbery.

INFANTS.

1. **INFANTS—Contracts—Voidable.**—The contract of an infant is, in general, voidable by him, and gains no additional force from the fact that he is engaged in business for himself or is emancipated. (Ill.) Wuller v. Chuse Grocery Co., 216.

2. **INFANTS—Contracts—Voidable Notwithstanding Injury to Contractee.**—The exercise of an infant's right to disaffirm his contract may operate injuriously and unjustly against the other party, but the right exists for protection against his own improvidence and is exercisable at his discretion. (Ill.) Wuller v. Chuse Grocery Co., 216.

3. **INFANTS—Contracts—Executed and Executory.**—There is no distinction between executed and executory contracts so far as the right of disaffirmance by an infant is concerned. (Ill.) Wuller v. Chuse Grocery Co., 216.

4. **INFANTS—Contracts Disaffirmed.**—Voluntary payments made by an infant may be recovered by him on his disaffirming a contract, but he must return such part of the consideration as he has, without obligation to make restitution of the remainder which he has expended or lost. (Ill.) Wuller v. Chuse Grocery Co., 216.

5. **INFANTS—Contracts—Time for Disaffirmance.**—Contracts concerning personal property and executory agreements may be avoided by the infant either during or after his minority. (Ill.) Wuller v. Chuse Grocery Co., 216.

6. **INFANTS — Contracts — Voidable.— Stocks and Shares Being Personalty,** an infant may avoid the purchase of them and recover the purchase money. (Ill.) Wuller v. Chuse Grocery Co., 216.

7. **INFANTS—Contracts Avoided—Mode of Restoring Stock.**—Where an infant sued to have a contract for the purchase of stock set aside and the decree provided for the cancellation of the certificate, such cancellation is equivalent to a surrender of the stock by

the infant and its restoration to the corporation. (Ill.) Wuller v. Chase Grocery Co., 216.

See Marriage.

INFORMATION.

See Indictments.

INJUNCTIONS.

In General.

1. **INJUNCTION Against Prosecuting an Action in Another State.**—Equity will enjoin one citizen from prosecuting against another citizen of the state an action in a sister state which involves a matter already adjudicated in the courts of the first state. (Colo.) O'Haire v. Burns, 191.

2. **INJUNCTION—Claim of Right—Manager.**—Where the manager of a corporation is enjoined from interfering with the business thereof on the ground of his removal by the board of directors, and such manager challenges the right of such directors, the fact that he simply claimed to be manager and not owner does not affect the question, which is to whom the business of such corporation is to be intrusted. (Cal.) Clute v. Superior Court, 54.

Mandatory Injunction.

3. **INJUNCTION, When Mandatory.**—For the purpose of determining whether the effect of an injunction is mandatory or prohibitory, the result of the enforcement of the writ on the defendant must be considered; and if it compels him affirmatively to surrender a position which he holds, and which, upon facts alleged by him, he is entitled to hold, it is mandatory. (Cal.) Clute v. Superior Court, 54.

4. **INJUNCTION, MANDATORY—Stay Pending Appeal.**—While an injunction which merely has the effect of preserving the subject of the litigation in statu quo is not suspended by an appeal, a mandatory injunction, i. e., one which compels affirmative action by the defendant, cannot be enforced pending a duly perfected appeal. (Cal.) Clute v. Superior Court, 54.

5. **INJUNCTION, MANDATORY IN EFFECT—Prohibitive in Terms—Contempt—Supersedeas.**—If an injunction, though couched in terms of prohibition, is mandatory in effect, a proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature of the writ; and, if the enforcement of the injunction has been stayed by an appeal, a writ of supersedeas may properly be issued by the appellate court to arrest further action by the court below. (Cal.) Clute v. Superior Court, 54.

See Contempt; Navigable Waters, 6; Nuisance.

INNKEEPERS.

1. **CONSTITUTIONAL LAW—Defrauding Innkeeper as a Crime.** A statute making it a crime punishable by fine or imprisonment to fraudulently procure accommodations of an innkeeper and not pay therefor, does not offend the constitutional prohibition against imprisonment for debt. (Wash.) In re Milecke, 968.

2. **CONSTITUTIONAL LAW—Making Certain Facts Prima Facie Evidence of Guilt.**—A statute providing that when it is shown that a person has refused or neglected to pay for his accommodations at an inn, or has surreptitiously removed his baggage, this shall be prima facie evidence of his intent to defraud the innkeeper, violates no constitutional provision. (Wash.) In re Milecke, 968.

INSTRUCTIONS.

See Trial, 2–8.

INSURANCE.

Agent's Commission on Cancellation of Policy.

1. **INSURANCE AGENT—Refunding Commission upon Cancellation of Policy.**—When an insurance company, in accordance with its right to do so, cancels a policy and directs its agent to return the premium which has not yet been remitted to the company, and the agent does as directed, he may recover from another agent who procured the insurance that portion of the premium paid the latter as commission. (Wash.) Ryder-Gougar Co. v. Garretson, 1053.

Construction of Policy—Conflict of Laws.

2. **INSURANCE, Construction of Policies, When must Favor the Assured.**—Where an insurance policy drawn by the insurer is not clear or leaves doubt respecting the nature or extent of a clause limiting liability, it should be construed favorably to the assured. (Md.) McEvoy v. Security Fire Ins. Co., 428.

3. **BENEFIT INSURANCE.—When a Word in a Benefit Certificate** is susceptible of two constructions, it must be given the one most favorable to the beneficiary. (Tex.) Roth v. Travelers' Protective Assn., 871.

4. **INSURANCE, LIFE—Policy in Foreign State—Lex Loci.**—Where a life insurance contract is made in a foreign state, to be performed there, it must be construed in accordance with the law of that state. (R. I.) Peckham, for an Opinion, 813.

Payment of Dues and Premiums.

5. **BENEFIT INSURANCE—Payment of Dues.—The Mailing of a Check** by a member of a beneficial association to the secretary is not a payment of his dues until received by that officer. (Tex.) Roth v. Travelers' Protective Assn., 871.

6. **LIFE INSURANCE—Payment of Premium—Days of Grace.**—Where a premium falls due on October 1st, which is Sunday, the "thirty days of grace" allowed by the policy commence to run at midnight of that day and expire at midnight of October 31st. (Tex.) Aetna Life Ins. Co. v. Wimberly, 852.

Accidental Death—Delinquency in Dues.

7. **BENEFIT INSURANCE—Meaning of the Word "Killed."**—If a member of a benefit association falls on the ice while delinquent in his dues, and dies from the effects thereof some weeks later after he has paid his dues and been reinstated, he is not "killed" at the time of the fall, and hence during delinquency, within a provision in the certificate "nor shall his beneficiaries receive anything should he be killed during such period of delinquency." (Tex.) Roth v. Travelers' Assn., 871.

8. **BENEFIT INSURANCE—Construction of Policy.**—A provision in a benefit certificate "That the Travelers' Protective Association of America shall not be liable in case of injury, disability or death happening to the member while intoxicated or in consequence of his having been under the influence of any narcotic or intoxicant, or disability when caused, wholly or in part, by any bodily or mental infirmity or disease, duelling, fighting, wrestling, war or riot," does not apply in any case of death, but of disability only. (Tex.) Roth v. Travelers' Assn., 871.

Persons Entitled to Proceeds of Life Policy.

9. **INSURANCE, LIFE—Persons Entitled on Death of Assured.**—The terms of the life policy decide the question of title to the proceeds. (R. I.) Peckham, for an Opinion, 813.

10. **INSURANCE, LIFE—Construction of Policy.**—Where under a life insurance policy the amount assured is made payable to the named wife of the assured, and, in the event of her prior death to their children, their executors, administrators or assigns, and no children having been born to them, the wife dies before the assured, leaving a will giving her husband a life interest in her property, with remainder to her brother's children, and the husband marries again, has a child by the second marriage and dies, having left a will dividing his property equally between his widow and his child, the second wife and her child took no interest under the policy, the first wife having taken a vested interest in the policy when issued, subject to be defeated if she bore children, and not being defeated, such interest was subject to her testamentary directions in favor of her brother's children. (R. I.) Peckham, for an Opinion, 813.

11. **INSURANCE, LIFE—"Statutory Investiture" Under the Statutes of Massachusetts.**—Where policies of insurance on the assignor's life are by him assigned, to be held by the trustees named in his will, and the assignment must be declared invalid as such because not executed and attested in a manner required for a will, and his wife is named as the beneficiary of the trust attempted to be created, the paper cannot operate as a "statutory investiture" in her favor under the statutes of Massachusetts, providing that every policy of life insurance made payable to or for the benefit of a married woman, or after it is issued, assigned, transferred, made payable to such woman, or to any person for her benefit, shall inure to her separate use and benefit and that of her children. (Mass.) Frost v. Frost, 476.

Earthquake Clauses.

12. **INSURANCE AGAINST FIRE—Loss Indirectly Due to Earthquake.**—Under a policy insuring property against destruction by fire, but providing that the insurer shall not be liable for loss caused directly or indirectly by invasion, riot, labor strikes, etc., or by order of any civil authority to prevent the spread of fire, or by explosion of any kind or from any cause, or the bursting of a boiler, or earthquake, or hurricane, or lightning, but liability for direct damage by lightning may be assumed by specific agreement thereon, the insurer is liable for loss from fire caused by an earthquake and originating in the property or building insured, or spreading from its point of origin to such property or building, and when, from the occurrence of the earthquake, the water mains and pipes were disconnected, and the prevention of the spread of fire was thereby rendered impossible. (Md.) McEvoy v. Security Fire Ins. Co., 428.

Change in Title to Property.

13. **FIRE INSURANCE—Administrator's Sale, When Avoids.**—The confirmation of an administrator's sale of insured property, although the deed is not yet executed or the purchase money paid, transfers the equitable title to the purchaser, and hence avoids the insurance because of a change in the interest or title of the insured. (Wash.) Moller v. Niagara Fire Ins. Co., 1115.

14. **FIRE INSURANCE—Change in Title to Property—Notice to Agent.**—The fact that an agent of an insurance company knows of a change in the title to property which avoids the insurance thereon, and makes no objection thereto, does not affect the right of the [illegible]

pany to declare a forfeiture. (Wash.) Moller v. Niagara Fire Ins. Co., 1115.

Arbitration and Appraisement.

15. **INSURANCE, Appraisement Fixing the Amount of the Loss, Necessity for.**—Where a policy of insurance provides that, in the event of a loss and the inability of the insurer and the assured to agree upon the amount thereof, each shall select an appraiser, and the appraisers shall choose an umpire and proceed to fix the amount of the loss, and in the event of their failure to agree, that they shall submit their differences to the umpire, and that the award in writing of any two shall determine the amount of the loss, no action can be maintained on the policy in the absence of an attempt in good faith to ascertain the amount of the loss by the appraisement provided for in the policy, and where the failure to secure an award after the submission to arbitration is due to the fault of the assured, he cannot maintain any action thereon, but if the absence of the award is due to the insurer or his appraiser, the action is maintainable without the award. (Md.) Shawnee Fire Ins. Co. v. Pontfield, 449.

16. **INSURANCE, Award Fixing the Amount of Loss, Absence of not Due to the Fault of the Assured.**—If the appraisers appointed by the insurer and the assured to fix the amount of the loss fail to do so without any fault on the part of the assured, as where they cannot agree as to such amount nor on the selection of an umpire, the assured is entitled to maintain his action on his policy notwithstanding the absence of the award. (Md.) Shawnee Fire Ins. Co. v. Pontfield, 449.

See Beneficial Associations; Wills, 10, 11.

Note.

Insurance, constitutionality of special legislation respecting, 445.
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See Waters and Watercourses.

JOINT WRONGDOERS.

See Torts.

JUDGMENT.

Decree in Vacation.

1. **JUDGMENT—Filing in Vacation.**—A decree signed in vacation is not effective till filed in court. (Ala.) Harper v. Raisin Fertilizer Co., 32.

Default Against Person in Wrong Name.

2. **JUDGMENT—Effect of Misnomer of Defendant.**—If summons is actually served on the person intended, although by mistake in the wrong name, a judgment by default binds him. (Colo.) Van Buren v. Posteraro, 199.

3. **JUDGMENT—Enjoining Because of Misnomer of Defendant.**—A default judgment, rendered in a justice's court against the defendant by the wrong name, binds him if he was the person intended to be sued and was actually served with process; and its enforcement will not be enjoined, although the justice, in excess of his authority, has amended it by correcting the name. (Colo.) Van Buren v. Posteraro, 199.

Warrant of Attorney and Confession of Judgment.

4. **WARRANT OF ATTORNEY—Judgment not in Strict Accord with.**—Proceedings under a warrant of attorney must be within its strict letter, and the court cannot enter a judgment except as by the terms of the instrument directed. (Mo.) First Nat. Bank v. White, 612.

5. **WARRANT OF ATTORNEY.—A Judgment upon Trial cannot be Entered** upon a warrant of attorney which gives authority only for the confession of judgment. (Mo.) First Nat. Bank v. White, 612.

6. **WARRANT OF ATTORNEY—Origin and Nature.—A Warrant of Attorney** is a special authority given by a person to an attorney to commence or defend a suit in his behalf. In its infancy the warrant was purely a question of practice, and was the subject of many ancient court rules and statutes; later it assumed the role of security for debt. (Mo.) First Nat. Bank v. White, 612.

7. **WARRANT OF ATTORNEY—Judgment of Sister State.**—The fact that a court has given effect to judgments of courts of other states rendered upon a warrant of attorney contained in an instrument, under the full faith and credit clause of the federal constitution, does not preclude it from refusing to uphold such a contract or instrument executed within the state. (Mo.) First Nat. Bank v. White, 612.

8. **WARRANT OF ATTORNEY—Provision Against Public Policy in Note.**—A power in a note authorizing any attorney to appear for the maker in an action on the note brought against him in any court of record, to waive service of process, confess judgment, and waive all errors in the proceedings and judgment, and all proceedings, appeals or writ of error therefrom, is void as against public policy. (Mo.) First Nat. Bank v. White, 612.

9. **CONFESSION OF JUDGMENT—Abrogation of Common Law by Statute.**—Confession of judgments is covered by the Missouri statutes, which necessarily abrogate the common law on that subject. (Mo.) First Nat. Bank v. White, 612.

Conclusiveness and Res Judicata.

10. **JUDGMENT—Conclusiveness.**—A judgment in a foreclosure suit rendered after the institution of a creditor's bill to set aside the conveyance of other lands as fraudulent does not impart to the bill equity which it did not have at the time it was filed, nor preclude

the defense of the statute of limitations by the grantee. (Ala.) Harper v. Raisin Fertilizer Co., 32.

11. **JUDGMENT—Res Judicata.—A Judgment Recovered Against a City** for injuries suffered from a defective sidewalk, in an action wherein the contractor (alleged to be responsible for the defect) and his sureties were given an opportunity to defend, is conclusive against them, in an action over by the city on their contract and bond wherein they agreed to save the city harmless from all actions and judgments resulting from the negligence of the contractor, of the fact that a defect existed which was not properly guarded, but not as to whether the contractor was responsible therefor. (Wash.) Seattle v. John C. Regan & Co., 963.

See Criminal Law, 15–17; Principal and Surety, 3, 4.

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See Evidence, 5.

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JUNK-SHOPS.

See Municipal Corporations, 30.

JURISDICTION.

See Contracts, 7; Courts, 2; Process.

JURY.

1. **CRIMINAL LAW—Trial.—The Jury may be Polled** on the request of either party after the verdict is given and before it is filed. (B. & C. Comp., sec. 150.) (Or.) State v. Waymire, 699.

2. **CRIMINAL LAW—Trial—Polling of the Jury.**—A defendant, charged with a misdemeanor, has a right to be present at the rendition of the verdict, in person or by counsel if so desired, for the purpose of polling the jury, and if he is in custody or is otherwise deprived of this right without his fault, the verdict cannot properly be taken. (B. & C. Comp., secs. 150, 1378.) (Or.) State v. Waymire, 699.

3. **CRIMINAL LAW—Trial—Polling of the Jury—Waiver.**—The rights conferred by section 1378, B. & C. Comp., upon defendants charged with misdemeanor to be present in person or by counsel at the rendition of the verdict may be waived expressly or by implication; and where a defendant so charged is on bail, but present throughout the trial, and, while the jury is deliberating, voluntarily departs from the court without leave and before its adjournment, he will be deemed to have waived his rights, and the verdict may be legally received in his absence. (Or.) State v. Waymire, 699.

LACHES.

See Pleading, 1.

LANDLORD AND TENANT.

1. LEASE OF RIGHT OF WAY—Cancellation on Ground of Waste.—To gravel a leased right of way for a logging road when the agreement is to timber it is not such waste as will authorize a cancellation of the lease, if the rental value of the land has not been impaired thereby nor the fee materially affected, and the lessee has benefited the property by draining it, and can be compelled to remove the gravel or respond in damages at the expiration of the lease. (Wash.) Northcraft v. Blumauer, 1071.

2. PAROL LEASE—Right of Lessor to Repudiate.—A Parol Lease of a logging right of way for more than one year is voidable only, and if the lessee has taken possession with the consent of the lessor, constructed a road at heavy expense, benefited the land by draining it, and purchased timber of the lessor primarily to secure the right of way, the latter cannot terminate the lease and recover possession. (Wash.) Northcraft v. Blumauer, 1071.

See Adverse Possession, 2; Railroads, 9, 10.

LEASES.

See Landlord and Tenant.

LEGACIES.

See Wills.

LEWDNESS.

See Adultery, 2.

LICENSES.

See Marriage, 1, 2.

LICENSE TAXES.

Validity and Power to Impose.

1. MUNICIPAL CORPORATIONS—License Taxes.—General Revenue for the support of the municipal government cannot be raised under the guise of a license tax for police regulation. (Pa.) Delaware etc. Tel. & Tel. Co.'s Petition, 750.

2. MUNICIPAL CORPORATIONS—Measure of Right to Impose. If there is no inspection or supervision by the municipality, there can be no license fee imposed; if there is inspection, then its actual cost is the measure of the license fee. (Pa.) Delaware etc. Tel. & Tel. Co.'s Petition, 750.

3. MUNICIPAL CORPORATIONS—License Tax on Vehicles—Local not General.—It is reasonable for a municipality to lay a license tax upon vehicles of residents, and such persons as reside out of the municipality, yet employ their vehicles for business within it; but to levy such tax on vehicles of nonresidents, whose business or pleasure casually carries them into or through the municipality, would be in derogation of their reserved rights to use the highways of the commonwealth and impose intolerable conditions upon the public, and lead to absurd results. (Va.) White Oak Coal Co. v. Manchester, 943.

4. MUNICIPAL CORPORATION, Power to Tax Contractors, Limitations upon.—The power being granted by the legislature to a

city of the first class to levy by ordinance an occupation tax on "contractors," held, that the term is not sufficiently generic to cover "persons doing contract work," and that that part of an ordinance seeking to levy such tax on "persons doing contract work" is illegal and void. (Okl.) In re Unger, 670.

Effect on Contract of Failure to Pay License.

5. **CONTRACTS—Failure to Pay License.**—If the carryng on of a business or the making of a contract is expressly prohibited unless a license fee is first paid, any contract without paying such license is void; but if the statute merely imposes a penalty for carrying on the business or making the contract without a license, the contract is not void. (Ala.) Sunflower Lumber Co. v. Turner Supply Co., 20.

6. **CONTRACTS—Validity—Absence of License.**—The same rule applies to contracts made by corporations in a business for which a license is prescribed, since neither sections 2361, 2401 nor 7712 of the Code of 1907 prohibit the business, but merely penalize it under certain conditions. (Ala.) Sunflower Lumber Co. v. Turner Supply Co., 20.

See Municipal Corporations, 30; Telegraphs and Telephones, 1-4.

LIMITATION OF ACTIONS.

In General.

1. **STATUTE OF LIMITATIONS—Accrual of Action on Default in Interest.**—Where the payee of notes secured by a deed of trust elects to declare the principal due and to begin foreclosure proceedings because of a default in the payment of interest, the statute of limitations runs from the date of the default rather than from the date of the election. (Colo.) Lovell v. Goss, 184.

2. **LIMITATION OF ACTIONS—Subsequent Damage.—Time Runs** from when a cause of action accrues and not from the time when consequential damage ensues, and if the action rests on a breach of contract, it accrues as soon as the contract is broken, though the injury from the breach is not suffered until afterward, the commencement of the limitation being contemporaneous with the origin of the cause of action. (Pa.) Woodland Oil Co. v. Byers, 737.

3. **LIMITATION OF ACTIONS—Breach of Warranty—Subsequent Damage.**—If one delivers goods which are not what he undertakes to sell, and the purchaser uses them and suffers damage, or resells them under his mistake and is obliged to pay damages, his claim against the first seller must in either case be enforced within six years from the first sale. (Pa.) Woodland Oil Co. v. Byers, 737.

4. **LIMITATION OF ACTIONS—Setoff—Pleading.—Where the Statute of Limitations** may be successfully set up against a claim sought to be enforced in an action of assumpsit, it may also be set up against the same claim if it occur in a setoff, and it makes no difference if the statute was not pleaded by the plaintiff in reply to the defendant's plea of setoff. (Pa.) Woodland Oil Co. v. Byers, 737.

5. **LIMITATION OF ACTIONS—Setoff—Pleading.**—A plaintiff may avail himself of the statute of limitations against a setoff given in evidence by the defendant without pleading the statute in any way. (Pa.) Woodland Oil Co. v. Byers, 737.

6. **LIMITATION OF ACTIONS—Setoff—Replication.**—If the defendant goes to trial without demanding a replication to his plea of setoff, the defense to the setoff is unrestricted, and the plaintiff may avail himself of the statute of limitations or any other defense. (Pa.) Woodland Oil Co. v. Byers, 737.

7. **STATUTE OF LIMITATIONS.—The Indorsement by the Trustee** on notes secured by a trust deed, of the proceeds of the sale of the property, does not take the debt out of the statute of limitations. (Colo.) Lovell v. Goss, 184.

Pleading by Demurrer.

8. **LIMITATION OF ACTION—Pleading by Demurrer.**—If, upon the face of the bill, it is apparent the claim or demand of the complainant is barred by lapse of time, or by the statute of limitations, the defense is available in a court of equity, on demurrer, as well as by plea or answer. (Ala.) Harper v. Raisin Fertilizer Co., 32.

9. **LIMITATION OF ACTION—Pleading by Demurrer.**—The statute of limitations may be set up in equity by demurrer where the bill shows that the cause of action stated in it is prima facie within the bar of the statute, or offensive to the rules which courts of equity adopt for the discouragement of stale claims. (Ala.) Van Ingin v. Duffin, 29.

See Adverse Possession; Fraudulent Conveyances, 3–10; Garnishment, 13; Mortgages, 2.

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Liquor Dealers, sureties of, effect upon of judgments against their principals, 766.

LIVERY-STABLE KEEPERS.

1. **BAILMENT—Livery-stable Keeper—Implied Warranty of.**—The relation between a livery-stable keeper and his customer is that of bailor and bailee for hire, and the former assumes the liability which the contract of bailment imposes. When the bailor lets a horse for hire he impliedly promises or warrants that the animal is fit and suitable for the purpose for which it is hired; warrants that the horse is not unruly or vicious, but is safe, manageable and suitable for the use for which the customer has hired it. (Pa.) Conn v. Hunsberger, 770.

2. **BAILMENT—Livery-stable Keeper—Duty to Ascertain Habits of Horse.**—It is the duty of a livery-stable keeper to inform himself of the habits and disposition of the horses which he hires out, and if he knows they are dangerous and unsuitable, or with care could have learned it, he is liable to his customers for injuries resulting from the vicious propensities of the horse hired. It will not be sufficient for him to allege that he did not know a particular horse was unsuitable, because his warranty is against defects or vicious habits which he knows, or which by the exercise of reasonable care he could have known. (Pa.) Conn v. Hunsberger, 770.

3. **BAILMENT—Livery-stable Keeper—Burden of Proof.**—In an action against a livery-stable keeper for hiring out a vicious horse to a customer who was injured by it, the burden of proving both the animal's viciousness and the scienter were upon the customer, and after the customer had introduced this evidence the burden was shifted to the livery-stable keeper to prove that the animal was not vicious, that if it were he was ignorant of it, and that he had exercised proper care to inform himself as to its habits. He may also use a defense that the animal's conduct was occasioned by the customer, or by some event which would have produced the same effect on a gentle horse, or that the hirer knew of the vicious habit of the horse and took the risk upon himself. (Pa.) Conn v. Hunsberger, 770.

4. **PLEADING—Implied Warranty—Negligence.**—Where a statement in an action sufficiently avers a breach of an implied warranty by a livery-stable keeper of the suitableness of a horse hired out to the plaintiff, and also avers facts sufficient to show negligence in

not ascertaining the viciousness of such horse, the plaintiff is entitled to recover for the breach of the implied warranty. (Pa.) Conn v. Hunsberger, 770.

5. ACTION—Tort or Contract.—Whether the plaintiff sues the defendant, a livery-stable keeper, in tort for negligence for not having supplied such a horse as he ought to have supplied or in contract for the breach of the implied warrant is immaterial. (Pa.) Conn v. Hunsberger, 770.

LOGGING.

See Navigable Waters.

LOGGING ROAD.

See Landlord and Tenant.

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See Master and Servant, 19–27.

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MARRIAGE.

License to Marry.

1. **MARRIAGE—License for Minor Procured by Fraud.**—The marriage of a minor is not void because the license was secured by fraud. (Wash.) In re Hollopeter, 952.

2. **MARRIAGE—Effect of Absence of License.**—A marriage without a license is valid, in the absence of an express statutory provision to the contrary. (Wash.) In re Hollopeter, 952.

Marriage of Minors.

3. **MARRIAGE—Female Under Age of Consent.—A Female Fourteen Years** old is within the common-law age of consent, and is not, as a matter of law, incapable of contracting marriage; and the common-law age of consent is not overcome by a statute fixing eighteen years as the age under which a female cannot consent to sexual intercourse. (Wash.) In re Hollopeter, 952.

4. **MARRIAGE—Mnnor not having Consent of Parents.**—The marriage of a female under legal age is not void because contracted without the consent of her parents. (Wash.) In re Hollopeter, 952.

Presumption in Favor of Validity.

5. **MARRIAGE, Question of, When for the Jury.**—If, in a suit to which a woman is a party, testimony is offered that four years before her second marriage she informed the witness that her husband was alive, it is error for the court to rule, as a matter of law, that he was not alive at such second marriage. The question should have been submitted to the jury. (Mass.) Turner v. Williams, 511.

6. **MARRIAGE, Presumption of Legality of.**—If there is no extrinsic evidence either way, the legality of a marriage will be assumed. (Mass.) Turner v. Williams, 511.

7. **MARRIAGE, Presumption of Innocence, When not Sufficient to Support.**—If a marriage is assailed and evidence received tending to impeach it, a question of fact arises, and a presumption of innocence does not compel the assumption of death or divorce in order to support the marriage. (Mass.) Turner v. Williams, 511.

8. **MARRIAGE, Presumption of Death in Support of.**—Ordinarily whether one is alive on any given date within the period of seven years of unexplained absence is a question to be determined upon all the probabilities of the case, and there is no inflexible rule by which this presumption can be invoked to protect a subsequent marriage. (Mass.) Turner v. Williams, 511.

9. **MARRIAGE, Supporting on the Ground that It was Entered into in Good Faith and that an Impediment Existing Thereto had been Removed.**—Where a marriage is assailed on the ground that when it was contracted the woman had a husband living from whom she had never been divorced, testimony that such husband had been absent, unheard of, for more than seven years prior to the death of her second husband is sufficient to uphold the marriage under the statutes of Massachusetts, on the ground that it had been entered into in good faith and followed by continued cohabitation after the removal of an impediment. (Mass.) Turner v. Williams, 511.

Effect of Void Marriage.

10. **VOID MARRIAGE—Property Rights of Woman.**—Where land is conveyed to a man illegally married, but the woman has contributed to the purchase by producing a portion of the money by her labor or by working together with him for the common purpose, she is entitled to a share in the property in proportion to what she has contributed. (Tex.) Hayworth v. Williams, 879.

Annulment of Minor's Marriage.

11. **MARRIAGE.—A Minor Becomes of Full Age When He Marries,** and may maintain an action in his own name to enforce his right to the custody of his minor wife. (Wash.) In re Hollopeter, 952.

12. **MARRIAGE.—Parents cannot Maintain an Action to Annul** the marriage of their child, under legal age, procured by fraud and

without their consent, when the statute gives only to the parties to the marriage the right to maintain such actions. (Wash.) In re Hollopeter, 952.

See Husband and Wife.

MARRIED WOMEN.

See Husband and Wife.

MARSHALING ASSETS.

See Homestead, 8, 9.

MASTER AND SERVANT.

Employment and Term of Service.

1. **MASTER AND SERVANT—Hiring, Presumed Duration of.**—In a contract of hiring, where no definite period is expressed, in the absence of facts and circumstances showing a different intention, the law will presume a hiring at will. The fact that the hiring is at so much per week or month or year will raise no presumption that the hiring was for such period. Where, however, a contrary intention can be fairly derived from the contract itself, the law will allow such intention to prevail; and where the contract is in writing, the court, in construing the instrument, will take into view the situation of the parties, and the objects they had in view. (Pa.) Weidman v. United Cigar Stores Co., 727.

2. **MASTER AND SERVANT—Hiring, when Deemed to be at Least for a Year—Presumption of Hiring at Will Rebutted.**—In a contract of hiring where no definite period is expressed, the law generally presumes a hiring at will; but if the future employment of a vendor at a stated sum per year is part of the consideration of a sale, it is not contemplated that a large portion of the consideration was to be subject to disappointment at the pleasure or caprice of the employer, and in such case the ordinary presumption of a hiring at will is rebutted, and an instruction that the person employed, if entitled to recover, is entitled to a year's salary less what he could reasonably have earned by due diligence, is not incorrect, and will not be disturbed by the court on appeal. (Pa.) Weidman v. United Cigar Stores Co., 727.

Employer's Duty and Liability to Employés.

3. **MASTER AND SERVANT — Negligence — Statutory Duty — Death—Risks Assumed by Employé.**—Where a statute imposes a duty upon the employer for the protection of the employé, injury from the neglect of this duty is not one of the risks assumed by the employé. (Mich.) Kleinfelt v. J. H. Somers Coal Co., 532.

4. **MASTER AND SERVANT — Negligence — Statutory Duty — Death—Risks Assumed by Employé.**—Public Act 1905, No. 100, section 3, provides that only competent and trustworthy engineers shall be permitted to operate the cages and hoisting devices in coal mines. While a fireman was operating a cage the accident occurred by which another employé was killed. The deceased did not assume the risk of his incompetency, he being unauthorized by the statute to operate the cage, and no notice to the master of his incompetency was needed, as in employing him such owners were committing a breach of their statutory duty. (Mich.) Kleinfelt v. J. H. Somers Coal Co., 532.

5. **MASTER AND SERVANT — Negligence — Death — Proximate Cause — Master and Fellow-servant Joint Tort-feasors.**—Where in operating a cage in a coal mine the death of an employé is caused, the

operator being one not authorized by statute and the accident being partly caused by the carriage of a rod which protruded through the roof of the cage and struck the shaft timbers, such rod being carried by a fellow-servant, inasmuch as the death was caused by the combination of the negligent act of the servant carrying the rod and the master employing an unauthorized operator, the rule is that both may be liable. (Mich.) Kleinfelt v. J. H. Somers Coal Co., 532.

6. **MASTER AND SERVANT—Duty to Promulgate Rules.**—If a logging car and roadbed cannot be so constructed as to prevent the frame of the car, under some circumstances, from dropping down and catching upon a highway crossing, then it is the duty of the owner of the car to promulgate rules against his employés riding thereon. (Wash.) Kluska v. Yeomans, 1121.

7. **MASTER AND SERVANT—Risks Assumed by the Latter.**—The risks with reference to which an employé may be held to have made his contract of service are only those open and obvious to a reasonable man making such examination as he might be expected to make if he wished to ascertain the nature and perils of the prospective service. (Mass.) Cummins v. Booth, 468.

8. **APPEAL AND ERROR—Instruction to Jury—Contributory Negligence.**—Where the judge instructs the jury that it is a question of fact for them whether under certain circumstances the plaintiff assumed a risk she should not have assumed, whether she put herself in a place of danger, and that if she did so without any excuse, she has to take the loss that falls on her, such instruction on the point of contributory negligence is proper, and the trial court properly refused an instruction that the plaintiff, having been guilty of contributory negligence could not recover. (R. I.) Clavin v. William Tinkham Co., 836.

Dangerous Logging Road.

9. **MASTER AND SERVANT—Defective Logging Car or Roadbed.**—If brass pieces which are necessary on top of the axles of a logging car are likely to slip out of place (and no foresight can prevent it), so as to permit the frame of the car to drop down and catch upon a highway crossing, the owner of the railway and car is negligent in failing to construct the roadbed so as to prevent the frame of the car from catching, under such circumstances, to the injury of his employés riding thereon. (Wash.) Kluska v. Yeomans, 1121.

10. **MASTER AND SERVANT—Notice of Condition of Roadbed.** Where new planking has been laid on a highway at a point where a logging road crosses it, and the owner of the logging road has run his cars over the place for two days, he is put on inquiry as to whether the cars may catch on the planks, to the injury of his employés riding thereon. (Wash.) Kluska v. Yeomans, 1121.

Independent Contractor.

See Railroads, 2.

11. **MASTER AND SERVANT—Railroad—Independent Contractor.**—A railroad company cannot escape liability for the neglect of duties imposed upon it by law, in the interest of the safety of its servants and the public by delegation to an independent contractor or otherwise. (Va.) Walton, Witten & Graham v. Miller, 908.

Fellow-servants.

12. **FELLOW-SERVANTS—Definition.**—Fellow-servants, with respect to injuries caused to one of them, are those who are directly co-operating with one another in a particular work at the time of

the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety. (Ill.) Aldrich v. Illinois Central R. R. Co., 220.

13. **FELLOW-SERVANTS—More than Employment by Common Master, Necessity for.**—It is not sufficient that fellow-servants are employed by the same master. In order to bring them within the rule freeing the master from liability for injuries, they must be directly co-operating in a particular business as distinguished from indirectly co-operating in the general business of the master. (Ill.) Aldrich v. Illinois Central R. R. Co., 220.

14. **FELLOW-SERVANTS—Question of Law and Fact.**—The definition of fellow-servant is for the court, but whether certain employés of a common master fall within it is a question of fact. Hence whether or not the relation exists is a mixed question of law and fact. (Ill.) Aldrich v. Illinois Central R. R. Co., 220.

15. **FELLOW-SERVANTS—Question of Law, When.**—Whether the relation of fellow-servants exists is a question of law when there is no dispute as to the facts, and the evidence and all the legitimate conclusions to be drawn from it are such that all reasonable men will agree to the existence of such relation. (Ill.) Aldrich v. Illinois Central R. R. Co., 220.

16. **FELLOW-SERVANTS.—Members of Freight Crews are not Necessarily Fellow-servants,** though employed by the same corporation, if their duties lie on different distant parts of the same division of the railroad, and where there was evidence that their duties brought them into habitual association, the question of the fact whether they were or were not fellow-servants was properly one for the jury. (Ill.) Aldrich v. Illinois Central R. R. Co., 220.

17. **MASTER AND SERVANT—Fellow-servant.—A loom fixer,** while repairing a loom, utilizing the services of a weaver present and accidently setting the loom in motion, whereby the weaver is injured, is not a fellow-servant of the weaver, but the representative of the employer, and an instruction to the jury to that effect is correct. (R. I.) Clavin v. William Tinkham Co., 836.

18. **MASTER AND SERVANT—Fellow-servant.—It is the Duty of a Master** who furnishes machinery for his servants to operate or work about to see to it that it is reasonably safe. He cannot devest himself of this duty by devolving it on others, and if he does, they will simply occupy his place, and he will remain as responsible for their negligence as if he were personally guilty of it himself. In cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure thereof he is accountable. (R. I.) Clavin v. William Tinkham Co., 836.

Ship Owner, Stevedores and Longshoremen.

19. **SHIPS AND STEVEDORES—What Deemed not a Part of Ways, Works and Machinery.**—In the absence of any special agreement governing the relation between a ship owner and a stevedore, the hatchway and hatches are not part of the ways, works and machinery of the stevedore. (Mass.) Crimmins v. Booth, 468.

20. **SHIP OWNERS, Duty of to Longshoreman.**—The duty of a ship owner toward a longshoreman, lawfully at work upon a vessel, is the same as that of an employer respecting his apparatus and

permanent constructions with and upon which a laborer is expected to work, even though he may be in the immediate employ of an independent contractor. (Mass.) Crimmins v. Booth, 468.

21. **SHIP OWNER, Duty of to Longshoreman Respecting Improvements or Changes.**—A ship owner does not owe a duty to a longshoreman to make improvements or changes in the ship to make the conditions of the labor safer. (Mass.) Crimmins v. Booth, 468.

22. **SHIPS AND LONGSHOREMAN — Assumption of Risk.**—A longshoreman working upon a ship does not assume risks which are not obvious. Even when the assumption of risk grows out of a contract, it does not cover those unseen or obscure dangers which cannot reasonably be discerned by an employé and which the employer properly may be held to know about. (Mass.) Crimmins v. Booth, 468.

23. **SHIP OWNER AND LONGSHOREMAN—Warning, Duty to Give.**—A ship owner, where there are unknown or obscure dangers with which a longshoreman cannot fairly be charged with knowledge, owes a duty of warning where such owner knows, or ought to know, the danger. (Mass.) Crimmins v. Booth, 468.

24. **SHIP OWNER AND LONGSHOREMAN—Danger, When cannot be Held to be Obvious.**—It cannot be ruled, as a matter of law, that a danger is obvious when it is not readily observed by the eye and is revealed only by an experiment, to perform which two men at least are required, or by accurately measuring a five foot space. (Mass.) Crimmins v. Booth, 468.

25. **SHIP OWNER AND LONGSHOREMAN—Risks of Defective Hatches, When not Assumed by the Latter.**—Where the hatches were about five feet long and two feet wide and so heavy that two men were required to move them, and they were provided with insufficient flanges and coamings to hold them in place, because of the hatches being a half inch too short, a longshoreman, working in the employ of a stevedore and having no actual knowledge of this condition of affairs, cannot be held, as a matter of law, to have assumed the risks of injury from the falling of such hatches. (Mass.) Crimmins v. Booth, 468.

26. **SHIP OWNER AND STEVEDORE, Contract Between When does not Exempt the Owner from Liability for Defects in the Hatches.**—A contract between a ship owner and a firm of stevedores, which attempts to make the latter and their employés mere licensees and to exempt the owner from liability to keep the winches, booms, fall, tackle and other appliances in a sufficient or fit condition for use, does not extend to the hatches of the ship, nor exempt the owner from liability for injury due to their insufficient and unsafe conditon. (Mass.) Crimmins v. Booth, 468.

27. **SHIP OWNERS AND STEVEDORES, Liability of the Latter to an Employé Injured Through a Defect in the Ship or Its Appliances.**—Where, by the terms of a contract between a ship owner and a firm of stevedores for the loading and unloading of a ship, the latter are given sole and entire charge, direction and control of the work, this involves such possession by the latter as is necessary to perform their contractual obligation, and they are liable to one of their employés for personal injuries received through a defect in the hatches of the vessel, because of which he fell through while he was standing on them in the discharge of his duties, if the circumstances were such that the ship owner is also answerable to such employé, especially if the employé was set to work without providing lights, and adequate lights might have revealed to the employé the defect occasioning his injury. (Mass.) Crimmins v. Booth, 468.

Liability for Act of Employé.

28. **MASTER AND SERVANT—Range and Limit of Liability.**—The rule that a master is liable for the acts of his servant in the line of his duty and within the scope of his employment does not apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligence an injury is occasioned. (Va.) Board of Trade v. Cralle, 917.

29. **MASTER AND SERVANT—Torts of Servant—Limit of Liability.**—A master is liable for the acts of his servant only when the servant acts within the scope of his employment. (Ky.) Robards v. P. Bannon Sewer Pipe Co., 394.

30. **MASTER AND SERVANT—Scope of Employment—Definition of Special Terms.**—The phrases "course of employment" and "scope of the authority" are not susceptible of accurate definition as to the acts of the servant, because the authority from the master is only gatherable from the surrounding circumstances and the root of his liability is his express or implied assent to the acts of the servant. (Ky.) Robards v. P. Bannon Sewer Pipe Co., 394.

31. **MASTER AND SERVANT—Injury to Third Person by Servant—Liability—Scope of Employment.**—When authority is given to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force toward others, the use of such discretion or force is part of the thing authorized, and when exercised becomes, as to others, the discretion and act of the master, even though the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business and was acting within the general scope of his employment. (Ky.) Robards v. P. Bannon Sewer Pipe Co., 394.

32. **MASTER AND SERVANT—Injury to Third Person by Servant—Doubt as to Scope of Employment.**—When in cases of tort by servants there is a doubt as to the line which separates the acts of the servant under authority and of the individual, it will be resolved against the master, because he set in motion the servant who committed the wrong. (Ky.) Robards v. P. Bannon Sewer Pipe Co., 394.

Liability for Act of Watchman.

See Railroads, 11, 12.

33. **MASTER AND SERVANT—Watchman's Authority.**—The mere employment of a watchman to guard property does not involve the authority to shoot a trespasser who was running away therefrom. (Ky.) Robards v. P. Bannon Sewer Pipe Co., 394.

34. **MASTER AND SERVANT—Injury to Third Person by Watchman.**—Where the master employs a watchman and authorizes him to use firearms in his discretion, the act of the watchman in shooting a third person near the premises he was guarding is not, as a matter of law, without the scope of his employment. (Ky.) Robards v. P. Bannon Sewer Pipe Co., 394.

Liability for Act of Person Employed by Servant.

35. **MASTER AND SERVANT—Range of Liability.—The Master is Liable** for the negligence of a person employed by his servant in the prosecution of the master's business, or of a person who assists his servant at his request, provided the servant had express or implied authority to procure assistance, and the negligent act complained of was done within the scope of the employment. (Va.) Board of Trade Co. v. Cralle, 917.

See Elevators; Executors and Administrators, 4, 5.

MERGER OF CONTRACT IN DEED.
See Deeds, 1, 2.

MILK.
See Food.

MINORS.
See Infants.

MONOPOLIES AND COMBINATIONS.

1. **MONOPOLY DEFINED.**—It is said to be a monopoly when one person alone buys up the whole of one kind of commodity, fixing a price at his own pleasure. A monopoly embraces any combination, the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public. (R. I.) State v. Eastern Coal Co., 817.

2. **COMBINATIONS to Fix Price of Commodity—What not Included.**—Labor, skilled or unskilled, is not a commodity within Iowa Code, section 5060, which renders criminal any unlawful combination, pool or trust to regulate or fix the price or fix or limit the quantity of any article, commodity or merchandise manufactured, mined, produced or sold in that state. (Iowa) Rohlf v. Kasemeier, 261.

3. **COMBINATIONS to Fix Price for Services of Physicians.**—Iowa Code, section 5060, which make combinations to fix the price or quantity of commodities to be made in the state a conspiracy does not include labor combinations, and therefore does not apply to an agreement of members of the medical profession to adopt a uniform schedule of charges. (Iowa) Rohlf v. Kasemeier, 261.

See Conspiracies and Monopolies.

MORTGAGES.

Assignment of Note.

1. **MORTGAGE—Effect of Assignment of Notes.—A Mortgage is a Mere Incident** to the notes which it secures, and an assignment of the notes ipso facto passes the security. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

Debt Barred by Statute of Limitations.

2. **LIMITATION OF ACTION.—Foreclosure Proceedings can be Maintained Notwithstanding the Debt is Barred** by the statute of limitations. (Ala.) Harper v. Raisin Fertilizer Co., 32.

Default of Mortgagor.

3. **MORTGAGE—Default in Payment as Maturing Whole Debt.**—Where a mortgage provides that on failure to pay one of the secured notes all of them shall become due, a default in payment does not ipso facto mature the whole debt. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

4. **MORTGAGE—Default in Interest.—Sixty-four Days is not an Unreasonable Time** within which the cestui que trust may elect to declare the debt secured by trust deed due for default in the payment of interest. (Colo.) Lovell v. Goss, 184.

5. **MORTGAGE—Default in Nonpayment of Taxes, Effect of Their Payment by the Mortgagor Before Suit Brought.**—Under a mortgage clause providing that the whole amount of the mortgage debt shall become due, at the option of the mortgagee, for default in the payment of taxes before the same become delinquent, a default and

subsequent sale of the mortgaged property does not entitle the mortgagee to foreclose, where all taxes, penalties and interest lawfully assessed against the said property have been fully paid off and discharged by the mortgagors and notice thereof given to the mortgagee before suit. (Okl.) Fleming v. Franing, 658.

6. **MORTGAGE—Default Based on Uncertain and Indefinite Covenants.**—Where from the record it appears that the clause in the mortgage upon which the alleged defaults are based is too indefinite and uncertain to authorize a default thereon, so as to enable the mortgagee to declare the mortgage absolute and foreclose the same, the judgment of the trial court in refusing to foreclose the same will not be disturbed. (Okl.) Fleming v. Franing, 658.

Foreclosure—Junior Lienholders.

7. **MORTGAGE, JUNIOR, Effect of not Making the Holder of a Party to Suit Foreclosing the Senior Mortgage.**—A junior mortgagee, not being made a party to a suit to foreclose a first mortgage, is not affected by a judgment and decree foreclosing it. The foreclosure is effectual against those persons who were made parties, and a sale would vest the estate in the purchaser, subject to the rights therein of the subsequent lienholder. (Okl.) Horr v. Herrington, 648.

8. **MORTGAGE FORECLOSURE, Effect on Persons not Made Parties.**—If a party interested, other than the owner of the equity of redemption, is not made a party to a suit for the foreclosure of the mortgage, such foreclosure is effectual only as against the parties in interest who are made parties, and the sale under the foreclosure vests the estate in the purchaser, subject to redemption by any person interested and not made a party to the foreclosure proceeding. (Okl.) Horr v. Herrington, 648.

9. **MORTGAGE FORECLOSURE, Effect of and of Sale Under Where a Party in Interest has been Omitted.**—Where a mortgage is foreclosed without making a junior mortgagee a party defendant, the sale, though not effectual against him, operates as an assignment of the first mortgage and of the mortgagee's rights thereunder to the purchaser, who may proceed de novo to foreclose against the party omitted. (Okl.) Horr v. Herrington, 652.

10. **MORTGAGE FORECLOSURE, Effect of Purchase at by a Junior Mortgagee not a Party to the Suit.**—If the holder of a junior encumbrance on land, not being made a party to a suit to foreclose a senior mortgage, becomes the purchaser of said premises at the foreclosure sale, he thereby waives his right to redeem. (Okl.) Horr v. Herrington, 652.

11. **MORTGAGE, Decree of Foreclosure, Effect of.**—The necessary consequence of a decree of foreclosure of mortgaged premises is to merge the interests of the parties to the suit in the decree, and to transfer and vest them in the purchaser at the sale. (Okl.) Horr v. Herrington, 652.

12. **MORTGAGEE, JUNIOR, When has a Right to the Surplus Proceeds of the Foreclosure Sale.**—A junior mortgagee has no claim, by virtue of his mortgage, upon the surplus money arising from a sale under a suit to foreclose a senior mortgage to which he was not made a party. (Okl.) Horr v. Herrington, 652.

13. **MORTGAGE FORECLOSURE, Purchase at, When Subject to Junior Mortgagee's Rights.**—If a junior mortgage has been duly recorded, a purchaser of the mortgaged premises on a foreclosure rendered on a senior mortgage will be presumed to have bid and purchased with reference to the junior mortgage and with knowledge of the right of the holder of that mortgage to redeem. (Okl.) Horr v. Herrington, 652.

14. **LIENHOLDERS, Inferior, Rights of.**—One who has a lien, inferior to another upon the same property has a right: First, to redeem the property, in the same manner as its owner might, from the superior lien; and, second, to be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby. (Okl.) Horr v. Herrington, 648.

Redemption—Verbal Extension of Time—Interest.

15. **STATUTE OF FRAUDS.—A Verbal Agreement to Extend the Time for Redemption** from a judicial sale is valid, and not affected by the statute of frauds. (Ill.) Ogden v. Stevens, 237.

16. **MORTGAGES—Redemption—Extension of Time for.**—Courts of equity will go further than enforcing verbal contracts for the extension of the period of redemption, and will grant relief where the purchaser has by a course of conduct induced the owner to refrain from redeeming within the statutory time by fraudulent representations or promises to the purchaser which do not constitute a contract. (Ill.) Ogden v. Stevens, 237.

17. **MORTGAGES—Redemption.—Where the Owner of the Equity** has been induced to rely upon the representations of the creditor until the period of redemption has expired, a court of equity will grant relief. (Ill.) Ogden v. Stevens, 237.

18. **MORTGAGES—Redemption.—Where the Owner of the Equity** was permitted by the purchaser to expend money for taxes, improvements, and in defending litigation concerning the property on the strength of his promise to extend the time for redemption, the court will enforce such extension. (Ill.) Ogden v. Stevens, 237.

19. **INTEREST—Penalty for Defending Rights.**—Where the purchaser at a foreclosure sale refused redemption to the owner of the equity after the statutory time, he should not be penalized for defending a suit by being ordered to pay interest on certain condemnation money for part of the mortgaged lands which had been deposited with the county treasurer after suit brought. (Ill.) Ogden v. Stevens, 237.

See Assignment, 4, 6; Homestead, 7-9; Limitation of Actions, 1; Taxation, 1; Vendor and Vendee, 2.

Note.

Mortgagors, guarantors of, effect upon of judgments against their principal, 767.

MUNICIPAL CORPORATIONS.

Powers of Municipality.

1. **MUNICIPAL CORPORATIONS can Exercise Only Such Powers of Legislation** as are given them by the law-making power of the state. Grants of such power are strictly construed, and any fairly reasonable doubt is resolved by the court against the corporation, and the power is denied. (Okl.) In re Unger, 670.

Negligence in Electric Plant.

2. **MUNICIPAL CORPORATIONS—Negligence in Electric Light Plant.**—A city which provides electric light to its inhabitants for remuneration is liable for the negligence of its employés in not insulating dangerous wires, and can claim exemption from liability only on the ground of being an agency of local government for the public purpose of benefit to the community when furnishing the service for lighting its public streets, places and buildings. (Mich.) Hodgins v. Bay City, 546.

Negligence of Fire Department.

3. **MUNICIPAL CORPORATIONS—Negligence of Fire Department.**—A municipality is not responsible for negligent injuries to persons or property committed by members of a fire department when engaged in work pertaining exclusively to the extinguishment of fires. (Mich.) Hodgins v. Bay City, 546.

Fire Limits.

4. **MUNICIPAL CORPORATION—Fire Limits—Judicial Proceedings.**—Measures taken by a city to establish and maintain fire limits are merely the exercise of the police power without the necessity of a resort to judicial proceedings. (Wash.) Davison v. Walla Walla, 983.

5. **MUNICIPAL CORPORATION—Authority to Establish Fire Limits.**—Under a charter authorizing a city to establish fire limits and provide for the removal of structures erected contrary to its prohibition, a city may, within prescribed limits, prohibit the repair of wooden buildings which have been damaged by fire to the extent of thirty per cent of their value. In estimating this percentage only the superstructure is considered in case of a building with concrete foundation. (Wash.) Davison v. Walla Walla, 983.

Safe Condition of Streets—Action for Damages.

5a. **MUNICIPAL CORPORATIONS—Roadway—Obligation to Provide and Repair.**—There is no legal duty on a city to furnish streets, even where they may be needed; but there is such a duty to keep such as it does furnish in a reasonably safe condition for use for purposes for which they are provided—sidewalks for pedestrians; roadways for vehicles and horses. (Ky.) Webster v. Vanceburg, 392.

6. **MUNICIPALITY—Premature Action Against.—Where an Action Against a City** for damages from a defective street is prematurely commenced, in that it is brought before the expiration of sixty days after the rejection of the claim, but the city's counsel waives the objection, this is not a bar to an action against the contractors and their sureties upon an indemnity agreement to save the city harmless from such actions, if they were given opportunity to defend in the original action and refused to do so. (Wash.) Seattle v. John C. Regan & Co., 963.

Limbs of Trees Overhanging Streets.

7. **MUNICIPAL CORPORATIONS — Negligence — Streets — Statutes—Construction.**—The presence of a dead limb of a tree within the limits of, or overhanging from private premises, a public highway, is not such a defect in the highway as to be within the intention of the legislature in its requirement that municipalities maintain and repair streets, etc., and respond in damages, and they are therefore not liable for injuries to a citizen caused by the falling on him of the dead branch of a tree growing in the highway. (Mich.) Miller v. Detroit, 537.

8. **MUNICIPAL CORPORATIONS—Negligence—Streets.**—1 Compiled Laws, sections 3441–3443, only requires the city to keep that part of its highways, streets and sidewalks used for actual traveling in reasonable repair, and does not cast on it the duty to trim trees growing between the sidewalk and the curb in a public street, so as to prevent them becoming a danger to passersby. (Mich.) Miller v. Detroit, 537.

9. **MUNICIPAL CORPORATIONS—Streets—Duty to Trim Trees in.**—The fact that a city ordinance forbids the injury or cutting of trees standing in a street by any person other than adjoining proprietors

does not create any obligation of the municipality to trim trees so as to prevent them becoming dangerous. (Mich.) Miller v. Detroit, 537.

10. **MUNICIPAL CORPORATIONS—Ordinances—City of Detroit.** No duty to remove dead limbs from trees on a highway for the safety of passersby is imposed either by statute or the charter or ordinances of the city of Detroit. (Mich.) Miller v. Detroit, 537.

Icy Sidewalks.

11. **STREETS—Sidewalks, Shopkeeper's Duty to Keep Clear from Ice.**—The law imposes no obligation on a shopkeeper to keep the sidewalk in front of his shop safe for his customers by removing ice therefrom. (R. I.) McGrath v. Misch, 798.

Control Over Streets and Highways.

12. **HIGHWAYS—Public Use—Local Control.**—The highways of the commonwealth, urban and rural, belong primarily to the public and the absolute dominion over them is lodged in the legislature. The control of streets is commonly delegated to the municipalities in such measure as the legislature sees fit to bestow, but the use of them remains in the public at large, subject only to such limitations as the municipalities are authorized by law to impose. (Va.) White Oak Coal Co. v. Manchester, 943.

13. **MUNICIPAL CORPORATIONS—Control of Highways—Construction of Grant.**—The grant by the legislature of municipal control over streets must be construed strictly in the interest of common right. (Va.) White Oak Coal Co. v. Manchester, 943.

Use of Sidewalks by Vehicles.

14. **MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Nonliability for Damage.**—The sidewalks of a city are intended solely for the use of pedestrians, and though they must be kept in reasonably safe repair therefor, the city is not bound to keep them fit for the use of vehicles, and drivers use them at their peril. (Ky.) Webster v. Vanceburg, 392.

15. **MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Acquiescence.**—The fact that the sidewalks in a city have been used by vehicles by the acquiescence of the civic authorities for many years does not affect its nonliability for damage to the drivers. (Ky.) Webster v. Vanceburg, 392.

16. **MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Absence of Roadway.**—The fact that using the sidewalk in a city was the only practicable way for wagons to reach a certain place does not fasten on the municipality any responsibility for injuries caused thereby. (Ky.) Webster v. Vanceburg, 392.

Enactment of Ordinances—Urgency—Pleading.

17. **MUNICIPAL CORPORATION — Enactment of Ordinance — Pleading.**—If an answer alleges that an ordinance was duly passed, a denial in the reply which merely questions the power of the city to pass the ordinance does not put in issue the regularity of the proceedings leading up to the enactment. (Wash.) Davison v. Walla Walla, 983.

18. **MUNICIPAL ORDINANCE—Immediate Operation—Urgency, What is.**—Where a municipal charter declares that no ordinance, except one for the immediate preservation of the public peace, health or safety, and which must be passed by a two-thirds vote and contain a statement of its urgency, shall go into effect before thirty days from its final passage, a statement in an ordinance merely echoing the words of the charter without stating the nature of the urgency is neither conclusive nor sufficient. (Cal.) In re Hoffman, 75.

19. **MUNICIPAL ORDINANCE—Urgency—Nature—Want of Description.**—Where a municipal charter declares that no ordinance, except one for the immediate preservation of the public peace, health or safety, and which must be passed by a two-thirds vote and contain a statement of its urgency, shall go into effect before thirty days from its final passage, an ordinance purporting to be within the exception, but containing no statement of the nature of its urgency, is not on that account nullified, but takes effect as an ordinary ordinance after the expiration of thirty days. (Cal.) In re Hoffman, 75.

Ordinance Conflicting With State Law.

20. **MUNICIPAL ORDINANCE—Conflict with State Laws.**—Where a conflict exists between the ordinance of a municipality and a statute, the ordinance must give way to the paramount law of the state. (Cal.) In re Hoffman, 75.

21. **MUNICIPAL ORDINANCE—Ancillary Provisions not Necessarily Conflicting with Statute.**—The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. (Cal.) In re Hoffman, 75.

22. **MUNICIPAL ORDINANCE—Statute—Nonconflicting—Illustration.**—Where the legislature declares that it is unlawful to sell milk containing less than a given percentage of solids, of which a certain portion shall be milk fat, an ordinance requiring of the milk vended in the municipality a larger percentage of solids, if not in its exactions unreasonable, does no violence to the laws of the state. (Cal.) In re Hoffman, 75.

23. **MUNICIPAL ORDINANCE—Statute—Nonconflicting.**—It is no objection to the validity of an ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law. (Cal.) In re Hoffman, 75.

Ordinance Regulating Billboards.

24. **MUNICIPAL CORPORATIONS—Ordinance Prohibiting Billboards Except on Business Premises—Public Notice—Injunction.**—If billboards erected in defiance of an ordinance are a public nuisance, a court of equity will refuse any writ designed to perpetuate them, regardless of the validity of such ordinance. (Cal.) Varney & Green v. Williams, 88.

25. **MUNICIPAL CORPORATIONS—Ordinances Ultra Vires—Sweeping Prohibition—Restriction of Owner's User of Property.**—A municipal ordinance which absolutely forbids the erection or maintenance of any billboard for advertising purposes, is beyond the power of the promulgators. (Cal.) Varney & Green v. Williams, 88.

26. **MUNICIPAL CORPORATIONS—Ordinance for Esthetes.**—The fact alone that ordinary advertising billboards may be offensive in the eyes of persons of refined taste does not justify their suppression. Esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation. (Cal.) Varney & Green v. Williams, 88.

Ordinance Regulating Business—Junk-shops.

27. **MUNICIPAL CORPORATIONS—Reasonableness of Ordinance—Validity.**—An ordinance which prescribes a certain restricted locality in which a certain class of business shall not be established or maintained, with a proviso that it shall not apply to those busi-

nesses already established there, that particular class of business having already centralized in the restricted area, is invalid for unreasonableness and unlawful discrimination. (Mich.) Weadock v. Judge of Recorder's Court, 527.

28. **MUNICIPAL CORPORATIONS—Ordinance in Pursuance of Charter—Reasonableness.**—If a power is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid. (Mich.) Weadock v. Judge of Recorder's Court, 527.

29. **MUNICIPAL CORPORATIONS—Ordinance in Pursuance of Charter—Discrimination.**—All individuals of a certain class within a municipality under its legislation must be treated alike and without discrimination. (Mich.) Weadock v. Judge of Recorder's Court, 527.

30. **MUNICIPAL CORPORATIONS—Powers Under Charter—Ordinances in Pursuance—Validity.**—Where the charter of a municipality empowers the common council to license and regulate the keepers of junk-shops and the purchase and sale of old junk, an ordinance made in pursuance thereof regulating the storing or keeping of old junk is valid, as that which it aims to regulate is necessarily incident to the business of buying and selling junk. (Mich.) Weadock v. Judge of Recorder's Court, 527.

Fiscal Affairs—Taxation, Bonds, Pledge of Credit by Treasurer.

31. **MUNICIPAL CORPORATION, Grants of Taxing Powers to Construction of.**—A grant by the legislature of taxing power to a municipal corporation is to be strictly construed, and any fairly reasonable doubt concerning the existence of such power is resolved by the courts against the corporation and the power is denied. All acts beyond the scope of the power granted are void. (Okl.) In re Unger, 670.

32. **MUNICIPAL CORPORATION—Irregular Issue of Bonds.**—Under a statute requiring municipal bonds for the purchase of waterworks to be sold as may be deemed for the best interests of the municipality, a town has no power to borrow money to purchase waterworks and promise to pay the lender in bonds of an equal amount subsequently to be authorized and issued. (Wash.) Hansard v. Green, 1107.

33. **MUNICIPAL CORPORATION—Acquisition of Waterworks—Submission to Vote.**—Where the law provides that the system or plan proposed in the acquisition of a public improvement shall be submitted to the people for ratification, a submitting ordinance is insufficient which gives no further information than to recite the advisability of purchasing an existing water system and issuing bonds to pay therefor in a certain sum, but not setting out the plan or system, nor stating the time the bonds are to run, the rate of interest, or the manner of payment. (Wash.) Hansard v. Green, 1107.

34. **MUNICIPAL CORPORATIONS — Treasurer — Unauthorized Pledging of City's Credit.**—The duties of a city treasurer are limited to receiving the city's moneys and paying them out on warrants, and unless specially authorized, an obligation signed by him as city treasurer does not commit the city to its discharge any more than if signed by him as an individual. (Pa.) First Nat. Bank v. New Castle, 779.

35. **MUNICIPAL CORPORATIONS — Treasurer — Unauthorized Pledging of City's Credit—Implied Liability.**—If a city treasurer without authority obtains an overdraft from a bank and opens a pseudo official account with the words "city treasurer" appended, the city is not liable thereon, and the strength of its position is un-

affected by the fact that he was a defaulter at the time of the transaction. (Pa.) First Nat. Bank v. New Castle, 779.

36. **MUNICIPAL CORPORATIONS—Powers of Officers to Pledge Credit.**—Public policy imperatively requires that, for the safety of a municipality, its ministerial officers shall not be permitted to impose liability upon it without express authority for the special purpose. (Pa.) First Nat. Bank v. New Castle, 779.

See Counties; Food; License Taxes.

Note.

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NAMES.

NAMES—Proceedings Against Person by His Initials.—A publication and judgment in a tax suit against "R. L. Hall," and a sheriff's deed in pursuance thereof, do not convey title to the purchaser where the title of record is in "Robert Lee Hall." (Mo.) Proctor v. Nance, 555.

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NAVIGABLE WATERS.

1. **NAVIGABLE WATERS.—The Title to the Bed of a Navigable Stream** is prima facie in the state. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

2. **NAVIGABLE WATERS—Booms.—Riparian Owners** upon navigable fresh rivers and lakes may construct, in the shoal water in front of their land, wharves, piers, landings, and booms, in aid of and not obstructing navigation. This is a private riparian right, derived from a passive or implied license by the public, dependent upon title to the bank and not upon title to the bed of the river, and its exercise is subject to state regulations or prohibition. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

3. **NAVIGABLE WATERS—Booms.—The Rights of Riparian Owners to Construct Booms**, etc., in the shoal water in front of their land is a franchise only as distinguished from appropriation and occupation of the soil under the water. It is not personal to the shore owner, but is the subject of grant and may be severed from the soil. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

4. **REAL PROPERTY—License—Estoppel.**—The licensees from a riparian owner to construct a boom on water in front of his shore land are estopped from denying his right or that of others claiming through him, and such estoppel inures also against their privies. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

5. **NAVIGABLE WATERS—Bed of Stream—Adverse Possession Against State.**—Until it is shown that one owning and operating a boom for storing logs in front of the property of a shore owner has explicitly and openly disclaimed any and all holding under the presumed riparian right, and has unequivocally asserted ownership of the bed of the stream and brought notice to the state of that claim, the statute could not begin to run against it so as to devest it of its title, and it is an open question whether a state can be so devested at all. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

6. **NAVIGABLE WATERS—Obstruction—Injunction by Riparian Owner.**—A riparian owner whose means of ingress and egress to and

from his property by way of a navigable stream is totally obstructed by the logging operations of a boom company is entitled to an injunction against the obstruction. (Wash.) Hulet v. Wishkah Boom Co., 1127.

7. **NAVIGABLE STREAM—Obstruction Injuring Riparian Owner.** The fact that tide lands along a navigable river belong to the state does not bar the right of a riparian owner to an injunction against the total obstruction to that part of the stream which is a means of access to his property, nor bar his action for damages from water and logs thrown upon his uplands. (Wash.) Hulet v. Wishkah Boom Co., 1127.

See Ejectment.

NEGLIGENCE.

Action in Emergency.

1. **NEGLIGENCE—Sudden Peril—Error of Judgment in Mode of Avoidance.**—One who is placed in a position of sudden peril by the negligence of another, without contributory negligence on his part, cannot be held responsible for error of judgment with respect to effecting his escape therefrom. (Va.) Walton, Witten & Graham v. Miller, 908.

Imputed Negligence.

2. **AUTOMOBILES—Imputing Negligence of Chauffeur to Passenger.**—The negligence of a chauffeur who is driving an automobile for hire cannot be imputed to a passenger therein. (Wash.) Wilson v. Puget Sound Elec. Ry., 1044.

Proximate Cause.

3. **NEGLIGENCE—Proximate Cause.—To Warrant a finding** that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. (Va.) Board of Trade v. Cralle, 917.

4. **NEGLIGENCE—Proximate Cause—Natural Consequence—Definition.**—A natural consequence is one which has followed from the original act complained of in the usual, ordinary and experienced course of events; a result, therefore, which might reasonably have been anticipated or expected. (Va.) Board of Trade v. Cralle, 917.

5. **NEGLIGENCE—Proximate Cause—Application to Evidence.**—If a live wire should fall upon a sidewalk, the electric company should reasonably anticipate that someone may attempt to remove it to prevent injury, and if in so doing some other person is injured, the electric company would be liable. (Ill.) Seith v. Commonwealth Elec. Co., 204.

6. **NEGLIGENCE—Proximate Cause—Application to Evidence.**—If a live wire should fall upon a sidewalk, the electric company cannot reasonably anticipate that a policeman in striking it with his club would cast it upon a person passing. The negligence of the company produced a condition which made the injury possible, but it occurred through the independent act of the policeman, for whose action the company was not responsible, and was therefore not liable. (Ill.) Seith v. Commonwealth Elec. Co., 204.

7. **NEGLIGENCE — Sole or Proximate Cause.**—The negligent act must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause; it is sufficient if it concurs with some other cause acting at the same time, which in combination with it produces the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by

any new or independent cause. (Ill.) Seith v. Commonwealth Elec. Co., 204.

8. **NEGLIGENCE — Proximate Cause—Requisites.**—To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act might have foreseen the precise form of the injury, but when it occurs it must appear that it was the natural and probable consequence. (Ill.) Seith v. Commonwealth Elec. Co., 204.

9. **NEGLIGENCE—Proximate Cause—Requisites.**—If the negligence creates a condition and the act of a third person in the plane of that condition causes injury, the existence of the condition is not the proximate cause, but if the original negligence operates with the intervening cause, then it becomes the proximate cause by the continuity of its action, and where the circumstances are such that the consequences might have been foreseen as a likely result, the act of a third person causing the injury will not excuse the first wrongdoer. (Ill.) Seith v. Commonwealth Elec. Co., 204.

10. **NEGLIGENCE—Proximate Cause—Requisites.**—When the act of a third person, causing injury, intervenes, is not consequential to the original act and could not reasonably have been foreseen, the first negligence is not the proximate cause of the injury. (Ill.) Seith v. Commonwealth Elec. Co., 204.

11. **NEGLIGENCE—Proximate Cause.**—The test is whether the party guilty of the first negligence might reasonably have anticipated the intervening cause as a natural and probable consequence from it, and, if so, the connection is not broken and the first act is the proximate cause. (Ill.) Seith v. Commonwealth Elec. Co., 204.

Issues and Evidence.

12. **NEGLIGENCE—Issues and Evidence.**—Where at the close of the evidence in a personal injury case the specific cause of the accident appears from the defendant's evidence, the plaintiff is entitled to such evidence as well as his own; and if his complaint does not conform to all the proofs, it may be amended, and if not challenged on that ground, it will be treated by both the trial and appellate courts as sufficient. (Wash.) Kluska v. Yeomans, 1121.

13. **NEGLIGENCE — Jury Question.**—In actions of negligence, where there is a doubt as to the inference to be drawn from the facts, or where the measure of duty is ordinary and reasonable care, and the degree of care required varies with the circumstances, the question of negligence is necessarily for the jury. (Pa.) Lehner v. Pittsburg Ry. Co., 729.

Presumptions—Res Ipsa Loquitur.

14 **NEGLIGENCE — Presumption from Accident — Pleading and Proof.**—The plaintiff in a personal injury case does not lose his right to a presumption of negligence from the happening of the accident, by alleging specific acts of negligence of which he makes no proof. (Wash.) Kluska v. Yeomans, 1121.

15. **NEGLIGENCE — Res Ipsa Loquitur.—When the Defendant's Evidence** in a personal injury case discloses the cause of the accident, the right of recovery does not depend upon the doctrine of res ipsa loquitur. (Wash.) Kluska v. Yeomans, 1121.

See Animals; Electricity; Elevators; Explosives; Telegraphs and Telephones.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

subsequent sale of the mortgaged property does not entitle the mortgagee to foreclose, where all taxes, penalties and interest lawfully assessed against the said property have been fully paid off and discharged by the mortgagors and notice thereof given to the mortgagee before suit. (Okl.) Fleming v. Franing, 658.

6. **MORTGAGE—Default Based on Uncertain and Indefinite Covenants.**—Where from the record it appears that the clause in the mortgage upon which the alleged defaults are based is too indefinite and uncertain to authorize a default thereon, so as to enable the mortgagee to declare the mortgage absolute and foreclose the same, the judgment of the trial court in refusing to foreclose the same will not be disturbed. (Okl.) Fleming v. Franing, 658.

Foreclosure—Junior Lienholders.

7. **MORTGAGE, JUNIOR, Effect of not Making the Holder of a Party to Suit Foreclosing the Senior Mortgage.**—A junior mortgagee, not being made a party to a suit to foreclose a first mortgage, is not affected by a judgment and decree foreclosing it. The foreclosure is effectual against those persons who were made parties, and a sale would vest the estate in the purchaser, subject to the rights therein of the subsequent lienholder. (Okl.) Horr v. Herrington, 648.

8. **MORTGAGE FORECLOSURE, Effect on Persons not Made Parties.**—If a party interested, other than the owner of the equity of redemption, is not made a party to a suit for the foreclosure of the mortgage, such foreclosure is effectual only as against the parties in interest who are made parties, and the sale under the foreclosure vests the estate in the purchaser, subject to redemption by any person interested and not made a party to the foreclosure proceeding. (Okl.) Horr v. Herrington, 648.

9. **MORTGAGE FORECLOSURE, Effect of and of Sale Under Where a Party in Interest has been Omitted.**—Where a mortgage is foreclosed without making a junior mortgagee a party defendant, the sale, though not effectual against him, operates as an assignment of the first mortgage and of the mortgagee's rights thereunder to the purchaser, who may proceed de novo to foreclose against the party omitted. (Okl.) Horr v. Herrington, 652.

10. **MORTGAGE FORECLOSURE, Effect of Purchase at by a Junior Mortgagee not a Party to the Suit.**—If the holder of a junior encumbrance on land, not being made a party to a suit to foreclose a senior mortgage, becomes the purchaser of said premises at the foreclosure sale, he thereby waives his right to redeem. (Okl.) Horr v. Herrington, 652.

11. **MORTGAGE, Decree of Foreclosure, Effect of.**—The necessary consequence of a decree of foreclosure of mortgaged premises is to merge the interests of the parties to the suit in the decree, and to transfer and vest them in the purchaser at the sale. (Okl.) Horr v. Herrington, 652.

12. **MORTGAGEE, JUNIOR, When has a Right to the Surplus Proceeds of the Foreclosure Sale.**—A junior mortgagee has no claim, by virtue of his mortgage, upon the surplus money arising from a sale under a suit to foreclose a senior mortgage to which he was not made a party. (Okl.) Horr v. Herrington, 652.

13. **MORTGAGE FORECLOSURE, Purchase at, When Subject to Junior Mortgagee's Rights.**—If a junior mortgage has been duly recorded, a purchaser of the mortgaged premises on a foreclosure rendered on a senior mortgage will be presumed to have bid and purchased with reference to the junior mortgage and with knowledge of the right of the holder of that mortgage to redeem. (Okl.) Horr v. Herrington, 652.

14. **LIENHOLDERS, Inferior, Rights of.**—One who has a lien, inferior to another upon the same property has a right: First, to redeem the property, in the same manner as its owner might, from the superior lien; and, second, to be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby. (Okl.) Horr v. Herrington, 648.

Redemption—Verbal Extension of Time—Interest.

15. **STATUTE OF FRAUDS.—A Verbal Agreement to Extend the Time for Redemption** from a judicial sale is valid, and not affected by the statute of frauds. (Ill.) Ogden v. Stevens, 237.

16. **MORTGAGES—Redemption—Extension of Time for.**—Courts of equity will go further than enforcing verbal contracts for the extension of the period of redemption, and will grant relief where the purchaser has by a course of conduct induced the owner to refrain from redeeming within the statutory time by fraudulent representations or promises to the purchaser which do not constitute a contract. (Ill.) Ogden v. Stevens, 237.

17. **MORTGAGES—Redemption.—Where the Owner of the Equity** has been induced to rely upon the representations of the creditor until the period of redemption has expired, a court of equity will grant relief. (Ill.) Ogden v. Stevens, 237.

18. **MORTGAGES—Redemption.—Where the Owner of the Equity** was permitted by the purchaser to expend money for taxes, improvements, and in defending litigation concerning the property on the strength of his promise to extend the time for redemption, the court will enforce such extension. (Ill.) Ogden v. Stevens, 237.

19. **INTEREST—Penalty for Defending Rights.**—Where the purchaser at a foreclosure sale refused redemption to the owner of the equity after the statutory time, he should not be penalized for defending a suit by being ordered to pay interest on certain condemnation money for part of the mortgaged lands which had been deposited with the county treasurer after suit brought. (Ill.) Ogden v. Stevens, 237.

See Assignment, 4, 6; Homestead, 7-9; Limitation of Actions, 1; Taxation, 1; Vendor and Vendee, 2.

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MUNICIPAL CORPORATIONS.

Powers of Municipality.

1. **MUNICIPAL CORPORATIONS can Exercise Only Such Powers of Legislation** as are given them by the law-making power of the state. Grants of such power are strictly construed, and any fairly reasonable doubt is resolved by the court against the corporation, and the power is denied. (Okl.) In re Unger, 670.

Negligence in Electric Plant.

2. **MUNICIPAL CORPORATIONS—Negligence in Electric Light Plant.**—A city which provides electric light to its inhabitants for remuneration is liable for the negligence of its employés in not insulating dangerous wires, and can claim exemption from liability only on the ground of being an agency of local government for the public purpose of benefit to the community when furnishing the service for lighting its public streets, places and buildings. (Mich.) Hodgins v. Bay City, 546.

Negligence of Fire Department.

3. **MUNICIPAL CORPORATIONS—Negligence of Fire Department.**—A municipality is not responsible for negligent injuries to persons or property committed by members of a fire department when engaged in work pertaining exclusively to the extinguishment of fires. (Mich.) Hodgins v. Bay City, 546.

Fire Limits.

4. **MUNICIPAL CORPORATION—Fire Limits—Judicial Proceedings.**—Measures taken by a city to establish and maintain fire limits are merely the exercise of the police power without the necessity of a resort to judicial proceedings. (Wash.) Davison v. Walla Walla, 983.

5. **MUNICIPAL CORPORATION—Authority to Establish Fire Limits.**—Under a charter authorizing a city to establish fire limits and provide for the removal of structures erected contrary to its prohibition, a city may, within prescribed limits, prohibit the repair of wooden buildings which have been damaged by fire to the extent of thirty per cent of their value. In estimating this percentage only the superstructure is considered in case of a building with concrete foundation. (Wash.) Davison v. Walla Walla, 983.

Safe Condition of Streets—Action for Damages.

5a. **MUNICIPAL CORPORATIONS—Roadway—Obligation to Provide and Repair.**—There is no legal duty on a city to furnish streets, even where they may be needed; but there is such a duty to keep such as it does furnish in a reasonably safe condition for use for purposes for which they are provided—sidewalks for pedestrians; roadways for vehicles and horses. (Ky.) Webster v. Vanceburg, 392.

6. **MUNICIPALITY—Premature Action Against.—Where an Action Against a City** for damages from a defective street is prematurely commenced, in that it is brought before the expiration of sixty days after the rejection of the claim, but the city's counsel waives the objection, this is not a bar to an action against the contractors and their sureties upon an indemnity agreement to save the city harmless from such actions, if they were given opportunity to defend in the original action and refused to do so. (Wash.) Seattle v. John C. Regan & Co., 963.

Limbs of Trees Overhanging Streets.

7. **MUNICIPAL CORPORATIONS — Negligence — Streets — Statutes—Construction.**—The presence of a dead limb of a tree within the limits of, or overhanging from private premises, a public highway, is not such a defect in the highway as to be within the intention of the legislature in its requirement that municipalities maintain and repair streets, etc., and respond in damages, and they are therefore not liable for injuries to a citizen caused by the falling on him of the dead branch of a tree growing in the highway. (Mich.) Miller v. Detroit, 537.

8. **MUNICIPAL CORPORATIONS—Negligence—Streets.**—1 Compiled Laws, sections 3441–3443, only requires the city to keep that part of its highways, streets and sidewalks used for actual traveling in reasonable repair, and does not cast on it the duty to trim trees growing between the sidewalk and the curb in a public street, so as to prevent them becoming a danger to passersby. (Mich.) Miller v. Detroit, 537.

9. **MUNICIPAL CORPORATIONS—Streets—Duty to Trim Trees in.**—The fact that a city ordinance forbids the injury or cutting of trees standing in a street by any person other than adjoining proprietors

does not create any obligation of the municipality to trim trees so as to prevent them becoming dangerous. (Mich.) Miller v. Detroit, 537.

10. **MUNICIPAL CORPORATIONS—Ordinances—City of Detroit.** No duty to remove dead limbs from trees on a highway for the safety of passersby is imposed either by statute or the charter or ordinances of the city of Detroit. (Mich.) Miller v. Detroit, 537.

Icy Sidewalks.

11. **STREETS—Sidewalks, Shopkeeper's Duty to Keep Clear from Ice.**—The law imposes no obligation on a shopkeeper to keep the sidewalk in front of his shop safe for his customers by removing ice therefrom. (R. I.) McGrath v. Misch, 798.

Control Over Streets and Highways.

12. **HIGHWAYS—Public Use—Local Control.**—The highways of the commonwealth, urban and rural, belong primarily to the public and the absolute dominion over them is lodged in the legislature. The control of streets is commonly delegated to the municipalities in such measure as the legislature sees fit to bestow, but the use of them remains in the public at large, subject only to such limitations as the municipalities are authorized by law to impose. (Va.) White Oak Coal Co. v. Manchester, 943.

13. **MUNICIPAL CORPORATIONS—Control of Highways—Construction of Grant.**—The grant by the legislature of municipal control over streets must be construed strictly in the interest of common right. (Va.) White Oak Coal Co. v. Manchester, 943.

Use of Sidewalks by Vehicles.

14. **MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Nonliability for Damage.**—The sidewalks of a city are intended solely for the use of pedestrians, and though they must be kept in reasonably safe repair therefor, the city is not bound to keep them fit for the use of vehicles, and drivers use them at their peril. (Ky.) Webster v. Vanceburg, 392.

15. **MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Acquiescence.**—The fact that the sidewalks in a city have been used by vehicles by the acquiescence of the civic authorities for many years does not affect its nonliability for damage to the drivers. (Ky.) Webster v. Vanceburg, 392.

16. **MUNICIPAL CORPORATIONS—Sidewalks—Use by Vehicles—Absence of Roadway.**—The fact that using the sidewalk in a city was the only practicable way for wagons to reach a certain place does not fasten on the municipality any responsibility for injuries caused thereby. (Ky.) Webster v. Vanceburg, 392.

Enactment of Ordinances—Urgency—Pleading.

17. **MUNICIPAL CORPORATION — Enactment of Ordinance — Pleading.**—If an answer alleges that an ordinance was duly passed, a denial in the reply which merely questions the power of the city to pass the ordinance does not put in issue the regularity of the proceedings leading up to the enactment. (Wash.) Davison v. Walla Walla, 983.

18. **MUNICIPAL ORDINANCE—Immediate Operation—Urgency, What is.**—Where a municipal charter declares that no ordinance, except one for the immediate preservation of the public peace, health or safety, and which must be passed by a two-thirds vote and contain a statement of its urgency, shall go into effect before thirty days from its final passage, a statement in an ordinance merely echoing the words of the charter without stating the nature of the urgency is neither conclusive nor sufficient. (Cal.) In re Hoffman, 75.

19. **MUNICIPAL ORDINANCE—Urgency—Nature—Want of Description.**—Where a municipal charter declares that no ordinance, except one for the immediate preservation of the public peace, health or safety, and which must be passed by a two-thirds vote and contain a statement of its urgency, shall go into effect before thirty days from its final passage, an ordinance purporting to be within the exception, but containing no statement of the nature of its urgency, is not on that account nullified, but takes effect as an ordinary ordinance after the expiration of thirty days. (Cal.) In re Hoffman, 75.

Ordinance Conflicting With State Law.

20. **MUNICIPAL ORDINANCE—Conflict with State Laws.**—Where a conflict exists between the ordinance of a municipality and a statute, the ordinance must give way to the paramount law of the state. (Cal.) In re Hoffman, 75.

21. **MUNICIPAL ORDINANCE—Ancillary Provisions not Necessarily Conflicting with Statute.**—The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. (Cal.) In re Hoffman, 75.

22. **MUNICIPAL ORDINANCE—Statute—Nonconflicting—Illustration.**—Where the legislature declares that it is unlawful to sell milk containing less than a given percentage of solids, of which a certain portion shall be milk fat, an ordinance requiring of the milk vended in the municipality a larger percentage of solids, if not in its exactions unreasonable, does no violence to the laws of the state. (Cal.) In re Hoffman, 75.

23. **MUNICIPAL ORDINANCE—Statute—Nonconflicting.**—It is no objection to the validity of an ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law. (Cal.) In re Hoffman, 75.

Ordinance Regulating Billboards.

24. **MUNICIPAL CORPORATIONS—Ordinance Prohibiting Billboards Except on Business Premises—Public Notice—Injunction.**—If billboards erected in defiance of an ordinance are a public nuisance, a court of equity will refuse any writ designed to perpetuate them, regardless of the validity of such ordinance. (Cal.) Varney & Green v. Williams, 88.

25. **MUNICIPAL CORPORATIONS—Ordinances Ultra Vires—Sweeping Prohibition—Restriction of Owner's User of Property.**—A municipal ordinance which absolutely forbids the erection or maintenance of any billboard for advertising purposes, is beyond the power of the promulgators. (Cal.) Varney & Green v. Williams, 88.

26. **MUNICIPAL CORPORATIONS—Ordinance for Esthetes.**—The fact alone that ordinary advertising billboards may be offensive in the eyes of persons of refined taste does not justify their suppression. Esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation. (Cal.) Varney & Green v. Williams, 88.

Ordinance Regulating Business—Junk-shops.

27. **MUNICIPAL CORPORATIONS—Reasonableness of Ordinance—Validity.**—An ordinance which prescribes a certain restricted locality in which a certain class of business shall not be established or maintained, with a proviso that it shall not apply to those busi-

nesses already established there, that particular class of business having already centralized in the restricted area, is invalid for unreasonableness and unlawful discrimination. (Mich.) Weadock v. Judge of Recorder's Court, 527.

28. **MUNICIPAL CORPORATIONS—Ordinance in Pursuance of Charter—Reasonableness.**—If a power is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid. (Mich.) Weadock v. Judge of Recorder's Court, 527.

29. **MUNICIPAL CORPORATIONS—Ordinance in Pursuance of Charter—Discrimination.**—All individuals of a certain class within a municipality under its legislation must be treated alike and without discrimination. (Mich.) Weadock v. Judge of Recorder's Court, 527.

30. **MUNICIPAL CORPORATIONS—Powers Under Charter—Ordinances in Pursuance—Validity.**—Where the charter of a municipality empowers the common council to license and regulate the keepers of junk-shops and the purchase and sale of old junk, an ordinance made in pursuance thereof regulating the storing or keeping of old junk is valid, as that which it aims to regulate is necessarily incident to the business of buying and selling junk. (Mich.) Weadock v. Judge of Recorder's Court, 527.

Fiscal Affairs—Taxation, Bonds, Pledge of Credit by Treasurer.

31. **MUNICIPAL CORPORATION, Grants of Taxing Powers to Construction of.**—A grant by the legislature of taxing power to a municipal corporation is to be strictly construed, and any fairly reasonable doubt concerning the existence of such power is resolved by the courts against the corporation and the power is denied. All acts beyond the scope of the power granted are void. (Okl.) In re Unger, 670.

32. **MUNICIPAL CORPORATION—Irregular Issue of Bonds.**—Under a statute requiring municipal bonds for the purchase of waterworks to be sold as may be deemed for the best interests of the municipality, a town has no power to borrow money to purchase waterworks and promise to pay the lender in bonds of an equal amount subsequently to be authorized and issued. (Wash.) Hansard v. Green, 1107.

33. **MUNICIPAL CORPORATION—Acquisition of Waterworks—Submission to Vote.**—Where the law provides that the system or plan proposed in the acquisition of a public improvement shall be submitted to the people for ratification, a submitting ordinance is insufficient which gives no further information than to recite the advisability of purchasing an existing water system and issuing bonds to pay therefor in a certain sum, but not setting out the plan or system, nor stating the time the bonds are to run, the rate of interest, or the manner of payment. (Wash.) Hansard v. Green, 1107.

34. **MUNICIPAL CORPORATIONS — Treasurer — Unauthorized Pledging of City's Credit.**—The duties of a city treasurer are limited to receiving the city's moneys and paying them out on warrants, and unless specially authorized, an obligation signed by him as city treasurer does not commit the city to its discharge any more than if signed by him as an individual. (Pa.) First Nat. Bank v. New Castle, 779.

35. **MUNICIPAL CORPORATIONS — Treasurer — Unauthorized Pledging of City's Credit—Implied Liability.**—If a city treasurer without authority obtains an overdraft from a bank and opens a pseudo official account with the words "city treasurer" appended, the city is not liable thereon, and the strength of its position is un-

affected by the fact that he was a defaulter at the time of the transaction. (Pa.) First Nat. Bank v. New Castle, 779.

36. **MUNICIPAL CORPORATIONS—Powers of Officers to Pledge Credit.**—Public policy imperatively requires that, for the safety of a municipality, its ministerial officers shall not be permitted to impose liability upon it without express authority for the special purpose. (Pa.) First Nat. Bank v. New Castle, 779.

See Counties; Food; License Taxes.

Note.

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NAMES.

NAMES—Proceedings Against Person by His Initials.—A publication and judgment in a tax suit against "R. L. Hall," and a sheriff's deed in pursuance thereof, do not convey title to the purchaser where the title of record is in "Robert Lee Hall." (Mo.) Proctor v. Nance, 555.

See Judgment, 2, 3.

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NAVIGABLE WATERS.

1. **NAVIGABLE WATERS.—The Title to the Bed of a Navigable Stream** is prima facie in the state. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

2. **NAVIGABLE WATERS—Booms.—Riparian Owners** upon navigable fresh rivers and lakes may construct, in the shoal water in front of their land, wharves, piers, landings, and booms, in aid of and not obstructing navigation. This is a private riparian right, derived from a passive or implied license by the public, dependent upon title to the bank and not upon title to the bed of the river, and its exercise is subject to state regulations or prohibition. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

3. **NAVIGABLE WATERS—Booms.—The Rights of Riparian Owners to Construct Booms**, etc., in the shoal water in front of their land is a franchise only as distinguished from appropriation and occupation of the soil under the water. It is not personal to the shore owner, but is the subject of grant and may be severed from the soil. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

4. **REAL PROPERTY—License—Estoppel.**—The licensees from a riparian owner to construct a boom on water in front of his shore land are estopped from denying his right or that of others claiming through him, and such estoppel inures also against their privies. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

5. **NAVIGABLE WATERS—Bed of Stream—Adverse Possession Against State.**—Until it is shown that one owning and operating a boom for storing logs in front of the property of a shore owner has explicitly and openly disclaimed any and all holding under the presumed riparian right, and has unequivocally asserted ownership of the bed of the stream and brought notice to the state of that claim, the statute could not begin to run against it so as to devest it of its title, and it is an open question whether a state can be so devested at all. (Or.) Coquille Mill etc. Co. v. Johnson, 716.

6. **NAVIGABLE WATERS—Obstruction—Injunction by Riparian Owner.**—A riparian owner whose means of ingress and egress to and

from his property by way of a navigable stream is totally obstructed by the logging operations of a boom company is entitled to an injunction against the obstruction. (Wash.) Hulet v. Wishkah Boom Co., 1127.

7. **NAVIGABLE STREAM—Obstruction Injuring Riparian Owner.** The fact that tide lands along a navigable river belong to the state does not bar the right of a riparian owner to an injunction against the total obstruction to that part of the stream which is a means of access to his property, nor bar his action for damages from water and logs thrown upon his uplands. (Wash.) Hulet v. Wishkah Boom Co., 1127.

See Ejectment.

NEGLIGENCE.

Action in Emergency.

1. **NEGLIGENCE—Sudden Peril—Error of Judgment in Mode of Avoidance.**—One who is placed in a position of sudden peril by the negligence of another, without contributory negligence on his part, cannot be held responsible for error of judgment with respect to effecting his escape therefrom. (Va.) Walton, Witten & Graham v. Miller, 908.

Imputed Negligence.

2. **AUTOMOBILES—Imputing Negligence of Chauffeur to Passenger.**—The negligence of a chauffeur who is driving an automobile for hire cannot be imputed to a passenger therein. (Wash.) Wilson v. Puget Sound Elec. Ry., 1044.

Proximate Cause.

3. **NEGLIGENCE—Proximate Cause.—To Warrant a finding that** negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. (Va.) Board of Trade v. Cralle, 917.

4. **NEGLIGENCE—Proximate Cause—Natural Consequence—Definition.**—A natural consequence is one which has followed from the original act complained of in the usual, ordinary and experienced course of events; a result, therefore, which might reasonably have been anticipated or expected. (Va.) Board of Trade v. Cralle, 917.

5. **NEGLIGENCE—Proximate Cause—Application to Evidence.**—If a live wire should fall upon a sidewalk, the electric company should reasonably anticipate that someone may attempt to remove it to prevent injury, and if in so doing some other person is injured, the electric company would be liable. (Ill.) Seith v. Commonwealth Elec. Co., 204.

6. **NEGLIGENCE—Proximate Cause—Application to Evidence.**—If a live wire should fall upon a sidewalk, the electric company cannot reasonably anticipate that a policeman in striking it with his club would cast it upon a person passing. The negligence of the company produced a condition which made the injury possible, but it occurred through the independent act of the policeman, for whose action the company was not responsible, and was therefore not liable. (Ill.) Seith v. Commonwealth Elec. Co., 204.

7. **NEGLIGENCE — Sole or Proximate Cause.**—The negligent act must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause; it is sufficient if it concurs with some other cause acting at the same time, which in combination with it produces the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by

any new or independent cause. (Ill.) Seith v. Commonwealth Elec. Co., 204.

8. **NEGLIGENCE — Proximate Cause—Requisites.**—To constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act might have foreseen the precise form of the injury, but when it occurs it must appear that it was the natural and probable consequence. (Ill.) Seith v. Commonwealth Elec. Co., 204.

9. **NEGLIGENCE—Proximate Cause—Requisites.**—If the negligence creates a condition and the act of a third person in the plane of that condition causes injury, the existence of the condition is not the proximate cause, but if the original negligence operates with the intervening cause, then it becomes the proximate cause by the continuity of its action, and where the circumstances are such that the consequences might have been foreseen as a likely result, the act of a third person causing the injury will not excuse the first wrongdoer. (Ill.) Seith v. Commonwealth Elec. Co., 204.

10. **NEGLIGENCE—Proximate Cause—Requisites.**—When the act of a third person, causing injury, intervenes, is not consequential to the original act and could not reasonably have been foreseen, the first negligence is not the proximate cause of the injury. (Ill.) Seith v. Commonwealth Elec. Co., 204.

11. **NEGLIGENCE—Proximate Cause.**—The test is whether the party guilty of the first negligence might reasonably have anticipated the intervening cause as a natural and probable consequence from it, and, if so, the connection is not broken and the first act is the proximate cause. (Ill.) Seith v. Commonwealth Elec. Co., 204.

Issues and Evidence.

12. **NEGLIGENCE—Issues and Evidence.**—Where at the close of the evidence in a personal injury case the specific cause of the accident appears from the defendant's evidence, the plaintiff is entitled to such evidence as well as his own; and if his complaint does not conform to all the proofs, it may be amended, and if not challenged on that ground, it will be treated by both the trial and appellate courts as sufficient. (Wash.) Kluska v. Yeomans, 1121.

13. **NEGLIGENCE — Jury Question.**—In actions of negligence, where there is a doubt as to the inference to be drawn from the facts, or where the measure of duty is ordinary and reasonable care, and the degree of care required varies with the circumstances, the question of negligence is necessarily for the jury. (Pa.) Lehner v. Pittsburg Ry. Co., 729.

Presumptions—Res Ipsa Loquitur.

14 **NEGLIGENCE — Presumption from Accident — Pleading and Proof.**—The plaintiff in a personal injury case does not lose his right to a presumption of negligence from the happening of the accident, by alleging specific acts of negligence of which he makes no proof. (Wash.) Kluska v. Yeomans, 1121.

15. **NEGLIGENCE — Res Ipsa Loquitur.—When the Defendant's Evidence** in a personal injury case discloses the cause of the accident, the right of recovery does not depend upon the doctrine of res ipsa loquitur. (Wash.) Kluska v. Yeomans, 1121.

See Animals; Electricity; Elevators; Explosives; Telegraphs and Telephones.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL—Misconduct of Jury.—The Court does not Abuse Its Discretion in refusing a new trial on the ground of misconduct of the jury in agreeing that a majority vote shall control their verdict, where the testimony of the jurors in regard to such agreement and its influence is not convincing. (Tex.) Kalteyer v. Mitchell, 889.

NOTARY.

See Witnesses, 3.

NOTICE.

NOTICE — Facts Putting upon Inquiry. — Whatever is Notice Enough to excite attention, put a person on guard, and call for inquiry is notice of everything to which an inquiry might lead. When one has sufficient information to lead him to a fact, he is deemed conversant of it. (Wash.) Wetzler v. Nichols, 1075.

See Vendor and Vendee, 35–39.

NUISANCE.

PUBLIC NUISANCE—Right of Individual to Enjoin.—A public nuisance, such as the obstruction of a highway, if it occasions an individual damage differing in kind and degree from that suffered by the general public, entitles him to an injunction or an action to abate. (Wash.) Hulet v. Wishkah Boom Co., 1127.

OFFICERS.

See Counties, 4.

OPINION TESTIMONY.

See Evidence, 7, 8.

PARENT AND CHILD.

PARENT AND CHILD—Helpless Offspring—Maintenance After Majority.—The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child becomes an adult, but his obligation, moral and legal, is continued in the case of an adult child rendered helpless by accident or disease. (Ky.) Crain v. Mallone, 355.

PARTIES.

PARTIES.—A Contract of Partnership Between the Plaintiff and a Third Person is not admissible to show want of proper parties plaintiff, and to show a necessity for pleading compliance with the statute requiring the names of partners to be filed with the county clerk, if the contract is dated after the cause of action arose. (Wash.) Ryder-Gougar Co. v. Garretson, 1053.

PARTITION.

1. **PARTITION SALE—Effect of Failure to Renew Order After Term.**—A partition sale is void where a term of court has intervened between it and the order of sale and there has been no renewal of the order. (Mo.) Walser v. Gilchrist, 580.

2. **PARTITION SALE—Effect of Approval of Invalid Sale.**—The approval by the court of a partition sale, ineffectual because made after a term of court has intervened between it and the order to sell, does not amount to a renewal of the order and a validation of the sale. (Mo.) Walser v. Gilchrist, 580.

PARTNERSHIP.
See Parties.

PASSENGERS.
See Carriers.

PHYSICIANS.
See Monopolies and Combinations, 8.

PLEADING.

Pleading Laches.

1. **PLEADING.—Laches must be Set Up** by plea or answer so as to afford complainant an opportunity to amend, and though there are cases where the question may be raised by demurrer, if a defendant fails in his answer to set up that defense, he cannot insist on it on the hearing. (Ill.) Ogden v. Stevens, 237.

Laws of Another State.

2. **LAWS OF ANOTHER STATE, Averment of the Complainant Respecting must be Accepted as True.**—Whatever is well averred in the declaration as the law of another state must be taken by the court as true, notwithstanding counsel on both sides, in the course of the argument, refer to the decisions of the courts of that state and show its laws. (Mass.) Miller v. Aldrich, 480.

Demurrer.

3. **PLEADING—Plea and Demurrer.**—A demurrer under the Code of 1907, section 5340, must point out the defect in the plea or comply with the requirements of that section. A special plea is demurrable which does not aver that the contract sued upon is specially prohibited by law, or was nonenforceable by statute, or that entering into such a contract was a violation of any law other than one enacted solely for revenue. (Ala.) Sunflower Lumber Co. v. Turner Supply Co., 20.

4. **PLEADING—Demurrer.**—Where the common counts in assumpsit are in the usual form, a demurrer to them is properly overruled. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

5. **PLEADING—Demurrer—Question of Evidence.**—Whether or not an agreement upon which other counts are based can be introduced to sustain a recovery upon the common counts is a question to be determined upon the trial, when the evidence is offered and not upon demurrer. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

6. **PLEADING — Demurrer — Count Partially Ill.**—An objection which if sustained would not vitiate the whole count cannot be raised by a general demurrer to such count. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

7. **PLEADING—Demurrer—Count Assigning Several Breaches—Some Valid.**—The assignment of a special cause as ground of demurrer does not narrow the scope of the demurrer. Where a count contains several breaches, any one of which is well assigned, this is sufficient to maintain the action, and a general demurrer to the count should be overruled. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

Amendments.

8. **PLEADING—Inability to Amend—Departure.**—When a plea cannot be amended so as to make it a good plea, without departing entirely from the attempted defense, the technical error of the court in sustaining a demurrer on general or inapt grounds is without legal injury to the defendant. (Ala.) Sunflower Lumber Co. v. Turner Supply Co., 20.

9. **PLEADING—Construction of, With Amendments and Substitutions.**—While a pleading and its amendments are ordinarily taken together to determine whether a cause of action is stated, where an amended and substituted petition in lieu of the original one and its amendment is filed, the party thereby indicates that the later documents alone set forth the cause of action, and a demurrer depends upon the allegations they alone contain. (Ky.) Robards v. P. Bannon Sewer Pipe Co., 394.

10. **PLEADING — Amendment of Complaint.— When There is Neither Surprise nor a Request** for a continuance on account of an amendment of the complaint by leave of court at the beginning of the trial, error cannot be assigned thereon. (Wash.) Ryder-Gougar Co. v. Garretson, 1053.

See Equity, 1; Limitation of Actions, 9.

POLLING JURY.

See Jury.

POWER OF ATTORNEY.

See Principal and Agent, 5, 6.

PRESENCE OF ACCUSED.

See Criminal Law, 12.

PRIESTS.

See Witnesses, 3.

PRINCIPAL AND AGENT.

In General.

1. **PRINCIPAL AND AGENT — Establishment of Agency.**— Where one requests another to send a telegram, in order to entitle the principal to recover, it must be proved that that other accepted the agency and did not send the telegram on his own account. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

2. **PRINCIPAL AND AGENT—Creation of Agency—Union of Minds of Parties.**—In order to constitute an agency, it requires the concurrence of the minds of both the principal and the agent. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

3. **PRINCIPAL AND AGENT — Undisclosed Principal — Contract by Deed with Agent.**—A Principal cannot sue upon a deed in which his agent is contracted with in his own name; but where the contract is not a deed, either may sue upon it. (Va.) Portsmouth etc. Refining Co. v. Oliver Refining Co., 924.

4. **PRINCIPAL AND AGENT—Undisclosed Principal—Right of Action.**—An undisclosed principal may sue on a contract made by his agent for the transmission of a telegraphic message. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

Power of Attorney.

5. **LETTER OF ATTORNEY—What Land Included Under Power to Sell.**—A power of attorney to convey any of the principals' land, excepting the farm occupied by them in Green River Valley, authorizes the agent to convey a lot in that valley that has never been occupied by the principals. (Wash.) Cummings v. Dolan, 986.

6. **VENDOR AND VENDEE—Deed Executed Under Power of Attorney.**—Long lapse of time intervening between the execution of a deed under power of attorney and an action by the principal to

recover the land may be considered on the question whether he knew of and acquiesced in the sale. (Tex.) Eastham v. Hunter, 854.

See Brokers.

PRINCIPAL AND SURETY.

Liability for Past Acts of Principal.

1. **PRINCIPAL AND SURETY—Bond—Liability of Surety for Past Acts of Principal.**—Where a surety enters into a bond for the faithful discharge by a trustee of his duties and that said trustee shall faithfully apply all the assets received by him in the trust estate, it is binding upon him, both prospectively and retrospectively. (Pa.) Commonwealth v. Fidelity & Deposit Co., 755.

2. **PRINCIPAL AND SURETY—Bond—Liability of Surety for Past Acts of Principal.**—Where a guardian is required to give additional security, the sureties on the second bond are equally bound with those on the first bond for the full performance of the duties of the guardianship trust by their principal. (Pa.) Commonwealth v. Fidelity & Deposit Co., 755.

Effect of Judgment Against Principal.

3. **PRINCIPAL AND SURETY—Judgment Against Principal—Effect on Surety.**—Where a decree surcharges a principal upon the ground of gross negligence and fixes the amount of his liability, and no appeal is taken for four years, the question of gross negligence cannot be opened up in an action against the surety on his bond. (Pa.) Commonwealth v. Fidelity & Deposit Co., 755.

4. **PRINCIPAL AND SURETY—Judgment Against Principal—Surety Bound by.**—The rule as to official bonds, bonds of indemnity, and bonds to insure the faithful performance of duty and to secure a proper accounting by persons in fiduciary relations, is that a judgment against the principal is conclusive against his sureties as to his misconduct and failure to properly account. (Pa.) Commonwealth v. Fidelity & Deposit Co., 755.

Right of Cosurety to Contribution and Indemnity.

5. **SURETYSHIP—Liability of Cosurety for Contribution.**—To relieve a surety on a note from liability to contribution to his cosurety, there must be a contract, express or implied, to that effect; no immunity arises simply because the cosurety requested him to sign, or assured him that, he would not be subjected to loss. (Colo.) Chappell v. John, 134.

6. **SURETYSHIP—Right of Cosurety to Share in Indemnity.**—If a surety, prior to his contract of suretyship, has taken a deed of trust from his principal to secure a debt, and subsequently, to indemnify himself as surety, he takes a second deed of trust which covers the same and other land, his cosurety is entitled to the benefit of the indemnity only to the extent of one-half the value of the property not covered by the first deed, the proceeds from the sale of all the property being less than the debt secured by the first deed. (Colo.) Chappell v. John, 134.

See Frauds, Statute of, 2, 3.

PROBATE LAW.

See Descent and Distribution; Executors and Administrators; Wills.

PROCESS.

JURISDICTION—Service by Publication—Notice of Decree—Requisites.—The notice of entry of a decree required, under section

19 of the chancery code, to be given to one who has been served with process by publication, must be something more than a letter written by a codefendant informing him in general terms of the result of litigation to which he has been made a party, but of which he has received no actual notice until the decree has been entered against him barring his rights in the subject matter of the suit. (Ill.) Smith v. Hunter, 231.

See Judgment; Names.

PROHIBITION, WRIT OF.

See Executors and Administrators, 3.

PROMOTERS.

See Corporations, 11–13.

PROXIMATE CAUSE.

See Negligence, 3–11.

PUBLIC LANDS.

1. **HOMESTEAD IN PUBLIC LAND—Action by Entryman for Trespass.**—When a patent is issued to a homestead claimant his title relates to the date of the homestead entry, and he has an action of trespass for intermediate injuries done the property. (Colo.) Manitou & Pike's Peak Ry. Co. v. Harris, 140.

2. **PUBLIC LANDS—Location by Soldier's Warrant.**—The rights of the locator of land under a soldier's warrant date from the time when the location is made and not from the delayed issuance of the patent. The legal title remained in the United States, but the locator was the equitable owner because from the date of the location the land ceased to be a part of the general domain. (Iowa) Herrick v. Sargent, 281.

See Taxation, 6–9.

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QUITCLAIM DEED.

See Deeds, 9, 10.

RAILROADS.

Independent Contractor—Safe Track, Obstructions, Flagging.

1. **RAILROADS—Safety of Track—Duty of Owner.**—A railroad company cannot devest itself of the duty of keeping its track in good and safe condition, free from obstructions, by the interposition of an independent contractor. (Va.) Walton, Witten & Graham v. Miller, 908.

2. **RAILROADS — Duties of Independent Contractors — Blasting Operations.**—The law imposes upon contractors who are widening the roadbed of a railroad company the twofold duty of exercising ordinary care not to obstruct the track, and, if they do, to use like care to give warning of the obstruction in time to enable others, by the exercise of reasonable care, to protect themselves from danger. (Va.) Walton, Witten & Graham v. Miller, 908.

3. **RAILROADS—Dangerous Obstruction—Duty of Signalmen.**—It is the duty of a flagman in case of danger to display his flag at a point where the engineman on an approaching train can see it if he is looking; and if, while so displaying it, the driver sounds two short blasts of the whistle, which is the proper and usual responsive signal, the flagman may assume that such blasts are in response to his flagging, and may then discontinue, and this would bar a recovery in an action for injury caused in consequence, even though the driver did not see the flag and consequently did not intend his whistle as an answer to its challenge; but if the flagman knows, or ought to know by the exercise of ordinary care, that the blasts are not in response to his flag but to other signals, he is not justified in discontinuing flagging. (Va.) Walton, Witten & Graham v. Miller, 908.

4. **RAILROADS — Proper Flagging — What is.**—Proper flagging consists in waving a flag across the track on the right side of the approaching train (the engineman's seat being on that side of the cab), in such manner as to attract attention, and at such distance from the point of danger as to enable the engineman to stop his train in time to avoid it. (Va.) Walton, Witten & Graham v. Miller, 908.

Speed of Trains.

5. **HIGHWAYS—Speed of Railways at Crossings.—Railroad Companies** may not habitually run their trains over highway crossings

at an unreasonable and unsafe rate of speed without giving reasonable and proper signals of approach for the protection of life and property. (Pa.) Commonwealth v. Baltimore etc. R. R. Co., 723.

6. **RAILWAYS—High Speed of Trains.**—The very purpose of locomotion by steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight, and this the law authorizes. (Pa.) Commonwealth v. Baltimore etc. R. R. Co., 723.

Obstruction of Highway.

7. **RAILROADS, Obstruction of Highway by Wrongful Acts of Third Persons, When No Defense.**—Under the statutes of Massachusetts imposing a penalty on any railroad corporation which shall willfully or negligently obstruct or unnecessarily or unreasonably use or occupy a highway, town way or street, or in any case obstruct, use or occupy it with cars or engines for more than five minutes at one time, it is no defense that the obstruction of the street beyond the allowed time was due to the unlawful acts of third persons without knowledge of the defendant or its servants in maliciously opening air-cocks on certain cars, and allowing the air to escape. (Mass.) Commonwealth v. New York Cent. etc. R. R. Co., 507.

8. **HIGHWAYS, Maintaining Railway Across.**—An indictment charging that the defendant unlawfully maintained a railroad track and way across a highway and used it for the frequent passing of trains, whereby the use of the highway was dangerous and obstructed, there being no averment that the track created any obstruction, charges no offense. (Pa.) Commonwealth v. Baltimore etc. R. R. Co., 723.

Liability of Lessor and Lessee.

9. **RAILROADS — Statutory Offense — Liability of Lessor and Lessee.**—Where a railroad company leases its road to another company which committed breaches of a statute requiring certain inscriptions to be maintained on the cars running thereon, the lessor company was not liable for such infraction of the law, in the absence of knowledge at the time of entering into the lease that the lessee company had contemplated it, and the facts that the lessor was furnished thereby with grounds to apply to forfeit the lease, and that the lease itself was invalid, are outside the main issue. (Ky.) Louisville Ry. Co. v. Commonwealth, 408.

10. **RAILROADS—Lessors and Lessees.**—If a railroad company leases its roadbed without legal authority, it is nevertheless liable civilly for any dereliction of duty upon the part of the latter resulting in public or private injuries. (Ky.) Louisville Ry. Co. v. Commonwealth, 408.

Liability for Acts of Deputy Sheriff.

11. **RAILROADS—Liability for Deputy Sheriff in Their Employ.**—The fact that a person who ejects trespassers from the property of a railroad is a deputy sheriff does not prove that his acts are official, nor does the fact that he is employed by the railroad company to watch its property prove that his acts are those of an employé; the question must be determined by all the facts and circumstances of the case. (Tex.) Texas etc. R. R. Co. v. Parsons, 857.

12. **RAILROADS—Liability of Deputy Sheriff in Their Employ.**—Where a deputy is appointed by the sheriff at the request of a railway company to preserve order and protect property on its premises, and is paid for his services by the company, it is liable for his act where, in expelling tramps from an empty car and putting them off

the premises without arresting them, he shoots at a third person whom he takes for one of the tramps attempting to attack him, and unintentionally wounds one of them. (Tex.) Texas etc. R. R. Co. v. Parsons, 857.

See Automobiles; Carriers; Garnishment, 10; Street Railway.

RAPE.

1. **RAPE—Insufficient Corroboration of Prosecutrix.**—In a prosecution for rape of a female under the age of consent, evidence that the accused was with her under suspicious circumstances at a time two months previous to the date of the alleged offense, at which prior time she testifies that there were no improper relations between them, is not corroborating evidence tending to prove the crime charged. (Wash.) State v. McCool, 1089.

2. **RAPE.—The Pregnancy of a Female** under the age of consent, while proof that rape has been committed, does not tend to establish the commission of the crime by any particular person, nor corroborate her testimony that the accused is the guilty one. (Wash.) State v. McCool, 1089.

RECEIVERS.

1. **RECEIVERS—Right to Hold Property Vested Under Lex Loci —Comity.**—Where property has once vested as the property of a receiver by the law of the state where the property was situated, the law of another state will not devest the receiver of his right to it if he takes it into such state in the performance of his duty. Comity in such cases prevails to exempt the property from attachment in a foreign jurisdiction, when taken there under authority from the foreign court. (Pa.) Somerset Coal Co. v. Diamond State Steel Co., 775.

2. **RECEIVER—Authority to Bind Stockholders by Stipulation.**—Where the receiver of a corporation and a number of stockholders intervene in an action against it, a stipulation entered into by him with the sanction of the court, in the nature of a compromise, binds the shareholders, and their appeal will not be considered. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

Note.

Receivers, sureties of, effect upon of judgments against their principals, 767.

RECORDS.

DEEDS, Unauthorized Recording of.—The Recording of an Instrument not Entitled to be Recorded does not operate as constructive notice thereof. (Md.) Lambert v. Morgan, 412.

See Assignment, 4; Garnishment, 9; Vendor and Vendee, 30–39.

REFORMATION OF DEED.

REFORMATION OF INSTRUMENT—Deed for Support of Wife.—A deed from a husband to his wife for her support is not a gratuity, but is founded upon a meritorious consideration; and if the description therein is incorrect, a court of equity will, after his death, reform the deed so as to convey the land actually intended. (Mo.) Partridge v. Partridge, 584.

See Executors and Administrators, 8.

RELEASE.

RELEASE, CONSTRUCTIVE — Operation on Subject Matter of Suit.—When the plaintiff in a suit to enjoin the defendants from maintaining a dam which caused damage to his lands failed in such

suit, and appealed from the dismissal of it, and subsequently sold the land referred to, to the defendants without reserving any rights therein, such deed operated as a release of his claim to injunctive relief as against the entire land, including any injury thereto, and the appeal should be dismissed. (Or.) Thomas v. Booth-Kelly Co., 713.

RES GESTAE.

See Evidence, 1.

RES IPSA LOQUITUR.

See Negligence, 15.

RES JUDICATA.

See Judgments, 10, 11.

Note.

Retraxit, authority of attorney to enter, 162.

REWARDS.

See Sheriff, 2.

RIPARIAN RIGHTS.

See Navigable Waters; Waters and Watercourses.

ROBBERY.

ROBBERY—Grand Larceny.—An Information for robbery is insufficient which does not state that the property was taken from the possession of the person robbed, but such an information may be found to contain an averment of grand larceny. (Cal.) People v. Tong, 110.

SALES.

Inspection.

1. SALE OF GOODS—Right to Inspect—At What Place.—Where goods are sold under an agreement for delivery f. o. b. cars at the place of shipment, no time of payment, inspection, or acceptance being mentioned, the buyers have the right of inspection after the arrival of the goods at their destination. (Or.) Eaton v. Blackburn, 705.

2. SALE OF GOODS—Right to Inspect—Time and Place.—Under an executory contract for the future sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them; and, unless he does so, he is not liable therefor. This gives the vendee the right of inspection, and he is entitled to an opportunity therefor before becoming liable for the price. (Or.) Eaton v. Blackburn, 705.

3. SALE OF GOODS—Right to Inspect—Time and Place.—Where articles are to be delivered to a common carrier by the vendor, to be forwarded to the vendee at a distant point, and no provision is made for inspection and acceptance before or at the time of shipment, the vendee is entitled, under the law, to a reasonable time, after the goods arrive at their destination, in which to exercise the right of inspection, and to accept or reject them, if they do not comply with the contract. (Or.) Eaton v. Blackburn, 705.

4. SALE OF GOODS—Right to Inspect—Waiver.—The question of whether the buyer has waived his right of inspection is one for the jury. (Or.) Eaton v. Blackburn, 705.

Acceptance.

5. **SALE OF GOODS—Acceptance.**—The fact that the buyer has offered to sell the goods before he had inspected them is not conclusive of an intent to accept them. (Or.) Eaton v. Blackburn, 705.

6. **SALE OF GOODS—Acceptance.**—The unauthorized sale by an employé before inspection of part of the goods purchased is not conclusive of the acceptance by the buyers of the entire shipment, and may be rebutted by evidence of their repudiation of that sale and replacement of the goods. (Or.) Eaton v. Blackburn, 705.

7. **SALE OF GOODS—Acceptance—Question for Jury.**—The question of the acceptance of goods is ordinarily for the jury. (Or.) Eaton v. Blackburn, 705.

Payment.

8. **SALE OF GOODS—Payment, When Due.**—Where no time or place of inspection, acceptance or payment is agreed upon, the payment becomes due on complete delivery; i. e., after opportunity for inspection. (Or.) Eaton v. Blackburn, 705.

See Explosives; Limitation of Actions, 3.

SEDUCTION.

1. **CRIMINAL LAW—Seduction—Divorced Female—Construction of Code.**—A woman who has been married and divorced is not an unmarried female within the intendment of section 3677 of the code which prohibits the seduction of "any unmarried female of previous chaste character." (Va.) Jennings v. Commonwealth, 946.

2. **CRIMINAL LAW—Seduction—Unmarried Female—Construction of Code.**—The code prohibiting the seduction of unmarried females under pain of imprisonment, being a highly penal statute, must be construed strictly in the interest of the liberty of the citizen, not to be extended but limited to cases clearly within the language used. (Va.) Jennings v. Commonwealth, 946.

SELF-DEFENSE.

See Assault and Battery; Homicide.

SENTENCE.

See Criminal Law, 15–17.

SETOFF.

See Limitation of Actions, 4–6.

SHERIFFS.

1. **SHERIFF—Liability to Third Persons.**—A sheriff is generally not liable at the suit of third persons unless expressly bound by the duties of his office. (Wash.) McPhee v. United States Fidelity & Guaranty Co., 958.

2. **SHERIFF—Liability for Reward When Prisoner Escapes.**—One entitled to a reward offered by third persons cannot recover against the sheriff for permitting the prisoner to escape. (Wash.) McPhee v. United States Fidelity & Guaranty Co., 958.

See Railroads, 11, 12.

SHIP OWNER'S LIABILITY.

See Master and Servant, 19–27.

SLEEPING-CARS.
See Carriers, 5.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—Contract in Excess of Broker's Authority.—Where an agent to sell land exceeds his authority by stipulating that his principal shall pay fifty dollars for every day he fails to make a deed after a specified date, the contract is invalid, and the vendee is not entitled to specific performance although he waives the unauthorized stipulation. (Tex.) Hagler v. Ferguson, 895.

2. SPECIFIC PERFORMANCE — Contract — Married Woman Trustee.—Specific performance will be decreed of a contract for the sale of land as against the purchaser from a married woman as trustee under a deed containing a power of sale independently of her husband, the objection of such purchaser to accept a conveyance executed under the power by reason of Kentucky Statutes 1903, section 506, not being tenable. (Ky.) Antonini v. Straub, 350.

3. SPECIFIC PERFORMANCE—Abstract of Title—Relation to Date.—The sufficiency of an abstract of title, upon a bill for specific performance, is to be determined as of the date fixed by the contract or by the agreement of the parties when the party was to furnish the abstract and the deal was to be closed, and not at some time after the filing of a bill for specific performance. (Ill.) Smith v. Hunter, 231.

4. SPECIFIC PERFORMANCE—Abstract of Title—Sufficiency.—An abstract of title which disclosed a decree in a suit for the reformation of the deed under which the vendor derived his title, which decree barred all the rights of one who had been served neither with process nor notice of the publication, and the time limit within which such one might appear in such suit to be heard touching his rights had not expired, does not show a good merchantable title, and therefore was insufficient to maintain a suit for specific performance. (Ill.) Smith v. Hunter, 231.

5. SPECIFIC PERFORMANCE—Cloud on Title.—The court will not force upon a vendee a title clouded with substantial defects, or one that a purchaser may be required to engage in litigation to defend, or one that he cannot readily dispose of by reason of defects therein. (Ill.) Smith v. Hunter, 231.

6. SPECIFIC PERFORMANCE—Defense—Clouded Title.—A defendant in a suit for specific performance of a contract for the sale of land is bound to show only that the title which the vendor is prepared to tender him is doubtful in its character. (Ill.) Smith v. Hunter, 231.

7. SPECIFIC PERFORMANCE—Pleading.—A complaint which purports to describe a quadrangle and mentions only three sides of it is insufficient. (Or.) Bogard v. Barhan, 676.

8. SPECIFIC PERFORMANCE—Pleading.—A complaint which purports to describe the boundaries of a lot of land and contains lines which do not close, or if read as closed by the aid of extrinsic evidence would inclose much more than the land contracted to be sold, is insufficient. (Or.) Bogard v. Barhan, 676.

9. SPECIFIC PERFORMANCE—Pleading.—A complaint which purports to describe several parcels of land and which runs the metes and bounds of all of them together without identifying the particular parcels, is insufficient. (Or.) Bogard v. Barhan, 676.

Note.
Specific Performance. See Marketable Title.

SPENDTHRIFT TRUSTS.
See Trusts, 3–7.

STARE DECISIS.
See Courts, 1.

STATUTE OF FRAUDS.
See Frauds, Statute of.

STATUTE OF LIMITATIONS.
See Limitation of Actions.

STATUTES.

Title of Act.

1. **CONSTITUTIONAL LAW—Amendment of Statute, When Includes Subject not Embraced in the Title.**—An amendment of "An act for the probate of wills and the settlement of testate and intestate estates," which adds a clause conferring a power of sale when necessary for the preservation of the estate or to prevent a sacrifice thereof or for the best interest of all concerned therein, introduces a new subject not within the original title, and is therefore void under a constitution declaring that no law shall embrace more than one object, which shall be expressed in its title. (Mich.) Bresler v. Delray Real Estate etc. Assn., 516.

Construction of Statutes Generally.

2. **STATUTES—Construction.**—There is a strong presumption in favor of a construction which will not work injustice. (Mich.) Miller v. Detroit, 537.

3. **STATUTES — Construction.—Statutes in Derogation of the Common Law** must be strictly construed, rights conferred therein should be express and not by implication, and liabilities cannot be enlarged by construction. The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. (Mich.) Miller v. Detroit, 537.

Construction of Criminal Statutes.

4. **CRIMINAL LAW.—The Interpretation of Criminal Statutes Demands a Strict Construction;** nothing is to be added to them by intendment. All the language is to be considered and such interpretation placed upon any debated word as was the manifest intention of the legislature. (Iowa) Rohlf v. Kasemeier, 261.

5. **CRIMINAL LAW—Statute—Construction.**—A case within the reason or mischief of a statute is not within its provisions to punish a crime not enumerated in the statute merely because it is of a kindred character with those which are enumerated. (Va.) Sutherland v. Commonwealth, 949.

See Constitutional Law.

STEVEDORES.
See Master and Servant, 19–27.

STOCK AND STOCKHOLDERS.
See Corporations.

STREET RAILWAYS.

STREET RAILWAYS.—For an Electric Car to Exceed the Speed Limit prescribed by ordinance is negligence per se. (Wash.) Wilson v. Puget Sound Elec. Ry., 1044.

See Carriers.

STRIKE OF EMPLOYES.

See Telegraphs and Telephones, 21.

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See Process.

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See Time.

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See Execution, 2.

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See Principal and Surety.

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TAXATION.

In General.

1. **TAXATION, DOUBLE—Mortgage and Land.**—The taxation of mortgages upon real estate in addition to the taxation of the real estate itself at its full value is not double taxation and therefore is not unconstitutional; though the mortgagor may pay the two, he is not doubly taxed, because when the mortgagor does pay the tax on the mortgage, it is not because it is a burden imposed upon him by the state, but because of a contract that he has voluntarily entered into, and this contract is subject to restrictions imposed by the usury laws. (Mich.) Stumpf v. Storz, 521.

2. **TAXATION—Sum Taxable.—The True Value** of the taxpayer's credits is the balance due after deducting debts. (Mich.) Stumpf v. Storz, 521.

3. **CONSTITUTIONAL LAW—Statute in Force Seventy Years—Construction.**—The fact that a statute has remained upon the statute books for over seventy years, and that a practice has grown up under it from the birth of the state, should not deter the court from declaring the law unconstitutional if convinced that it is, but equally it calls upon the court to move with the utmost caution before asserting its invalidity. (Mich.) Stumpf v. Storz, 521.

4. **TAXATION—Uniformity—Unequal Results.**—Taxation is not invalid because of unequal results which must of necessity occur in individual instances under any system of tax legislation. Taxation would become impossible if such inequality were to defeat the general law and governments would be constrained to resort to arbitrary exactions. (Mich.) Stumpf v. Storz, 521.

5. **TAXATION—Deduction—Exemption.**—The law permitting a creditor in listing his property for taxation to deduct the amount of any indebtedness owing by him is not in violation of the constitutional requirement of uniformity; and the provision for deducting such indebtedness is not an exemption of so much of his property from taxation. (Mich.) Stumpf v. Storz, 521.

Public Lands.

6. **PUBLIC LANDS—Location by Soldier's Warrant—Taxation—** Although the issuance of the patent for land located under a soldier's warrant has been delayed by reason of conflicting claims, the equitable title is in the locator from the date of location, entry at the land office and certificate of entry obtained, and it then becomes liable for taxation. (Iowa) Herrick v. Sargent, 281.

7. **PUBLIC LANDS—Location by Soldier's Warrant—Sale for Taxes.**—Land located under a soldier's warrant are exempt from taxation under the federal statute for three years after issuance of the patent, but this exemption is limited to the soldier himself and does not pass to an assignee. A sale, therefore, of such land for taxes due while the title was in such assignee is valid. (Iowa) Herrick v. Sargent, 281.

8. **PUBLIC LANDS—Location by Soldier's Warrant—Sale for Taxes—Effect of Subsequent Issuance of Patent.**—Where lands

located under a soldier's warrant, in respect of which the patent has not issued, are sold for nonpayment of taxes thereon, the subsequent issuance of the patent to another does not affect the title of the purchaser under the tax deed. (Iowa) Herrick v. Sargent, 281.

9. **PUBLIC LANDS—Relation Back of Patent—Taxation.**—As soon as a patent issues for land located by a soldier's warrant, it relates back to the original location and removes any possible doubt as to the taxable character of the property after that date. (Iowa) Herrick v. Sargent, 281.

Delinquency Due to Mistake of Officer.

10. **TAXES—Delinquency Due to Mistake of Officer.**—Where one attempts in good faith to pay his taxes, but is told by the county treasurer that they have been paid, this is the legal equivalent of payment so far as to discharge the lien and bar a sale for nonpayment. (Wash.) Gleason v. Owens, 1087.

Sales for Taxes.

11. **TAX SALE—Ratification by Receiving Proceeds.**—Where a tax sale is ineffectual because the proceedings were against the owner by his initials instead of his full name, but he demands and receives the surplus of the sale from the county treasurer, he, and his grantees with notice, are estopped to deny the validity of the sale and deed, and cannot avoid the effect of the ratification by showing that he is an ignorant man and did not appreciate the legal significance of his act. (Mo.) Proctor v. Nance, 555.

12. **TAX SALE—Avoiding Ratification and Refunding Surplus.**—Where an owner of land has ratified an invalid tax sale thereof by demanding and receiving the surplus from the county treasurer, the rights of the parties become fixed as of that time, and he, and his grantees with notice, cannot avoid the effect of his ratification by tendering back the amount to be repaid to the county treasurer. (Mo.) Proctor v. Nance, 555.

13. **TAXES—Avoiding Illegal Sale—Tender to Purchasers.**—In an action by the owner to recover land illegally sold for taxes, it is not necessary that he pay the purchasers the amount paid out by them, but it is enough that he pays the same into court before entry of judgment. (Wash.) Gleason v. Owens, 1087.

See Counties, 3; License Taxes; Municipal Corporations, 31–34; Names.

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TELEGRAPHS AND TELEPHONES.

License Taxes.

1. **MUNICIPAL CORPORATIONS—License Tax—Telegraph and Telephone Companies—Inspection.**—Reasonable latitude is allowed to municipalities in dealing with the supervision of the appliances of telegraph and telephone companies which go through their streets, but they must not make useless and unnecessary inspections at the cost of the operating companies, and if they do, the court may take the question into consideration in a dispute to be settled under the act of April 17, 1905 (Pub. Laws, 183). (Pa.) Delaware etc. Tel. & Tel. Co's. Petition, 750.

2. **MUNICIPAL CORPORATION — License Tax — Telegraph and Telephone Companies, Power of Court to Reduce License Charge.**—A municipality has power to levy a license tax to recoup the cost of inspection of the appliances of telegraph and telephone, etc., companies, but an ordinance to that effect cannot be sustained on the presumption that it was reasonable without reference to whether it is based upon the cost of inspection or not, and where license fees were fixed at certain sums per pole, per mile of wire, and per mile of conduits, and the court found that the aggregate of the license fees paid by the various companies was three times the amount paid to the municipal policeman for inspecting, and that to a great extent such inspection consisted of looking at filled in excavations which were settling, and looking at new poles and wires, the court properly reduced them on the ground that the cost of necessary inspection was the proper rule to be adopted in every case by the court under the act of April 17, 1905 (Pub. Laws, 183). (Pa.) Delaware etc. Tel. & Tel. Co's. Petition, 750.

3. **MUNICIPAL CORPORATIONS—License Tax—Telegraph and Telephone Companies—Charge not to be General Throughout Commonwealth.**—In determining a dispute between a municipality and a telegraph, telephone, etc., company under the act of April 17, 1905, (Pub. Laws, 183), the court is controlled by the imperative rule that no flat per pole or per mile charge can be made applicable throughout the commonwealth, because in no two cases will the cost of inspection be the same. (Pa.) Delaware etc. Tel. & Tel. Co's. Petition, 750.

4. **MUNICIPAL CORPORATIONS — Telegraph and Telephone Companies, Duties Which may be Imposed upon.**—Though the duty of inspection and maintenance imposed by law upon telegraph and telephone companies can be more safely relied on than if casually made by a borough officer without technical knowledge, the municipal-

ity may properly, by way of police regulation, require poles to be kept in proper condition, wires in safe repair, and see that conduits and other appliances do not interfere with the public use of the streets. (Pa.) Delaware etc. Tel. & Tel. Co's. Petition, 750.

Negligence in Transmission or Delivery of Messages—Damages.

5. **TELEGRAPH CORPORATIONS—Notice of Necessity for Expeditious Delivery.**—The very fact of a communication being sent by telegraph gives notice that expedition is the main object in view; so that it is not necessary to bring to the attention of the corporation the circumstances which call for sending the message without delay, or even to couch the message in intelligible language. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

6. **TELEGRAPH CORPORATIONS—Failure to Deliver Message.** The want of evidence that if the sendee had received the message promptly, the failure to deliver which was the cause of action, he would have complied with its terms, which were to make immediate burial preparations, precludes the admissibility of evidence that rain fell on the day of the funeral, which was consequently postponed. (Ala.) Western Union Tel. Co. v. McMorris, 46.

7. **TELEGRAPH CORPORATIONS—Failure to Deliver Message.—Nominal Damages at the Least** should be awarded for the failure to deliver a telegraphic message for which the toll has been paid. (Ala.) Western Union Tel. Co. v. McMorris, 46.

8. **TELEGRAPH CORPORATIONS—Pleading.—Toll Paid for the Transmission of a Telegraphic Message** is not special damage, necessary to be specifically claimed; but averment of it in the complaint authorizes proof and recovery thereof under the general sum claimed as damages. (Ala.) Western Union Tel. Co. v. McMorris, 46.

9. **TELEGRAPH CORPORATIONS—Damages—Mental Suffering.** Where there is a right of recovery of anything else for the breach of a contract for the transmission of a telegraphic message, a recovery may be had in addition for the mental anguish, but then only in case of messages between persons occupying close degrees of relationship, relating to exceptional events, such as sickness or death. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

10. **TELEGRAPH CORPORATIONS—Damages—Mental Suffering.** The nondisclosure to the telegraph company of the principal in a telegram dispatched by an agent, and it not appearing in the telegram, disentitles the principal from recovering for mental pain and anguish. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

11. **TELEGRAPH CORPORATIONS—Mental Suffering.**—The measure of damages to which the sender of a telegram delayed by a telegraph corporation, so that relatives sent for were too late to attend a funeral, is limited to the time between when the relatives could have reached the sender and the time when they actually did reach. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

12. **TELEGRAPH CORPORATIONS—Action Against—Admissibility of Evidence.**—The mental suffering of the plaintiff, forming a ground for damages in an action against a telegraph corporation for delay in delivering a telegram asking relatives to come to a funeral, is limited to the time between the hour when the relative could have gotten there if the telegram had been expeditiously delivered and the time when he did get there, and evidence of the plaintiff's mental suffering from the time of the death was inadmissible. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

13. **TELEGRAPH CORPORATIONS—Evidence.**—Mental suffering is not the subject of direct proof. It is an inference to be drawn by the jury from the manner and causelessness of the wrong. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

14. **TELEGRAPH CORPORATIONS. — Mental Anguish and Wounded Feelings Alone** and unaccompanied by personal injury, and which naturally and proximately arise from the breach of a contract to deliver a telegraphic message, furnish ground for the recovery of damages, limited, however, to certain degrees of relationship. Brothers fall within the degree recognized by the rule. (Ala.) Western Union Tel. Co. v. McMorris, 46.

15. **TELEGRAPH CORPORATIONS — Evidence of Mental Anguish.**—In an action for damages for breach of contract to deliver a telegraphic message, direct proof of wounded feelings or mental pain is not an indispensable prerequisite to the right of the plaintiff to have the jury consider the mental suffering as an element of recoverable damages, but it may be inferred by the jury from circumstances attending the breach. (Ala.) Western Union Tel. Co. v. McMorris, 46.

16. **TELEGRAPH CORPORATIONS—Mental Anguish, When Inferable.**—When the evidence was that the corporation receiving a message knew that the sender was the brother of one just dead, and the message itself suggested the obsequies and intimations to friends to meet for the burial, it was a natural presumption therefrom that mental pain would ensue from the miscarriage of the arrangements through failure to deliver the message, and the jury might infer the fact of such suffering without direct proof. (Ala.) Western Union Tel. Co. v. McMorris, 46.

17. **TELEGRAPH CORPORATIONS—Evidence.**—In an action for breach of contract to deliver a telegraphic message in order to entitle the sender to recover for mental anguish, it is indispensable to prove that if the sendee had received the message promptly he would have complied with its terms. (Ala.) Western Union Tel. Co. v. McMorris, 46.

18. **TELEGRAPH CORPORATIONS — Jury Questions.** — Where there was evidence contradicting the genuineness of the signature to the delivery sheet of a telegram, it was for the jury to determine both whether the telegram was received at the time therein specified and the signature to the delivery sheet was genuine. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

19. **TELEGRAPH CORPORATIONS—Evidence.**—In an action for delay in delivering a telegram, the telegram received by the sendee is admissible. Letters and figures upon it are evidence calling for explanation as well as by whom and when they were marked, and whether the deliverer was the agent of the corporation. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

20. **TELEGRAPH CORPORATIONS—Jury Trial—Instructions.**—In an action for damages for delay in delivering a telegram, in consequence of which relatives were prevented from attending a funeral, a charge that if the telegram in question was delivered to the sendee before any passenger train passed his station the plaintiff could not recover was bad, as a passenger train might have passed just after the sendee received the telegram, not leaving sufficient time for him to have reached the depot. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

Strike of Employés as Relieving Company from Responsibility.

21. **TELEGRAPH CORPORATIONS—Strike of Employés.**—When the fact of a strike of the employés of a telegraph corporation was not communicated to the sender of a message, it is not available as a defense by the telegraph corporation in an action for failure to deliver such message. (Ala.) Western Union Tel. Co. v. McMorris, 46.

TIMBER.

TIMBER.—The Sale of Standing Timber Includes the Right to Remove It in a judicious manner, but not to cut it down and leave it or any part of it so that it will do damage to the lands of the owner. (Ky.) Bates v. Burt & Brabb Lumber Co., 407.

See Execution; Landlord and Tenant.

TIME.

TIME—Sunday.—Days of Grace are not Enlarged by the fact that the obligation matures on Sunday. (Tex.) Aetna Life Ins. Co. v. Wimberly, 852.

TORTS.

1. **NEGLIGENCE — Joint Tort-feasors — Joint Defendants.** — Where a railroad company employed contractors to duplicate their roadbed and the plaintiff's intestate employed on a freight train was killed by the train running into a mass of debris caused by the contractors' blasting operations, the company and the contractors were properly joined as defendants. (Va.) Walton, Witten & Graham v. Miller, 908.

2. **NEGLIGENCE — Joint Tort-feasors — Joint Defendants.** — When the negligence of two or more persons concurs in producing a single indivisible injury, they are jointly and severally liable, although there was no common duty, common design, or concert of action. (Va.) Walton, Witten & Graham v. Miller, 908.

3. **APPEAL AND ERROR—Joint Tort-feasors—Prosecution of Action Against One—Contribution.**—Joint tort-feasors are jointly and severally liable, but no right of contribution exists among them, or remedy over by one against the other. Consequently, if proceeded against jointly, the plaintiff may dismiss or discontinue his action as to one defendant without affecting his rights against the other, who is not entitled to relief by writ of error. (Va.) Walton, Witten & Graham v. Miller, 908.

4. **APPEAL AND ERROR—Instruction—Severance of Liability of Railroad Owner and Contractor.**—The facts that by a written contract between the owner of a railroad and well-known and reputable contractors, the latter were independent contractors, and their work under the contract lawful and not inherently dangerous, do not exonerate the owner from liability where injury is caused on his roadbed by the negligence of the contractors thereon and error lies for an instruction to the contrary. (Va.) Walton, Witten & Graham v. Miller, 908.

TREES.

See Municipal Corporations, 7–10.

TRESPASS.

See Execution, 1; Public Lands, 1.

TRESPASS TO TRY TITLE.

TRESPASS TO TRY TITLE—Facts that may be Shown in Defense.—In an action of trespass to try title, the defendant without a plea may show any fact that will defeat the plaintiff's right to recover. (Tex.) Wilkin v. Owens, 867.

TRIAL.

Remarks of Judge.

1. **TRIAL—Conduct of Judge—Remarks.**—After a document had been put in evidence, it was error for the judge to say to counsel

for the party impeaching the document, "You are responsible for it." (Ala.) Western Union Tel. Co. v. Northcutt, 38.

Instructions to Jury.

2. **TRIAL—Negative Instructions.**—A trial court is under no duty to give charges which instruct the jury that there is no evidence of a certain fact. (Ala.) Western Union Tel. Co. v. McMorris, 46.

3. **APPEAL AND ERROR—Ignoring Oral and Mentioning Written Evidence.**—An instruction which directs the attention of the jury to the written evidence only, ignoring the oral testimony, and authorizes a verdict on this evidence, singled out, is misleading, and constitutes reversible error. (Va.) Strause v. Richmond Woodworking Co., 937.

4. **APPEAL AND ERROR—Advancement and Relegation of Parts of Evidence.**—An instruction must not call attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relative to the matter in issue. (Va.) Strause v. Richmond Woodworking Co., 937.

5. **TRIAL—Charge to Jury—Erroneous but not Prejudicial.**—Where considering the charge to the jury in globo the court is satisfied that though technical errors were committed they were not greatly prejudicial, and that otherwise the case was fairly and impartially submitted to the jury and the verdict is amply supported by the evidence, a motion for a new trial will be denied. (Mich.) Hodgins v. Bay City, 546.

6. **TRIAL—Charge—Argumentative Instructions.**—A charge was properly refused as argumentative which stated that it was possible that the plaintiff understood that the man she asked to dispatch a telegram was acting then as her agent, but that the evidence must go further and establish to the satisfaction of the jury that the agent also understood and agreed to act. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

7. **TRIAL—Charge—Misleading and Faulty Instructions.**—A charge requiring the jury to determine what was the negligence charged in the complaint is misleading and faulty, and properly refused. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

8. **TRIAL—Invasion of Jury's Province.**—Charges covering the general effect of evidence and alleging the absence of evidence of particular facts are properly refused as trenching on the province of the jury. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

Reopening Case for Evidence.

9. **TRIAL—Reopening Case for Evidence—Discretion.—An Application** to reopen a case to admit evidence is analogous to a motion for a new trial, and so much within the discretion of the trial court that the appellate court will not interfere except in case of a clear abuse of such discretionary power. (Wash.) Spencer v. Alki Point Transp. Co., 1058.

See Criminal Law, 12–17; Jury; Witnesses.

TRUSTS.

Investment of Funds.

1. **TRUSTS—Investment of Funds—Trustees' Duties and Liabilities.**—Under the rule prevailing in Kentucky prior to the enactment of Kentucky Statutes of 1903, section 4706, a trustee investing trust funds in bank stock was liable for loss sustained by the shrinkage in value thereof, although the investment was made bona fide. (Ky.) Robertson v. Robertson's Trustee, 368.

2. **TRUSTS—Investment of Funds—Trustees' Duties and Liabilities.**—Kentucky Statutes of 1903, section 4706, regulates the classes of investments open to trustees and under that section a trustee cannot invest trust funds in bank stock unless the bank has been in operation more than ten years. (Ky.) Robertson v. Robertson's Trustee, 368.

Spendthrift Trusts.

3. **SPENDTHRIFT TRUST—Principle of Protection.—Cujus est Dare, Ejus est Disponere,** is the fundamental principle on which the law rests its protection of what is known as the spendthrift trust. It allows the donor, within the law, to condition his bounty as suits himself. (Pa.) Morgan's Estate, 732.

4. **SPENDTHRIFT TRUSTS, When Protected and When not.—Spendthrift Trusts have No Other Justification** than is to be found in considerations affecting the donor alone. They allow the donor so to control his bounty, through the creation of the trust, that it may be exempt from liability for the donee's debts, not because of any monitory care for the donee, but because it is concerned to protect the donor's right of property, but when he substitutes the pleasure of the donee for his own absolute right of disposition, the gift is absolute. (Pa.) Morgan's Estate, 732.

5. **SPENDTHRIFT TRUST—Character of Estate.**—Where by her will a woman gave all her estate to a trustee for the use and benefit of her husband, and created what is known as a spendthrift trust, and directed that at the end of three years the trustee should give over the whole of the estate to the appointee of the husband, and in default of appointment the husband should have testamentary powers over the estate, and in case he did not dispose of it by will then it was to go to his heirs at law, her declared object being to keep it free from his debts, the husband takes an estate in fee, and his creditors are entitled to proceed against the estate the moment the merger of the legal and equitable estates takes place. (Pa.) Morgan's Estate, 732.

6. **ALIENATION, Attempts to Restrain as Against Creditors.**—The law will not sanction an attempt to give title to property without the incident of ownership. The reasoning is that a man shall not be the real owner of property with full right to deal with it, and reap its benefits to the exclusion of the rights of creditors, and as he cannot do this for himself, another may not do it for him. (Pa.) Morgan's Estate, 732.

7. **SPENDTHRIFT TRUSTS.**—Where property is left on what is known as a spendthrift trust creditors cannot deprive the beneficiary of the support provided for him out of such property, so long as it is in accordance with his station in life; nor can the trustee and beneficiary combine to defeat the trust and purpose of the donor which was to give a support which should be free from the claims of creditors. (Iowa) Merchants' Nat. Bank v. Crist. 267.

See Husband and Wife, 3.

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VEHICLES.

See License Taxes, 3.

VENDOR AND VENDEE.

Rights and Liabilities of Parties Generally.

1. **VENDOR AND VENDEE—Amount of Consideration as Showing Bona Fides.**—While one who pays a grossly inadequate consideration may not be regarded as a bona fide purchaser, and while inadequacy of consideration is a circumstance that may be looked to on the issue whether a deed was intended to convey the land or a mere chance of title, still one is not deprived of his status as a bona fide purchaser by the mere fact that he pays less than the market value. (Tex.) Eastham v. Hunter, 854.

2. **VENDOR OR MORTGAGOR, When can Convey a Better Title than He has.**—To the general rule that a vendor or mortgagor can convey no better title than he has, there is this well-defined exception, which is, that where the owner of the property clothes another with the indicia of title, or allows him to appear as the owner thereof or as one having full power of disposition, an innocent third person thus led into dealing with such apparent owner with reference to such property will be protected. (Okl.) First National Bank v. Kissare, 644.

3. **VENDOR'S LIEN—Unsecured Note—Transfer for Collection—No Loss of Lien.**—When a vendor takes an unsecured note for unpaid purchase money of land, and for the purpose of collection only transfers and indorses it to an agent, and on nonpayment resumes possession of it and seeks foreclosure of his lien, such lien is not lost thereby. (Cal.) Nolan v. Nolan, 99.

4. **VENDOR AND VENDEE—Purchase on Installments—Premature Tender—Rescission.**—Where a contract for the sale of land provides for payment by installments, bearing interest, the vendee cannot tender the whole amount due prior to the maturity of the last installment, so as to place the vendor in default and thereby entitle

the vendee to rescission for breach of the contract. (Cal.) Hanson v. Fox, 72.

5. **VENDOR AND VENDEE—Abandonment of Contract—Estoppel.**—Where the vendee impliedly abandons his contract, either as valueless or from sinister motives, and afterward expressly refers to others as purchasers of the land described in it, and subsequently acquires by tortuous device a paper title to such lands at a date when he was aware of the sale to a bona fide purchaser, he is estopped from asserting title against such purchaser. (Iowa) Herrick v. Sargent, 281.

6. **VENDOR AND PURCHASER — Contract — Rescission.**— The motive for the rescission of a contract is immaterial if there has been a breach entitling the one who rescinds to do so. (Cal.) Crim v. Umbsen, 127.

7. **VENDOR AND VENDEE—Right of Vendee to Recover Money.** If a vendor who contracts to sell land has no title, or fails or refuses to furnish a proper title at the time the vendee is entitled to it, the latter can maintain an action to recover the purchase price. (Wash.) Davis v. Lee, 973.

8. **INTEREST.—Where a Vendee of Land Recovers the Purchase Price** from a vendor who fails or refuses to make title, he is entitled to the legal rate of interest, but no more. (Wash.) Davis v. Lee, 973.

Representations of Vendor—Caveat Emptor.

9. **VENDOR AND VENDEE — Restriction on Caveat Emptor.**— The tendency of recent authorities is to restrict rather than extend the doctrine of caveat emptor; the unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim. (Wash.) Wooddy v. Benton Water Co., 1102.

10. **VENDOR AND VENDEE—Reliance on Misrepresentations of Vendor.**—A vendee may rely upon the representations of his vendor when for any reason their falsity is not readily ascertainable. (Wash.) Wooddy v. Benton Water Co., 1102.

11. **VENDOR AND VENDEE—Misrepresentation That Land can be Irrigated.**—It is error to nonsuit a vendee in his action for damages for false representations by the vendor that the land can all be irrigated from a certain canal by gravity flow, when in fact only a part of it can be, which fact, the evidence tends to show, could be ascertained only by an accurate survey and was known to the vendor. (Wash.) Wooddy v. Benton Water Co., 1102.

Description of Land and Area—Representations by Vendor.

12. **VENDOR AND PURCHASER—Presumption of Sale by the Acre.**—Where an agreement is for the payment of a gross sum for a tract of land, upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre and not a sale in gross, unless the contract plainly indicates the contrary; and this presumption can only be overcome by clear and cogent proof. (Va.) Epes v. Saunders, 904.

13. **VENDOR AND PURCHASER—Description—"More or Less."**— The employment of the words "more or less," or "containing by estimation so many acres, more or less," will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency beyond what may be reasonably attributed to small errors from variations of instruments or otherwise, unless there is evidence to show that a contract of hazard was intended. (Va.) Epes v. Saunders, 904.

14. **VENDOR AND VENDEE—Deficiency in Area—Damages.**—Where a contract of purchase calls for a certain number of acres out of a larger tract, without other description, the vendee may assume that his deed, which describes an irregular tract by metes and bounds, conveys the quantity of land specified in the contract, and if there proves to be a deficiency in the area, he is entitled to damages although he has accepted the deed. (Wash.) Wooddy v. Benton Water Co., 1102.

15. **VENDOR AND PURCHASER—Misrepresentation as to Area Where the Boundaries are Correctly Pointed Out.**—Where the seller of real property shows upon the face of the earth its true boundaries to the purchaser and does not fraudulently dissuade him from making full examination and measurement, and the estate is not so extensive or of such a character as to be reasonably incapable of inspection and estimate, and there is no relation of trust between the parties, the purchaser has no remedy for a misrepresentation as to area alone. (Mass.) Mabardy v. McHugh, 484.

16. **MISREPRESENTATION AND OPINION, Difference Between.** An opinion respecting the number of acres in a tract of land pointed out by the seller to the purchaser, made in good faith, is not a false representation for which the seller is bound, there being no fraudulent intent on his part, but if he knows that there are not nearly the number of acres stated, or does not know anything about it yet states it as if it were his personal knowledge, this is a false representation for which he is liable, provided it is material and induces the purchase of the property. (Mass.) Mabardy v. McHugh, 484.

Title of Vendor, in General.

17. **VENDOR AND VENDEE—Want of Title in Vendor.**—The fact that at the signing of a contract for sale of land, and at the premature tender of the balance of the purchase price, the vendor had no title to the land sold, affords no reason for the interposition of equity to rescind the contract. (Cal.) Hanson v. Fox, 72.

18. **VENDOR AND VENDEE—Want of Title in Vendor.**—It is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. (Cal.) Hanson v. Fox, 72.

19. **VENDOR AND PURCHASER—Title—Implied Condition in Contract.**—In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unencumbered with defect. (Cal.) Crim v. Umbsen, 127.

20. **VENDOR AND VENDEE—Implied Obligation to Make Title.** An agreement to sell land is in legal effect an agreement to sell a title to the land; and in the absence of a stipulation to the contrary, the law implies an undertaking on the part of the vendor to make a good title. (Wash.) Davis v. Lee, 973.

21. **VENDOR AND VENDEE—Defects in Title—Duty to Investigate.**—Where a vendor misrepresents his title, the vendee is not bound to investigate the truth of his statements and to inform himself of the defects in title from the abstract in his possession. (Tex.) Buchanan v. Burnett, 900.

22. **MARKETABLE TITLE—Test for Determining Whether Cloud Exists.**—The test by which to determine whether a deed casts a cloud is, would the owner of the property, in ejectment by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery; if so a cloud would exist, if not, no shade

would be cast by the presence of the deed. (Wash.) Cummings v. Dolan, 986.

23. **MARKETABLE TITLE—What Does not Constitute Cloud.**—A conveyance not falling in the chain of title, as from one who never had any connection with the property, does not constitute a cloud upon such title. (Wash.) Cummings v. Dolan, 986.

24. **MARKETABLE TITLE—Mortgage by Stranger to Chain of Title.**—A mortgage on property, given by strangers to the title, does not constitute a cloud on the title and authorize a vendee to rescind for want of a marketable title on the part of his vendor; but if the contrary were conceded, a quitclaim deed would cure the defect. (Wash.) Cummings v. Dolan, 986.

25. **MARKETABLE TITLE.—To Render a Title Marketable It is Necessary** only that it shall be free from reasonable doubt; a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion, but only such title as a reasonably well informed and intelligent purchaser, acting upon business principles, would be willing to accept. (Wash.) Cummings v. Dolan, 986.

Representations as to Title.

26. **VENDOR AND VENDEE—Representation or Opinion as to Title.**—A statement by a vendor to vendees who are ignorant of land titles that he has and can make a good title to the land, while embodying a conclusion, is in effect a representation that the facts which would constitute a good title exist. (Tex.) Buchanan v. Burnett, 900.

27. **VENDOR AND VENDEE—Reliance on False Representations.** A vendee who relies upon false representations by the vendor as to his title, and would not have made the purchase if the representations had not been made, is entitled to rescind the sale. It is not necessary that he should have relied solely upon the false representations. (Tex.) Buchanan v. Burnett, 900.

28. **VENDOR AND VENDEE—Reliance on False Representations.** The fact that a vendor believes his title good when he so represents it does not affect the vendee's right to rescind if he relies on the representations and they prove false. (Tex.) Buchanan v. Burnett, 900.

29. **VENDOR AND VENDEE—Rescission for False Representations.**—A vendee who purchases in reliance upon false representations of the vendor as to the title, without notice of their falsity, is entitled to be restored to his former state upon his surrendering or offering to surrender what he has received. (Tex.) Buchanan v. Burnett, 900.

Title—Effect of Destruction of Records.

30. **VENDOR AND PURCHASER—Destruction of Records—Rescission, Because of.**—Where a contract for the sale of land was made shortly before the great fire of San Francisco, the 18th of April, 1906, which destroyed all the records of the land except the general index, and in consequence the vendor was unable to show within the time limited in the contract a record title of his ownership of such land or a title fairly deducible from the entire record, the purchaser was entitled to rescind the contract and recover the money paid on account thereof. (Cal.) Crim v. Umbsen, 127.

31. **VENDOR AND PURCHASER—Title of Vendor—Destruction of Records—Patchwork Title—Right of Purchaser to Reject.**—Where the records relating to a lot of land were destroyed in the great fire of San Francisco, the 18th of April, 1906, and a contract dated prior thereto for the sale of the land called for a good title, which the

vendor was unable, by reason of the fire, to furnish, the vendor's recording a deed to himself within the time limited and his attempted completion of the chain of title, by recording other deeds and certified copies, do not establish the title to which the vendor has a right under the contract—a title free from possible defect or encumbrance, fairly deducible of record—and such vendor cannot enforce the contract. (Cal.) Crim v. Umbsen, 127.

32. **VENDOR AND PURCHASER—Title of Vendor.**—The record from which title should be fairly deducible is the entire record, which alone determines whether or not the chain of title is sufficient; and, if this setting—the entire record—has been destroyed, there can be no title furnished by the vendor in accordance with the terms of a contract of sale calling for a good title, and in default, the repayment of the deposit. (Cal.) Crim v. Umbsen, 127.

33. **VENDOR AND PURCHASER—Title of Vendor—Destruction of Records.**—Where records have been destroyed and only the general index preserved, the position of a vendor who has contracted to prove a good title is not helped by it; such index, containing the mere mention of persons and instruments, only serving its original purpose of giving clues to the documents and no information as to the substantial part of their contents. (Cal.) Crim v. Umbsen, 127.

34. **VENDOR AND PURCHASER—Records—Destruction by Great Fire—Effect—McEnerney Act.**—The destruction of the records in San Francisco on the 18th of April, 1906, made all titles for the time practically unmerchantable. The McEnerney Act was passed for the removal of this objection to the titles by enabling owners to secure a decree which shall furnish a publicly authenticated evidence of title. (Cal.) Crim v. Umbsen, 127.

Notice of Title or Defects Therein—Records—Possession.

35. **VENDOR AND VENDEE—Defective Description in Record as Notice.**—The record of a deed of lots 7 and 8 in an addition without naming the block puts a subsequent purchaser on notice if the grantor owned lots of that number only in one block of the addition. (Wash.) Wetzler v. Nichols, 1075.

36. **DEEDS—Defects in Title—Notice.**—When a purchaser cannot make out a title but through a deed which leads to a fact, he will be affected with notice of that fact. (Pa.) Mulholland's Estate, 791.

37. **DEEDS—Defects Disclosed in Recitals—Purchaser Affected by.** Where the recitals in a deed disclose that there was no valid title to the premises sold, and the purchaser accepts delivery, his notice of the flaws runs from his acceptance of the deed. (Pa.) Mulholland's Estate, 791.

38. **REAL PROPERTY—Possession—Unrecorded Deed.**—Where a party receives a deed and takes possession of the land thereby conveyed, although the deed is not recorded, such possession is notice to subsequent purchasers, who deal at their peril with the former owner and take title subject to the purchaser in possession. (Ill.) Mathias v. Fulton, 245.

39. **REAL PROPERTY — Indefeasible Possession — Illustration.**—Where a mother had a life estate in lands and her daughter purchased the fee, and the mother, in consideration of the daughter's residing on and improving the property, released by parol her life estate, and the daughter went into possession, such possession supported by her deed of the fee, although unrecorded, was paramount

and prevailed against subsequent purchasers from the original owner who did record their debts. (Ill.) Mathias v. Fulton, 245.

See Deeds; Frauds, Statute of, 4–8; Principal and Agent, 5, 6; Specific Performance; Timber.

Note.

Vendor and Vendee. See Marketable Title.

WAGES.

See Executors and Administrators, 4, 5.

WARRANT OF ATTORNEY.

See Judgment, 4–9.

WARRANTY.

See Limitation of Actions, 3; Livery-stable Keepers, 1.

WATCHMEN.

See Master and Servant, 33, 34; Railroads, 11, 12.

WATERS AND WATERCOURSES.

1. RIPARIAN RIGHTS—Origin.—The right of a riparian owner to the use of water bordering upon his land does not arise from the fact that the water is flowing and that any part thereof taken from the stream is immediately replaced by water from the current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages and benefits. (Cal.) Turner v. The James Canal Co., 59.

2. RIPARIAN RIGHTS—Equality—User.—Out of regard to the equal rights of others, whose lands may abut upon the same water, the use of water for irrigation, so far as it affects the rights of others similarly situated, must be reasonable and confined to a reasonable share thereof. (Cal.) Turner v. The James Canal Co., 59.

3. RIPARIAN RIGHTS — Stagnant Waters.—The right to use water upon adjoining land applies as well to the water of a lake, artificial pond made by a dam in a watercourse, slough or any natural body of water, large or small, tidal or nontidal, current or no current, by whatever name it may be called, as to a running stream. (Cal.) Turner v. The James Canal Co., 59.

4. RIPARIAN RIGHTS—Stagnant Waters—Source of Supply.—A permanent pond or lake must of necessity have a source of supply and even if that source is an overflow alone which would soon disappear by seepage and evaporation, the riparian owners have a right to the reasonable use of the water both for domestic purposes and for irrigation. (Cal.) Turner v. The James Canal Co., 59.

5. RIPARIAN RIGHTS—Slough Fed by River.—Persons owning land abutting on a slough always connected with a river have equal riparian rights to a reasonable share of the water with those owning land abutting on the river itself, regard being had to the proportions of extent of the land, interest in it, quantity of water in the slough, and all other circumstances affecting the reasonable division of the water in case there should not be sufficient for all. (Cal.) Turner v. The James Canal Co., 59.

6. RIPARIAN RIGHTS—Origin of Water Supply Immaterial.—The source of the water supply to a slough does not affect the right

to use it, but is material only in determining what is a reasonable use, and if the slough is fed by one river, it is part of that river, and riparian rights are to be proportional to the rights and needs of other lands riparian to that river; if fed at a different period by another river, the same rule applies mutatis mutandis to that one. (Cal.) Turner v. The James Canal Co., 59.

7. **RIPARIAN RIGHTS—Diversion for Irrigation—Diminution of Flow.**—The owner of lands abutting on a slough fed by a river has the right for the purposes of irrigation, during the time the slough receives supply from the river, to take his reasonable share of the water from the river at any convenient point thereon, whether on his own land or not, so long as it does not injuriously affect the rights of other owners abutting on the river between the point of diversion and such owner's land, and so long as no unreasonable waste is caused, other riparian owners below have no right of interference. (Cal.) Turner v. The James Canal Co., 59.

8. **RIPARIAN RIGHTS — Mode of Diversion.**—The fact that a riparian owner in diverting water carries it from the river, by ditch or otherwise, over intervening nonriparian lands, with the consent of the owners of such lands affords no ground for legal complaint on the part of other riparian owners, so long as the one diverting the water causes no unreasonable waste and uses only his share of the water. (Cal.) Turner v. The James Canal Co., 59.

9. **RIPARIAN RIGHTS — Overflows — Utilization.** — A riparian owner is entitled to divert his share of water in a slough during such time as it forms part of the river supplying it, although such diversion may interfere with the natural irrigation of the lands of other riparian owners below by the overflowing of the river in flood time. (Cal.) Turner v. The James Canal Co., 59.

10. **RIPARIAN RIGHTS—Common Law—Modification.**—The common-law rule that a riparian owner is entitled to the full flow of the stream in its natural course through his land, undiminished by any diversion, is modified in the state of California to the extent that it is subject to the common right of the other riparian owners to a reasonable share of the water. (Cal.) Turner v. The James Canal Co., 59.

11. **RIPARIAN RIGHTS—Reasonable Share—Jury Question.**—The determination of what is a reasonable share of the water for each riparian owner is a question of fact, to be decided in each case according to its circumstances. (Cal.) Turner v. The James Canal Co., 59.

12. **RIPARIAN RIGHTS—Local Proportion.**—An upper riparian proprietor is entitled to a reasonable use of the water for irrigation, although it may diminish the flow to a lower proprietor and put him to substantial inconvenience in his use of the stream. (Cal.) Turner v. The James Canal Co., 59.

13. **RIPARIAN RIGHTS—Intermittent User.**—It has been held that upper riparian proprietors could be allowed to take the whole stream for certain hours or days, at stated intervals, and that the use of the lower owner could be limited to the intervening periods. (Cal.) Turner v. The James Canal Co., 59.

See Fisheries; Navigable Waters.

WATERWORKS.

See Municipal Corporations, 33.

WEAPONS.

CRIMINAL LAW—Concealed Weapons About His Person Hid from Observation—Construction of Statute.—A man carrying a pistol in its scabbard, in a pair of saddle-bags with the lids pulled down hiding the contents from view, or having a pistol concealed in a rug in the bottom of his buggy, or in saddle-bags when riding on a public road, does not violate the statute against carrying about his person concealed weapons, as the construction of that part of the statute is that the weapon shall be so accessible as to afford prompt and immediate use if desired. (Va.) Sutherland v. Commonwealth, 949.

WILLS.

In General.

1. **WILL, Effect of as a Muniment of Title.**—A will is regarded in England and the United States as a conveyance, and takes effect as a deed, upon proof of its execution, unless there is some statute requiring it to be probated. The probate is operative as the authenticated evidence, rather than the foundation, of the executor's or devisee's title. (Cal.) Estate of Patterson, 116.

2. **WILLS — Prospective Construction of Statutes — Code Civ. Proc. Amendment, sec. 1339.**—This amendment is not retrospective, and applies only to trials which take place after its enactment. It is remedial in its nature, and designed to preserve the testamentary right. The legislation on the subject passed after the great fire of San Francisco was intended to preserve rights that would otherwise have been lost for want of evidence, and the construction of the amendment is unaffected by the death of the testator prior to its becoming law. (Cal.) Estate of Patterson, 116.

3. **WILLS, Proof of—Statute Removing Impediments—Rights of Heirs Defeated.**—The right of heirs to the ancestor's estate is by statute contingent on the nonproving of a will; and if a will was not capable of proof under existing statutes, and the legislature removes the obstacle to probate by an alleviating measure, the heirs have no remedy for the divestment. (Cal.) Estate of Patterson, 116.

4. **WILLS—Intestacy, Construction of is Against.**—Where a will has been made, the testator will never be deemed to have died intestate as to any part of his estate, if this result can be avoided without violating clearly controlling legal principles. The abhorrence of courts to intestacy under a will may be likened to the abhorrence of nature to a vacuum. (Md.) Lavender v. Rosenheim, 420.

5. **WILLS, When Construed as Speaking as of the Time When Made Rather Than as of the Time of the Death of the Testator.**—With respect to the objects of a gift or the persons to be benefited by it, a will is construed as speaking of the time when made rather than of the date of the testator's death. (Md.) Lavender v. Rosenheim, 420.

6. **WILLS—Devise of Lands to Wife, When not Affected by Her Subsequent Divorce.**—If property is devised or bequeathed to the testator's son's wife, without naming her, and before the testator's death she is divorced from the son and contracts a second marriage, she nevertheless takes the gift of the will. (Md.) Lavender v. Rosenheim, 420.

7. **DEVISE, When Does not Give an Interest in the Realty.**—A devise of lands to a trustee with direction to sell and pay the income to a tenant for life does not give an interest in the realty. (Md.) Lambert v. Morgan, 412.

8. **WILLS—Life Estate and Contingent Remainder.**—Where by one clause of his will the testator bequeaths F. all his property, and

in the following clause declares that if F. "shall die without issue, then it is my will and desire that all of my said property willed as aforesaid be given" to a specified charity, F. is not entitled to the property in fee simple, but if he dies at any time without issue the limitation over to the charity takes effect. (Tex.) St. Paul's Sanitarium v. Freeman, 886.

9. **WILLS—Devise to Sell or With Power of Sale.**—There is a difference between a devise to an executor to sell real estate and a devise to an executor of real estate with power to sell. In the one case a naked authority is given to sell; in the other an authority to sell coupled with an interest is given. In the former, the freehold remains in the heirs until a sale is made by the executor; in the latter a freehold immediately vests in the executor. (Ill.) Smith v. Hunter, 231.

9a. **WILLS—Construction.**—A will giving a life estate in lands to the husband of the testatrix and on his death the lands to be sold and the proceeds divided among certain named legatees gives the legal title not to the executor as trustee, but to the heirs of the testatrix during the life estate. (Ill.) Smith v. Hunter, 231.

10. **WILLS, Assignment to Trustees to be Named in the Testator's Will, What Will is Meant.**—If a testator assigns policies of insurance on his life to the trustees to be named in his will, this must be held to mean the document filed and admitted to probate as his will and to exclude every other will, though in existence at the time of the assignment, but which is not admitted to probate, nor entitled to be admitted. (Mass.) Frost v. Frost, 476.

11. **WILLS, Assignment, When of Testamentary Nature and not Effective Unless Executed as if a Will.**—An assignment of insurance policies to the trustees to be named in the assignor's will is without effect unless executed and attested in a manner required of a will, though the wife of the assignor, being the beneficiary of the trust, assents thereto. (Mass.) Frost v. Frost, 476.

Provisions for Support of Person.

12. **WILLS—Provisions for Support, Who must Comply With.**—A devise of property with a direction to and obligation on the devisees to provide for and take care of their father for life, which obligation is expressly made a lien on the devised property and in lieu of his distributive share thereof, does not make the executors trustees for the provision for the father, but casts on them collectively the duty to settle the estate, and individually to support and care for their father, which duties are obligatory on their acceptance of the devise. (Iowa) Merchants' Nat. Bank v. Crist, 267.

13. **WILLS.—The Duty Under a Will to Furnish Care and Support** to an aged and infirm parent is not primarily a duty to pay money for that purpose, but rather to give the care and support which is usually given to parents without other home, and no duty to pay money arises until there is a failure to furnish such a home as the natural relations of the parties would suggest as a proper performance of the obligation. (Iowa) Merchants' Nat. Bank v. Crist, 267.

14. **WILLS—Provision for Support—Incapable of Transfer.**—A beneficiary cannot assign to another his right to receive care and support during his life. (Iowa) Merchants' Nat. Bank v. Crist, 267.

Lost or Destroyed Wills.

15. **WILLS—Accidental Destruction—Probate.**—Where a will, executed with all the formalities which the code requires, was accidentally destroyed in the great fire of San Francisco in April, 1906, with-

out the knowledge of the testatrix, it was not revoked, and where the two witnesses agree in their evidence as to a portion only of it, such portion must be admitted to probate under the Code of Civil Procedure, section 1339 (1907 amendment), and as to the remaining portion, as intestacy exists. (Cal.) Estate of Patterson, 116.

16. **WILLS, LOST—Partial Probate.**—The rule is "any substantial provision of a lost will, which is complete in itself and independent of the others, may, when proved, be admitted to probate, though the other provisions cannot be proved, if the validity and operation of the part which is proved are not affected by those parts which cannot be proved." (Cal.) Estate of Patterson, 116.

17. **WILLS, LOST—Partial Probate—Code Provisions.**—The construction of section 1339, Code of Civil Procedure, which declares that no will shall be proven as a lost or destroyed will unless "its provisions are clearly and distinctly proved by at least two credible witnesses," is that a part which is distinctly proven can be given effect, notwithstanding that some other part, not affecting it in any particular, cannot be satisfactorily established. (Cal.) Estate of Patterson, 116.

18. **WILLS, LOST—Probate and Administration—Allocation of Debts.**—Where that portion of a lost will admitted to probate contained a devise of realty and a specific legacy and an intestacy was declared as to the residuary estate, the payment of debts and expenses of administration should be made out of the residuary estate, if sufficient, leaving the devise as a final resort. (Cal.) Estate of Patterson, 116.

19. **WILLS—Effect—Common Law and Code.**—Destruction of a will by accident or without intention to revoke is not a prescribed method of revocation. By the common law a will, once duly executed, has a recognized legal existence during the lifetime of the testator, if not revoked; it merely remains in abeyance until his death; and then becomes an effective instrument. (Cal.) Estate of Patterson, 116.

See Creditor's Bill; Fraudulent Conveyance, 1.

WITNESSES.

Competency.

1. **WITNESS—Husband Testifying Against Wife.**—The rule that a husband cannot be examined as a witness against his wife without her consent has no application in supplemental proceedings against them on a community deficiency judgment entered against both in an action of foreclosure. (Wash.) Belknap v. Platter, 1097.

2. **WITNESS—Husband Testifying Against Wife.**—The statute forbidding one spouse to be examined as a witness against the other without the latter's consent must, if possible, be so construed as to promote justice and fair dealing, and not made an instrument for the promotion of dishonesty, injustice, and fraud. (Wash.) Belknap v. Platter, 1097.

3. **WITNESS—Competency of Priest Who Acted as Notary.**—In proceedings to reform a deed, the notary who took the acknowledgment is not incompetent, merely because he is a priest, to testify as to the grantor's intention in executing the instrument, if he was not consulted in his capacity as priest. (Mo.) Partridge v. Partridge, 584.

4. **WITNESS — Transaction With Person Since Deceased.**— A widow who has filed a sworn disclaimer in an action to quiet title is not disqualified, by an averment in a cross-complaint that she claims an interest in the property, to testify to facts showing that

her husband, since deceased, held the title in trust for her. (Wash.) Denny v. Schwabacher, 1140.

Examination.

5. **WITNESS — Leading Questions.—An Interrogatory as to the Condition** of a person who was injured by falling on the ice, followed by the further inquiry, "Did he seem sick or stupid?" is objectionable as leading. (Tex.) Roth v. Travelers' Protective Assn., 871.

6. **APPEAL AND ERROR — Objection, When must be Made.—** The time for objection to a question is before it is answered, otherwise the objection is too late. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

Impeachment.

7. **EVIDENCE — Impeachment of Own Witness.—A** party cannot discredit his own witness, notwithstanding the witness has testified in certain matters differently from what the party himself has testified. (Ala.) Western Union Tel. Co. v. Northcutt, 38.

See Evidence.


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